

**Award**  
**NASD Regulation, Inc.**

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**In the Matter of the Arbitration Between:**

Merrill Lynch Pierce Fenner & Smith, Inc. vs. Prudential Securities, Inc., Paul Payne, Jesse Diaz, Thomas Stotz, James Kilgallon, Gregory Schneider, and Stephen Czocher

Case Number: 00-03855

Hearing Site: Chicago, Illinois

**consolidated with**

Paul Payne, Jesse Diaz, Thomas Stotz, James Kilgallon, Gregory Schneider, and Stephen Czocher v. Merrill Lynch Pierce Fenner & Smith, Inc.

Case Number: 00-3881

Hearing Site: Chicago, Illinois

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**REPRESENTATION OF PARTIES**

Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"): Daniel P. O'Meara, Esq., Rubin & Associates, P.C., Paoli, Pennsylvania

Prudential Securities, ("Prudential") and Paul Payne ("Payne"), Jesse Diaz ("Diaz"), Thomas Stotz ("Stotz"), James Kilgallon ("Kilgallon"), Gregory Schneider ("Schneider"), and Stephen Czocher ("Czocher") hereinafter collectively referred to as "individual Respondents": Anthony Paduano, Paduano & Weintraub, Esq., New York City, New York

**CASE INFORMATION**

00-3855

Statement of Claim filed on or about: September 05, 2000

Amended Statement of Claim filed on or about: September 25, 2000

Merrill Lynch signed the Uniform Submission Agreement: September 05, 2000

Statement of Answer to Merrill Lynch's Amended Statement of Claim filed by the

individual Respondents on or about: October 10, 2000

Emergency Motion of Compliance with [the Arbitrator's Interim Injunctive] Order filed by Merrill Lynch on or about: September 20, 2000

Opposition to Merrill Lynch's Motion for Compliance with the Interim Injunctive Order filed by the individual Respondents on or about: September 22, 2000

Pre-Hearing Brief filed by Merrill Lynch on or about: October 06, 2000

Motion for Summary Adjudication filed Claimant Merrill Lynch on or about: December 05, 2000

Opposition to Merrill Lynch's Motion for Summary Adjudication and Cross-Motion for Dismissal filed by Respondent Prudential on or about: December 29, 2000

Reply in Support of Motion for Summary Adjudication and Opposition to Cross Motion to Dismiss filed by Merrill Lynch on or about: January 08, 2001

Motion to Preclude Merrill Lynch from Presenting Evidence because of its Failure to Produce Documents

Hearing Memorandum filed by Merrill Lynch on or about: January 08, 2001

00-3881

Statement of Claim and Request for Immediate Injunctive Relief filed on or about: September 06, 2000

Amended Statement of Claim filed by the individual Respondents on or about: October 10, 2000

Payne signed the Uniform Submission Agreement: September 05, 2000

Stotz signed the Uniform Submission Agreement: September 05, 2000

Schneider signed the Uniform Submission Agreement: September 05, 2000

Diaz signed the Uniform Submission Agreement: September 05, 2000

Kilgallon signed the Uniform Submission Agreement: September 05, 2000

Czocher signed the Uniform Submission Agreement: September 05, 2000

Statement of Answer filed by Merrill Lynch on or about: October 06, 2000

### **CASE SUMMARY**

**00-3855**

Merrill Lynch asserted the following causes of action: misappropriation and conversion of trade secrets and business property, unfair competition, breach of fiduciary duty, tortious and intentional interference with contractual relationships and prospective business relations, conspiracy, unjust enrichment, and breach of training costs agreements.

Unless specifically admitted in its Answer, Prudential and the Individual Respondents denied the allegations made in the Statement of Claim and asserted the following affirmative defenses:

1. failure to state a claim upon which relief can be granted,
2. claimed barred in whole or in part because Merrill Lynch has sustained no injury arising from the conduct alleged,
3. claimed barred in whole or in part because any and all losses sustained by Merrill Lynch were due to its actions, omissions or negligence
4. failure to mitigate
5. Merrill Lynch is precluded from any recovery because it breached the purported agreement entered into by the individual
6. Unclean Hands
7. the purported agreements are void and unenforceable
8. damages being sought are speculative and not recoverable under the law
9. Merrill Lynch is precluded from seeking any of the equitable relief it demands because of the superior and intervening rights of the investors served by the individuals
10. Merrill Lynch is precluded from any recover against the individuals because it constructively discharged them making unenforceable the Agreements to Repay Training Costs allegedly entered into by Schneider, Kilgallon and Czocher.

**00-3881**

Payne, Diaz, Stotz, Kilgallon, Schneider, Czocher asserted: Defamation, Unfair Competition, and Tortious Interference

Unless specifically admitted in its Answer, Merrill Lynch denied the allegations made in the Statement of Claim.

### **RELIEF REQUESTED**

00-03855

Merrill Lynch requested:

Other Monetary/Non-Monetary Relief if any:	Permanent Injunctive Relief
Compensatory Damages:	Unspecified

00-03881

The Individuals requested:

Other Monetary/Non-Monetary Relief if any:	Immediate Injunctive Relief
Compensatory Damages:	Unspecified

### **ISSUES CONSIDERED AND DECIDED**

Prudential did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

Merrill Lynch's Request for Immediate Injunctive Relief was granted.

Prudential's Request for Immediate Injunctive Relief was denied.

Merrill Lynch's Motion Directing Compliance was granted.

At the hearing on October 11, 2000, the parties requested time for a conference between themselves, and the panel granted the request. Upon their return to the hearing room they announced on the record that the only (emphasis supplied) issue to be decided by the panel was:

"Have the Respondents failed to comply with any order issued by the Court or the Interim Arbitrator in this matter? Yes No"

Prudential Securities, Inc. and the individual Respondents orally moved for a summary finding in their favor during the October 11, 2000 hearing session.

Merrill Lynch Pierce Fenner and Smith, Inc.'s Motion for Summary Adjudication against Prudential was argued via conference call on January 15, 2001.

Prudential Securities, Inc.'s Cross-Motion to Dismiss was denied.

Prudential Securities, Inc.'s Motion to Preclude Evidence was rendered moot prior to a ruling.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing sessions and conference calls held, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The panel determined that the six individual Respondents did not fail to comply with orders issued by the Court and/or the Interim Arbitrator in this matter and granted the Respondents' Motion for Summary Finding in their favor. Respondents Paul Payne, Jesse Diaz, Thomas Stotz, James Kilgallon, Gregory Schneider, and Stephen Czochoer were dismissed from the case with prejudice.
2. The panel denied the Motion for Summary Finding as to Prudential Securities, Inc.
3. The panel determined that Respondent Prudential Securities, Inc. failed to comply with orders issued by the Court and/or the Interim Arbitrator in this matter and granted Merrill Lynch's Motion for Summary Adjudication. However, the panel does not award compensatory damages to Merrill Lynch Pierce Fenner and Smith, Inc.
4. All of Prudential Securities, Inc.'s claims are hereby dismissed with prejudice.
5. Any and all relief not specifically addressed herein is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim in each case:

00-03855

Initial claim filing fee	= \$ 500.00
Injunctive claim filing fee	= \$2,500.00

00-03881

Initial claim filing fee	= \$ 250.00
Injunctive claim filing fee	= \$2,500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firms are:

00-03855

Merrill Lynch:

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
<u>Hearing process fee</u>	<u>= \$2,000.00</u>
Total	= \$3,800.00

Prudential:

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
<u>Hearing process fee</u>	<u>= \$2,000.00</u>
Total	= \$3,800.00

00-03881

Merrill Lynch

<u>Member surcharge</u>	<u>= \$1,200.00</u>
Total	= \$1,200.00

**Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

00-03855 and 00-03881

Two (2) Injunctive Pre-hearing sessions with a single arbitrator x 450.00= \$900.00

Injunctive Pre-hearings: September 11, 2000 2 sessions  
September 25, 2000 1 session

Two (2) Pre-hearing sessions with a single arbitrator x \$450.00 = \$900.00

Pre-hearing conferences: December 11, 2000 1 session  
December 28, 2000 1 session

3 Pre-hearing sessions with Panel x \$1000.00	= \$2000.00
Pre-hearing conferences: October 6, 2000	1 session
January 15, 2001	1 session
7 Hearing sessions x \$1000.00	= \$7,000.00
Hearing Dates: October 11, 2000	1 session
October 12, 2000	2 sessions
November 6, 2000	2 sessions
November 7, 2000	2 sessions
Total Forum Fees	= \$10,800.00

1. The Panel has assessed \$5,400.00 of the forum fees to Merrill Lynch
2. The Panel has assessed \$5,400.00 of the forum fees jointly and severally to Prudential Securities, Inc., Paul Payne, Jesse Diaz, Thomas Stotz, James Kilgallon, Gregory Schneider, and Stephen Czochoer.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Merrill Lynch, two (2) tapes of proceedings=\$30.00.
2. Prudential, two (2) tapes of proceedings=\$30.00.

#### **Fee Summary**

00-3855

1. Claimant Merrill Lynch be and hereby is solely liable for:

Initial Filing Fee	= \$ 500.00
Injunctive Fee	= \$ 2,500.00
Member Fees	= \$ 3,800.00
Administrative Fee	= \$ 30.00
Forum Fees	= \$ 5,400.00
Total Fees	= \$12,230.00
Less payments	= \$ 5,330.00
Balance Due NASD Regulation, Inc.	= \$ 6,900.00
2. Respondent Prudential Securities be and hereby is solely liable for:

Member Fees	= \$3,800.00
Administrative Fee	= \$ 30.00
Total Fees	= \$3,830.00
Less payments	= \$ 000.00
Balance Due NASD Regulation, Inc.	= \$3,830.00
3. Respondents Prudential Securities, Inc., Paul Payne, Jesse Diaz, Thomas

Stotz, James Kilgallon, Gregory Schneider, and Stephen Czocher shall be and hereby are jointly and severally liable for:

Forum fee	= \$5,400.00
Balance Due NASD Regulation, Inc.	= \$5,400.00

00-03881

1. Payne, Diaz, Stotz, Kilgallon, Schneider and Czocher shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 250.00
Injunctive Fee	= \$2,500.00
Total Fees	= \$2,750.00
Less payments	= \$ 000.00
Balance Due NASD Regulation, Inc.	= \$2,750.00

2. Claimant Merrill Lynch be and hereby is solely liable for:

Member Fees	= \$1,200.00
Total Fees	= \$1,200.00
Less payments	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$1,200.00

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

/s/ Charles E. Jones

February 14, 2001

\_\_\_\_\_  
Judge Charles E. Jones  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

/s/ John W. Cooley

February 13, 2001

\_\_\_\_\_  
John W. Cooley, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

/s/ Ramona V. Larson

February 12, 2001

\_\_\_\_\_  
Ramona V. Larson  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

February 15 2001  
Date of Service (For NASD office use only)



Stotz, James Kilgallon, Gregory Schneider, and Stephen Czocher shall be and hereby are jointly and severally liable for:

<u>Forum fee</u>	= \$5,400.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$5,400.00

00-03881

1. Payne, Diaz, Stotz, Kilgallon, Schneider and Czocher shall be and hereby are jointly and severally liable for:

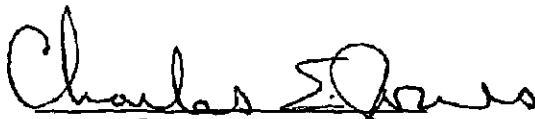
<u>Initial Filing Fee</u>	= \$ 250.00
<u>Injunctive Fee</u>	= \$2,500.00
<u>Total Fees</u>	= \$2,750.00
<u>Less payments</u>	= \$ 000.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$2,750.00

2. Claimant Merrill Lynch be and hereby is solely liable for:

<u>Member Fees</u>	= \$1,200.00
<u>Total Fees</u>	= \$1,200.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$1,200.00

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**



Judge Charles E. Jones  
Public Arbitrator, Presiding Chair

2-14-01  
Signature Date

\_\_\_\_\_  
John W. Cooley, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Ramona V. Larson  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD office use only)

Stotz, James Kilgallon, Gregory Schneider, and Stephen Czocher shall be and hereby are jointly and severally liable for:

<u>Forum fee</u>	= \$5,400.00
Balance Due NASD Regulation, Inc.	= \$5,400.00

00-03881

1. Payne, Diaz, Stotz, Kilgallon, Schneider and Czocher shall be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 250.00
<u>Injunctive Fee</u>	= \$2,500.00
<u>Total Fees</u>	= \$2,750.00
<u>Less payments</u>	= \$ 000.00
Balance Due NASD Regulation, Inc.	= \$2,750.00

2. Claimant Merrill Lynch be and hereby is solely liable for:

<u>Member Fees</u>	= \$1,200.00
<u>Total Fees</u>	= \$1,200.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$1,200.00

All balances are due to NASD Dispute Resolution, Inc.

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Judge Charles E. Jones  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

  
John W. Cooley, Esq.  
Public Arbitrator

2/13/01  
Signature Date

\_\_\_\_\_  
Ramona V. Larson  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD office use only)

NASD Dispute Resolution, Inc.  
Arbitration No. 00-03855 consolidated with 00-03881  
Award Page 8 of 8

Stotz, James Kilgallon, Gregory Schneider, and Stephen Czochoer shall be and hereby are jointly and severally liable for:

Forum fee	= \$5,400.00
Balance Due NASD Regulation, Inc.	= \$5,400.00

00-03881

1. Payne, Diaz, Stotz, Kilgallon, Schnelder and Czochoer shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 250.00
Injunctive Fee	= \$2,500.00
Total Fees	= \$2,750.00
Less payments	= \$ 000.00
Balance Due NASD Regulation, Inc.	= \$2,750.00

2. Claimant Merrill Lynch be and hereby is solely liable for:

Member Fees	= \$1,200.00
Total Fees	= \$1,200.00
Less payments	= \$ 0.00
Balance Due NASD Regulation, Inc.	= \$1,200.00

All balances are due to NASD Dispute Resolution, Inc.

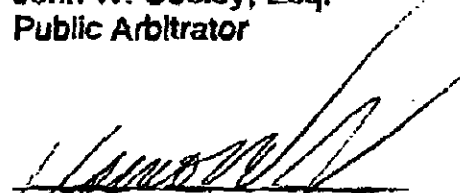
Concurring Arbitrators' Signatures

Judge Charles E. Jones  
Public Arbitrator, Presiding Chair

Signature Date

John W. Cooley, Esq.  
Public Arbitrator

Signature Date

  
Ramona V. Larson  
Industry Arbitrator

  
Signature Date

Date of Service (For NASD office use only)