

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Ropohl Family Trust, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Donald W. Smith, Respondents

Case Number: 01-02484

Hearing Site: San Diego, California

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**REPRESENTATION OF PARTIES**

For Claimants:

Arthur S. Leider  
Investors Arbitration  
Specialists, Inc.  
San Diego, California

For Respondents:

James P. Delphey, Esq.  
Seltzer Caplan McMahon Vitek  
San Diego, California

**CASE INFORMATION**

Statement of Claim filed: May 9, 2001

Claimant's Uniform Submission Agreement signed: March 7, 2001

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Donald W. Smith: August 31, 2001

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Uniform Submission Agreement signed: July 24, 2001

Respondent Donald W. Smith's Uniform Submission Agreement signed: July 24, 2001

**CASE SUMMARY**

Claimant alleged fraudulent misrepresentation, negligence, and breach of fiduciary duty. The dispute involved Claimant's Personal Investment Advisory Account and OTC securities.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$200,000.00, exemplary or punitive damages in the amount of \$250,000.00, rescission or refund of all fees paid to Respondents in connection with Claimant's account, legal fees, and arbitration costs.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, attorney's fees, and arbitration costs.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On October 10, 2002, Claimant and Claimant's representative signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On February 7, 2003, Respondents' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

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

- 1) Claimant's claims are denied in their entirety.
- 2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Donald W. Smith's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent Donald W. Smith must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 300.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 600.00
Hearing Process Fee	= \$ 2,500.00
<b>Total Member Fees</b>	<b>= \$ 4,600.00</b>

#### **Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Panel. The following fees are assessed:

(4) Pre-hearing conference sessions with the Panel @ \$1,125.00/session	= \$ 4,500.00
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Pre-hearing conferences:	April 9, 2002	1 session
	August 20, 2002	1 session
	September 18, 2002	1 session
	October 8, 2002	1 session

(6) Hearing sessions @ \$1,125.00/session	= \$ 6,750.00
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Hearings:	March 5, 2003	2 sessions
	March 6, 2003	2 sessions
	March 7, 2003	2 sessions

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<b>Total Forum Fees</b>	<b>= \$11,250.00</b>
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1. The Panel assessed \$5,062.50 of the forum fees to Claimant Ropohl Family Trust.
2. The Panel assessed \$5,062.50 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.
3. The Panel waived \$1,125.00 of the forum fees for the telephonic pre-hearing conference conducted on August 20, 2002.

**Fee Summary**

1. Claimant Ropohl Family Trust is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	= \$ 5,062.50
Total Fees	= \$ 5,362.50
<u>Less payments</u>	= \$(1,425.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,937.50</b>

2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is charged with the following fees and costs:

Member Fees	= \$ 4,600.00
<u>Forum Fees</u>	= \$ 5,062.50
Total Fees	= \$ 9,662.50
<u>Less payments</u>	= \$(4,600.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 5,062.50</b>

All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Richard J. Rosenthal	-	Public Arbitrator, Presiding Chair
Laurel Littman Gothelf, MPH	-	Public Arbitrator
Lauren Litman	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Richard J. Rosenthal  
Chair, Public Arbitrator

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Signature Date

  
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Laurel Littman Gothelf, MPH  
Public Arbitrator

3-15-03  
\_\_\_\_\_  
Signature Date

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Lauren Litman  
Non-Public Arbitrator

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

03/14/03  
\_\_\_\_\_  
Date of Service

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*Lauren Litman*  
Lauren Litman  
Non-Public Arbitrator


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*3/14/03*  
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