
Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Claimant,

Vs.

First Union Securities, Inc.,
Respondent, and

Robert W. Berry and
Diane L. Spencer,
Respondents/Counterclaimants/Third-Party Claimants,

Vs.

John J. Inhouse, III,
Third-Party Respondent.

Case Number: 01-02983
Hearing Site: Cleveland, Ohio

REPRESENTATION OF PARTIES

David F. McComb, Esquire, and Michael Fortunato, Esquire, of Rubin & Associates, P.C., Paoli, Pennsylvania, represented Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch").

William H. Falin, Esquire, of Moscarino & Treu, Cleveland, Ohio, represented Respondent First Union Securities, Inc. ("First Union").

William A. Jacobson, Esquire, of Kaplan & Jacobson, Inc., Providence, Rhode Island, and Kenneth A. Bravo, Esquire, of Ulmer & Berne, Cleveland, Ohio, as co-counsel for both parties, represented Respondents/Counterclaimants/Third-Party Claimants Robert W. Berry ("Berry") and Diane L. Spencer ("Spencer").

David F. McComb, Esquire, and Michael Fortunato, Esquire, of Rubin & Associates, P.C., Paoli, Pennsylvania, represented Third-Party Respondent John J. Inhouse, III ("Inhouse").

CASE INFORMATION

Merrill Lynch filed its Statement of Claim on or about June 6, 2001.
Merrill Lynch did not file a signed Uniform Submission Agreement.

First Union filed its Statement of Answer on or about October 16, 2001.
First Union did not file a signed Uniform Submission Agreement.

Berry and Spencer filed their joint Statement of Answer, Counterclaim and Third-Party Claim on or about: October 16, 2001.
Berry and Spencer both signed the Uniform Submission Agreement on October 23, 2001.

Merrill Lynch and Inhouse filed their joint Answer to Berry and Spencer's Counterclaim (against Merrill Lynch) and Third-Party Claim (against Inhouse) on or about October 31, 2001.
Third-Party Respondent Inhouse did not file a signed Uniform Submission Agreement.

CASE SUMMARY

Merrill Lynch asserted the following causes of action in its Statement of Claim: breach of contract, misappropriation, conversion of trade secrets and business property, breach of fiduciary duty and unfair competition. Merrill Lynch sought and obtained temporary injunctive relief in United States District Court against Berry and Spencer on June 6, 2001. This arbitration was filed on that date and expedited as mandated by Rule 10335(g) of the NASD Code of Arbitration Procedure ("the Code").

Unless specifically admitted in its answer, Respondent First Union denied the allegations made in the Statement of Claim and asserted the following affirmative defenses: failure to state a claim upon which relief can be granted, waiver, estoppel, unclean hands, lack of mutuality and/or privity of contract, comparative negligence and failure to mitigate.

Unless specifically admitted in their joint answer, Berry and Spencer denied the allegations made in the Statement of Claim and asserted the following affirmative defenses: judicial estoppel and unclean hands.

In their joint Counterclaim and Third-Party Claim, Berry and Spencer asserted the following causes of action against Merrill Lynch and Inhouse: age discrimination, constructive discharge, retaliation, federal and state whistleblower claims, wrongful termination, deceptive trade practices, tortious interference with business relations and defamation.

Unless specifically admitted in their joint answer to Berry and Spencer's Counterclaim and Third-Party Claim, Merrill Lynch and Inhouse denied the allegations therein and asserted the following affirmative defenses: failure to state a claim upon which relief can be granted, respondeat superior, speculative damages, waiver, estoppel, failure to mitigate, truth of allegedly defamatory statements, privilege, fair comment doctrine and justification.

RELIEF REQUESTED

Merrill Lynch requested permanent injunctive relief, unspecified compensatory damages and other unspecified relief. Merrill Lynch and Inhouse also requested that the claims against them be dismissed in their entirety.

First Union requested that the claims against it be dismissed in their entirety.

Berry and Spencer requested compensatory damages in excess of two million dollars, double damages, unspecified punitive damages, unspecified costs, unspecified attorneys' fees and other unspecified relief.

OTHER ISSUES CONSIDERED AND DECIDED

On or about August 14, 2001, First Union filed a motion to dismiss. On or about the same date, Berry and Spencer filed a joint motion to dismiss. On or about August 24, 2001, Merrill Lynch filed a consolidated response to both motions. On or about September 12, 2001, First Union filed a reply in support of its motion to dismiss. On or about the same date, Berry and Spencer filed a joint reply in support of their motion to dismiss. On September 17, 2001, the Panel heard oral argument on the motions to dismiss. On September 18, 2001, the Panel denied both motions.

At the hearing, Berry and Spencer moved for monetary and evidentiary sanctions against Merrill Lynch for failure to produce certain documents and information regarding employee complaints made against them. The Panel denied monetary sanctions, but limited Merrill Lynch to the presentation of certain evidence regarding previously identified employees.

Merrill Lynch, First Union and Inhouse did not file with NASD Dispute Resolution, Inc., properly executed submissions to arbitration, but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

AWARD

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

1. Respondents Robert W. Berry and Diane L. Spencer are jointly and severally liable for, and shall pay to Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., the sum of \$250,000.00 (Two Hundred Fifty Thousand Dollars and No Cents) in damages for breach of contract.
2. Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., is solely liable for, and shall pay to Respondent/Counterclaimant Robert W. Berry, the sum of \$125,000.00 (One Hundred Twenty-five Thousand Dollars and No Cents) in damages for defamation.

3. All claims asserted against Respondent First Union Securities, Inc., are denied.
4. All claims asserted against Third-Party Respondent John J. Inhouse, III, are denied.
5. All claims asserted by Respondent/Counterclaimant Diane L. Spencer against Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., are denied.
6. Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc., is awarded injunctive relief as follows:
 - a. Respondents Robert W. Berry and Diane L. Spencer are prohibited from initiating any contact with any customers whom they serviced while employed by Merrill Lynch, Pierce, Fenner & Smith, Inc., except those customers whose accounts have already been transferred, until 5:00 (Five O'clock) pm, Eastern Daylight Time, on June 1, 2002.
 - b. Respondents Robert W. Berry and Diane L. Spencer are permitted to speak and/or meet with any customers whom they serviced while employed by Merrill Lynch, Pierce, Fenner & Smith, Inc., only if such conduct is initiated by the customers.
 - c. Any new ACATS (Automated Customer Account Transfer System) transfers that arise from telephone conversations or meetings initiated by the customers may be processed by First Union Securities, Inc.
7. Unless specified otherwise herein, parties are to bear their own fees and costs.
8. Any and all other relief not addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc., will collect or retain the following non-refundable filing fees:

Initial claim filing fee	= \$ 500.00
Counterclaim/Third-Party claim filing fee	= \$ 500.00

Injunctive Relief Fee

NASD Dispute Resolution, Inc., will collect or retain the following non-refundable fee:

Injunctive Relief Surcharge	= \$ 2,500.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,000.00

Forum Fees and Assessments

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

Two (2) Pre-hearing sessions with chairperson x \$450	= \$ 900.00
Pre-hearing conferences: November 26, 2001 1 session	
December 13, 2001 1 session	

Three (3) Pre-hearing sessions with the full Panel x \$1,200	= \$ 3,600.00
Pre-hearing conferences: July 12, 2001 1 session	
September 17, 2001 1 session	
September 26, 2001 1 session	

Seventeen (17) Hearing sessions x \$1,200	= \$20,400.00
Hearing Dates January 14, 2002 2 sessions	
January 15, 2002 2 sessions	
January 16, 2002 3 sessions	
January 17, 2002 3 sessions	
January 18, 2002 2 sessions	
January 21, 2002 2 sessions	
January 22, 2002 3 sessions	

Total Forum Fees	= \$24,900.00
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The Panel has assessed the forum fees incurred in this arbitration as follows: one half (\$12,450) to Merrill Lynch and one half (\$12,450) to First Union.

FEE SUMMARY

Claimant Merrill Lynch is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 3,800.00
Injunctive Relief Surcharge	= \$ 2,500.00
<u>Forum Fees</u>	<u>= \$12,450.00</u>
Total Fees	= \$19,250.00
<u>Less payments</u>	<u>= \$ 7,200.00</u>
Balance Due to NASD Dispute Resolution, Inc.	= \$12,050.00

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Respondents Berry and Spencer are jointly and severally liable for:

<u>Counterclaim/Third-Party Claim filing fee</u>	= \$ 500.00
<u>Total Fees</u>	= \$ 500.00
<u>Less payments</u>	= \$ 1,700.00
<u>Refund Due from NASD Dispute Resolution, Inc.</u>	= \$ 1,200.00

Respondent First Union is solely liable for:

<u>Member Fees</u>	= \$ 3,800.00
<u>Forum Fees</u>	= \$12,450.00
<u>Total Fees</u>	= \$16,250.00
<u>Less payments</u>	= \$ 3,200.00
<u>Balance Due to NASD Dispute Resolution, Inc.</u>	= \$13,050.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Daniel G. Zeiser, JD
James Dale Ellis, CPA
Steven C. Bender, CPA

- Public Arbitrator, Chairperson
- Public Arbitrator
- Non-Public Arbitrator


Daniel G. Zeiser, JD
Chairperson

2/28/02
Signature Date

James Dale Ellis, CPA
Public Arbitrator

Signature Date

Steven C. Bender, CPA
Non-Public Arbitrator

Signature Date

Date of Service (For NASD-Dispute Resolution office use only)

NASD Dispute Resolution, Inc.

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Respondents Berry and Spencer are jointly and severally liable for:

Counterclaim/Third-Party Claim filing fee	= \$ 500.00
Total Fees	= \$ 500.00
Less payments	= \$ 1,700.00
Refund Due from NASD Dispute Resolution, Inc.	= \$ 1,200.00

Respondent First Union is solely liable for:

Member Fees	= \$ 3,800.00
Forum Fees	= \$12,450.00
Total Fees	= \$16,250.00
Less payments	= \$ 3,200.00
Balance Due to NASD Dispute Resolution, Inc.	= \$13,050.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Daniel G. Zeiser, JD

James Dale Ellis, CPA

Steven C. Bender, CPA

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Public Arbitrator, Chairperson

Public Arbitrator

Non-Public Arbitrator

Daniel G. Zeiser, JD

Chairperson

Signature Date

James Dale Ellis, CPA

Public Arbitrator

Signature Date

Steven C. Bender, CPA

Non-Public Arbitrator

Signature Date

Date of Service (For NASD-Dispute Resolution office use only)

NASD Dispute Resolution, Inc.

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Respondents Berry and Spencer are jointly and severally liable for:

Counterclaim/Third-Party Claim filing fee	= \$ 500.00
Total Fees	= \$ 500.00
Less payments	= \$ 1,700.00
Refund Due from NASD Dispute Resolution, Inc.	= \$ 1,200.00

Respondent First Union is solely liable for:

Member Fees	= \$ 3,800.00
Forum Fees	= \$12,450.00
Total Fees	= \$16,250.00
Less payments	= \$ 3,200.00
Balance Due to NASD Dispute Resolution, Inc.	= \$13,050.00

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL*Daniel G. Zeiser, JD**James Dale Ellis, CPA**Steven C. Bender, CPA**Public Arbitrator, Chairperson**Public Arbitrator**Non-Public Arbitrator**Daniel G. Zeiser, JD*

Chairperson

Signature Date

James Dale Ellis, CPA

Public Arbitrator

Signature Date

*Steven C. Bender, CPA**Steven C. Bender, CPA*

Non-Public Arbitrator

2-28-02

Signature Date

Date of Service (For NASD-Dispute Resolution office use only)