

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

---

In the Matter of the Arbitration Between:

Mary Holzinger, Trustee of the Holzinger Trust U/A dtd 8/25/1978 by Carl & Mary Holzinger Trust-A, Claimant v. Merrill Lynch, Pierce, Fenner and Smith Incorporated, J. Graydon Coghlan, and Quinton Hue Ellis, Jr., Respondents

Case Number: 02-05083

Hearing Site: San Diego, California

---

Nature of the Dispute: Customer v. Member and Associated Persons

**REPRESENTATION OF PARTIES**

For Claimant:

Erwin J. Shustak, Esq.  
Shustak Jalil & Heller  
San Diego, California

For Respondents Merrill Lynch, Pierce, Fenner  
& Smith Incorporated ("Merrill Lynch"), and  
Quinton Hue Ellis, Jr. ("Ellis"):

Bruce W. Day, Esq.  
Tara A. LaClair, Esq.  
Day Edwards Propester &  
Christensen, PC  
Oklahoma City, Oklahoma

For Respondent J. Graydon Coghlan ("Coghlan"):

Martha K. Gooding, Esq.  
Howrey LLP  
Irvine, California

**CASE INFORMATION**

Statement of Claim filed: August 28, 2002

Claimant's Uniform Submission Agreement signed: September 3, 2002

Joint Statement of Answer filed by Respondents Merrill Lynch, Ellis and Coghlan:  
November 18, 2002

Respondent Merrill Lynch's Uniform Submission Agreement signed: November 15, 2002

Respondent Ellis' Uniform Submission Agreement signed: November 8, 2002

Respondent Coghlan's Uniform Submission Agreement signed: November 14, 2002

### **CASE SUMMARY**

Claimant alleged breach of fiduciary duty, unsuitable investments, fraud, concealment, constructive fraud, vicarious liability, respondent superior, control person liability, and failure to supervise. Claimant's allegations involved the alleged over-concentration of Claimant's account in Class B shares of the following mutual funds: Pilgrim Growth Opportunity Fund, MFS Utilities FD, MFS Capital Opportunity Fund, Van Kampen Capital Equity Inc., and Hancock Strategic Inc.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and set forth various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in an amount of at least \$135,000.00 and interest compounded annually until date of Award at minimum of 7%, or, alternatively, rescission and restitution of \$420,000.00 with interest at the legal rate until time of hearing. Claimant also requested punitive damages of at least \$305,000.00, and costs, including attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, expungement of all reference to the above-captioned arbitration from Respondent Ellis' registration records maintained by the NASD Central Registration Depository, and costs.

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

On June 27, 2005, Claimant and Claimant's 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.

On January 6, 2005, Claimant moved to Amend its Statement of Claim. On January 23, 2005, Respondents Merrill Lynch and Ellis filed an Objection to Claimant's Motion to Amend. On January 27, 2006, after due deliberation of the pleadings submitted, the Panel denied Claimant's Motion to Amend.

On February 13, 2006, the parties fully and finally settled all claims by and between them and stipulated to the following:

- 1) The parties have agreed to settle this matter for a sum certain to be paid by Respondent Merrill Lynch;
- 2) Merrill Lynch and Ellis have proposed and Claimant supports a Recommendation by the Panel to expunge Ms. Holzinger's complaint and the above-captioned arbitration proceeding from the Central Registration Depository Record ("CRD") of Ellis; and,
- 3) Claimant, Merrill Lynch, and Ellis represent that expungement of reference to these proceedings and the settlement from the registration record of Ellis maintained by CRD would have no material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

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

### **AWARD**

After considering the pleadings and the Parties request for this Stipulated Award, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimant and Respondents have entered into a confidential settlement agreement.
- 2) Claimant's claims are dismissed with prejudice.
- 3) The Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Quinton Hue Ellis, Jr.'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 Quinton Hue Ellis, Jr. must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) The parties shall bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted, including Claimant's request for punitive damages, 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 = \$ 375.00

#### **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 and Smith Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$4,000.00</u>
<b>Total Member Fees</b>	<b>= \$7,000.00</b>

#### **Three-Day Cancellation Fees**

Three-day cancellation fees apply when a hearing on the merits is postponed or settled within three business days before the start of the first scheduled hearing session. The following three-day cancellation fees are assessed:

Cancellation of February 14-16, 2006 hearings dates: = \$ 300.00

- 1 The Panel assessed \$150.00 of the three-day cancellation fee to Claimant.
- 2 The Panel assessed \$150.00 of the three-day cancellation fee jointly and severally to Respondents Merrill Lynch, Pierce, Fenner and Smith Incorporated, J. Graydon Coghlan, and Quinton Hue Ellis, Jr.

#### **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 Chair/Panel. The following fees are assessed:

One (1) Pre-hearing conference session with a single arbitrator @ \$ 450.00/session	= \$ 450.00
Pre-hearing conference: January 31, 2006 1 session	
One (1) Pre-hearing conference session with the Panel @ \$1,200.00/session	= \$1,200.00
<u>Pre-hearing conference: August 22, 2005 1 session</u>	<u></u>
<b>Total Forum Fees</b>	<b>= \$1,650.00</b>

1. The Panel assessed \$825.00 of the forum fees to Claimant.
2. The Panel assessed \$825.00 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner and Smith Incorporated, J. Graydon Coghlan, and Quinton Hue Ellis, Jr.

**Fee Summary**

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

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 825.00
<u>Three-Day Cancellation Fees</u>	= \$ 150.00
Total Fees	= \$ 1,350.00
Retained Deposit in accordance with Rule 10332(f) of the Code	= \$ 375.00
<u>Less payments</u>	= \$(1,575.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 150.00</b>
2. Respondent Merrill Lynch Pierce Fenner and Smith Incorporated is charged with the following fees and costs:

Member Fees	= \$ 7,000.00
<u>Less payments</u>	= \$(7,000.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>
3. Respondents Merrill Lynch, Pierce, Fenner and Smith Incorporated, J. Graydon Coghlan, and Quinton Hue Ellis, Jr. are charged jointly and severally with the following fees and costs:

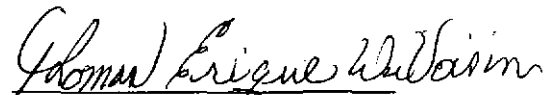
Forum Fees	= \$ 825.00
<u>Three-Day Cancellation Fees</u>	= \$ 150.00
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 975.00</b>

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**

<b>Thomas Erique DuVoisin</b>	-	<b>Public Arbitrator, Presiding Chair</b>
<b>Edward I. Miller</b>	-	<b>Public Arbitrator</b>
<b>Richard M. Leigh</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**

  
Thomas Erique DuVoisin  
Chair, Public Arbitrator

February 22, 2006  
Signature Date

\_\_\_\_\_  
Edward I. Miller  
Public Arbitrator

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

\_\_\_\_\_  
Richard M. Leigh  
Non-Public Arbitrator

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

2/27/06  
Date of Service

**ARBITRATION PANEL**

<b><i>Thomas Erique DuVoisin</i></b>	-	<b><i>Public Arbitrator, Presiding Chair</i></b>
<b><i>Edward I. Miller</i></b>	-	<b><i>Public Arbitrator</i></b>
<b><i>Richard M. Leigh</i></b>	-	<b><i>Non-Public Arbitrator</i></b>

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Thomas Erique DuVoisin  
Chair, Public Arbitrator

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

\_\_\_\_\_  
*Edward I. Miller*

Edward I. Miller  
Public Arbitrator

\_\_\_\_\_  
*2/22/06*  
Signature Date

\_\_\_\_\_  
Richard M. Leigh  
Non-Public Arbitrator

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

\_\_\_\_\_  
*2/27/06*  
Date of Service

**ARBITRATION PANEL**

<b><i>Thomas Erique DuVoisin</i></b>	-	<b><i>Public Arbitrator, Presiding Chair</i></b>
<b><i>Edward I. Miller</i></b>	-	<b><i>Public Arbitrator</i></b>
<b><i>Richard M. Leigh</i></b>	-	<b><i>Non-Public Arbitrator</i></b>

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Thomas Erique DuVoisin  
Chair, Public Arbitrator

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

\_\_\_\_\_  
Edward I. Miller  
Public Arbitrator

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



\_\_\_\_\_  
Richard M. Leigh  
Non-Public Arbitrator

2/22/06  
Signature Date

2/27/06  
Date of Service