

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

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In the Matter of the Arbitration Between:

Kinel Ltd., and Nikolai Lougovskoi (Claimants) vs. Merrill Lynch Pierce Fenner & Smith, Inc., Merrill Lynch Bank and Trust Co., Merrill Lynch International Inc., Merrill Lynch International Bank Limited, and Merrill Lynch Bank (Suisse) S.A. (Respondents)

Case Number: 02-05868

Hearing Site: New York, New York

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Nature of the Dispute: Customer vs. Member

**REPRESENTATION OF PARTIES**

Claimants Kinel Ltd. ("Kinel") and Nikolai Lougovskoi ("Lougovskoi") hereinafter collectively referred to as ("Claimants"): James F. Koehler, Esq., Gallagher, Sharp, Fulton & Norman Cleveland, OH.

Respondents Merrill Lynch Pierce Fenner & Smith, Inc. ("MLPFS"); Merrill Lynch Bank and Trust Co. ("MLBTC"); Merrill Lynch International, Inc. ("MLII"); Merrill Lynch International Bank Limited ("MLIBL") and Merrill Lynch Bank (Suisse) S.A. ("MLBS") hereinafter collectively referred to as ("Respondents"): Brant C. Will, Esq., Morgan, Lewis & Bockius, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: September 30, 2002.

Kinel signed the Uniform Submission Agreement: September 10, 2002.

Lougovskoi signed the Uniform Submission Agreement: September 10, 2002.

Statement of Answer filed by Respondent MLPF&S on or about: August 8, 2003.

MLPFS did not sign the Uniform Submission Agreement.

Respondents MLBTC, MLII, MLIBL and MLBS did not file a Statement of Answer or sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of contract, breach of fiduciary duty, and negligence. Claimants' claims relate to unspecified securities.

Unless specifically admitted in its Answer, Respondent MLPFS denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested unspecified compensatory damages, benefit of the bargain damages, model portfolio damages, punitive damages; lost opportunity costs; prejudgment interest; attorneys' fees; and such other relief as is deemed necessary and proper.

Respondent MLPFS requested an award dismissing the Statement of Claim in its entirety; reimbursement for expenses including attorneys' fees incurred in defending this action; and all other relief deemed equitable and just.

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

MLBTC, MLII, MLIBL and MLBS are non-members of the NASD without contracts to arbitrate and did not agree to voluntarily submit to arbitration of this action before NASD. Accordingly, they were not parties to this matter.

Respondent MLPFS did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and having answered the claim is bound by the determination of the Panel on all issues submitted.

By letters dated April 25, and August 22, 2005, the parties were asked to submit dates for rescheduling the hearings in this matter. To date, the parties did not respond to either of those letters. Because of the inaction on the part of the parties to the prosecution of this arbitration, the Panel, after due deliberation, determined that the dispute in this matter was no longer active and dismissed the case.

The parties have 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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are dismissed in their entirety.
2. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 250.00
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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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, Pierce, Fenner, & Smith, Inc. is a party.

Member surcharge	= \$	1,500.00
Pre-hearing process fee	= \$	750.00
<u>Hearing process fee</u>	= \$	2,200.00
Total Member fees	= \$	4,450.00

### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 21, 22, 23, 24, and 25, 2004, adjournment by Claimants and MLPF&S	= \$	1,000.00
Claimants' share	= \$	500.00
Respondent MLPFS' share	= \$	500.00

November 29 and 30, December 1, 2, and 3, 2004 adjournment  
by Claimants and MLPFS

Waived

### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A 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:

Two (2) Pre-hearing sessions with Panel @ \$1,000.00 per session	= \$	2,000.00
Pre-hearing conferences: December 19, 2003 1 session		
November 30, 2004 1 session		
Total Forum Fees	= \$	2,000.00

1. The Panel has assessed \$1,000.00 of the forum fees jointly and severally to Claimants.
2. The Panel has assessed \$1,000.00 of the forum fees to Respondent MLPFS.

### **Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$	250.00
Adjournment Fee	= \$	500.00
<u>Forum Fees</u>	= \$	1,000.00
Total Fees	= \$	1,750.00
<u>Less payments</u>	= \$	2,400.00
Refund Due Claimants	= \$	650.00
2. Respondent MLPFS is solely liable for:

Member Fees	= \$	4,450.00
Adjournment Fee	= \$	500.00
<u>Forum Fees</u>	= \$	1,000.00
Total Fees	= \$	5,950.00
<u>Less payments</u>	= \$	10,000.00

Refund Due Respondent MLPFS

= \$ 4,050.00

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

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Arbitration No. 02-03868  
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NASD REGULATION

ARBITRATION PANEL

Ernest Fanwick, Esq.	-	Public Arbitrator, Presiding Chairperson
Shelley Teitelbaum, Esq.	-	Public Arbitrator
Vicki Z. Holleman, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Ernest Fanwick  
Ernest Fanwick, Esq.  
Public Arbitrator, Presiding Chairperson

12/15/05  
Signature Date

Shelley Teitelbaum, Esq.  
Shelley Teitelbaum, Esq.  
Public Arbitrator

Signature Date

Vicki Z. Holleman, Esq.  
Vicki Z. Holleman, Esq.  
Non-Public Arbitrator

Signature Date

December 20, 2005  
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

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Signature Date

  
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Vicki Z. Holleman, Esq.  
Non-Public Arbitrator

12/16/05  
Signature Date

December 20, 2005  
Date of Service (For NASD Dispute Resolution use only)