

ORIGINAL

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Shelly Berman and Tom Cluck, Claimants v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. and
Allen R. Ernst, Respondents

Case Number: 02-06825

Hearing Site: Seattle, Washington

Nature of the Dispute: Customers v. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

G. Michael Zeno, Jr., Esq.
Zeno, Drake and Hively, P.S.
Kirkland, Washington

For Respondents:

Curt Roy Hinline, Esq.
Bridgette Helms, Esq.
Dorsey & Whitney LLP
Seattle, Washington

CASE INFORMATION

Statement of Claim filed: November 8, 2002

Claimants' Joint Uniform Submission Agreement signed: October 14, 2002

Respondents' Joint Statement of Answer filed: February 7, 2003

Respondent Merrill Lynch, Pierce, Fenner, & Smith, Inc.'s Uniform Submission Agreement
signed: December 16, 2002

Respondent Allen R. Ernst's Uniform Submission Agreement signed: February 6, 2003

CASE SUMMARY

Claimants alleged breach of contract, breach of fiduciary duty, unsuitability, fraud, misrepresentation, non-disclosure, negligence, violation of state and federal securities laws, violation of NASD Rules, and failure to supervise. Claimants' allegations involved transactions in the following stock: Broadcom Corp., Cisco Systems, EMC Corp., Exodus Communications, Infospace, LSI Logic, Motorola, Nortel Networks, Nokia, Oracle, Qualcomm, Sun Microsystems, Texas Instruments, and Yahoo.

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

RELIEF REQUESTED

Claimants requested \$200,000.00 in compensatory damages, \$300,000.00 in punitive damages or, in the alternative, treble damages up to \$10,000.00 (pursuant to RCW 19.86.020), pre- and post-judgment interest, and reimbursement of costs, including attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

On May 13, 2004, during the evidentiary hearing, Respondents made a Motion to Strike Claimants' Exhibits 6, 7, 8, 9, 10 and 12 located in Claimants' blue binder. Claimants subsequently withdrew Exhibit 7. After due deliberation, the Panel granted Respondents' motion.

On May 13, 2004, during the evidentiary hearing, Respondents made a Motion to Strike Claimants' request for punitive damages. The Panel took the motion under submission and disposed of the issue in the Award.

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) Respondents are jointly and severally liable to and shall pay Claimants the sum of \$186,532.00 in compensatory damages.
- 2) Respondents are jointly and severally liable to and shall pay Claimants the sum of \$300.00 as reimbursement for filing fees.
- 3) Respondents are jointly and severally liable to and shall pay Claimants interest in the amount of 8% per annum on \$186,532.00 from June 28, 2002, until payment of this Award is made in full.
- 3) Punitive damages are denied.
- 4) Except as set forth in paragraph 2, the Parties shall bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code of Arbitration Procedure (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
--------------------------	-------------

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	= \$1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,750.00</u>
Total Member Fees	= \$5,200.00

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 or the parties and the Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the Panel @ \$1,125.00/session	= \$1,125.00
Pre-hearing conference: June 26, 2003 1 session	
Seven (7) Hearing sessions @ \$1,125.00/session	= \$7,875.00
Hearings: May 10, 2004 2 sessions	
May 11, 2004 2 sessions	
May 12, 2004 2 sessions	
May 13, 2004 1 session	
Total Forum Fees	= \$9,000.00

The Panel assessed the entire balance of the forum fees, in the amount of \$9,000.00, jointly and severally to Respondents.

Fee Summary

1. Claimants are jointly and severally charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	<u>= \$(1,425.00)</u>
Refund Due from NASD Dispute Resolution	= \$(1,125.00)

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

Member Fees	= \$ 5,200.00
<u>Less payments</u>	<u>= \$(5,200.00)</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Merrill Lynch, Pierce, Fenner, & Smith, Inc. and Allen R. Ernst are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 9,000.00
Balance Due NASD Dispute Resolution	= \$ 9,000.00

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

Frederic E. Dorkin, Esq.
Elwood C. Avery
Peter G. Walker

-
-
-

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures


Frederic E. Dorkin, Esq.
Chair, Public Arbitrator

May 24, 2004
Signature Date

Elwood C. Avery
Public Arbitrator

Signature Date

Peter G. Walker
Non-Public Arbitrator

Signature Date

5/24/04
Date of Service

ARBITRATION PANEL

Frederic E. Dorkin, Esq.
Elwood C. Avery
Peter G. Walker

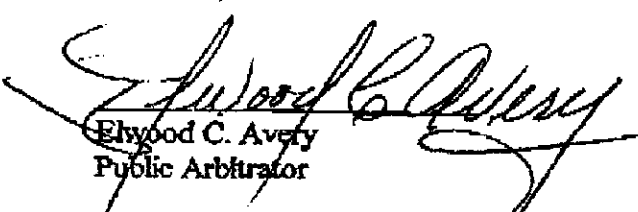
-
-
-

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

Frederic E. Dorkin, Esq.
Chair, Public Arbitrator

Signature Date


Elwood C. Avery
Public Arbitrator


Signature Date

Peter G. Walker
Non-Public Arbitrator

Signature Date

Date of Service

NASD Dispute Resolution

Arbitration No. 02-06825

Award Page 6 of 6

ARBITRATION PANEL

Frederic E. Dorkin, Esq.

Elwood C. Avery

Peter G. Walker

-
-
-

Public Arbitrator, Presiding Chair

Public Arbitrator

Non-Public Arbitrator


Concurring Arbitrators' Signatures

Frederic E. Dorkin, Esq.
Chair, Public Arbitrator

Signature Date

Elwood C. Avery
Public Arbitrator

Signature Date



Peter G. Walker
Non-Public Arbitrator

5/24/04
Signature Date

5/24/04
Date of Service