

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

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In the Matter of the Arbitration Between:

The John F. Bright Family Trust, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,  
Angela K. Adler and Stephen B. Smith, Respondents

Case Number: 02-07085

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimant:

Mitchell S. Ostwald, Esq.  
Sacramento, California

For Respondents:

Edward Dudensing, Esq.  
Mennemeier, Glassman & Stroud  
Sacramento, California

**CASE INFORMATION**

Statement of Claim filed: November 21, 2002

Claimant's Uniform Submission Agreement signed: November 21, 2002

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc.  
("Merrill Lynch"), Angela K. Adler and Stephen B. Smith: February 3, 2003

Respondent Merrill Lynch's Uniform Submission Agreement signed: July 21, 2003

Respondent Angela K. Adler's Uniform Submission Agreement signed: July 23, 2003

Respondent Stephen B. Smith's Uniform Submission Agreement signed: July 16, 2003

**CASE SUMMARY**

Claimant alleged that the above-referenced dispute involves investments in equities, primarily, technology based companies. Claimant's Claim did not specify the products at issue in this matter. Claimant also alleged the following claims: 1) Breach of Fiduciary Duty; 2) Fraud; 3) Constructive Fraud (Civil Code Section 1573); 4) Failure to Supervise; and 5) Violation of Federal and State Securities Laws; NASD Rules of Fair Practice and NYSE Rules.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimant's Claim requested:

1. Compensatory damages in an amount according to proof, but not less than \$200,000.00;
2. Disgorgement and restitution of all earnings, profits, compensation and benefits received by the Respondents as a result of their unlawful acts and practices in an amount according to proof;
3. Lost opportunity cost of what the purchase of \$200,000.00 would have been if suitably invested;
4. Attorney's fees and costs;
5. Pre- and post judgment interest at the legal rate;
6. Punitive damages in an amount according to proof; and
7. Such other and further relief as the Panel may deem just and proper.

At hearing, Claimant requested compensatory damages in the amount of \$127,862.00.

Respondents requested that the Panel dismiss Claimant's Statement of Claim; enter an award in Respondents' favor; expunge any reference to this matter from the regulatory records of the individual Respondents; assess attorneys' fees and costs against Claimant; and grant such other and further relief as is deemed just and proper.

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

On April 7, 2003, 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 May 6, 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.

On or about February 11, 2004, Claimant dismissed Respondents Angela K. Adler and Stephen B. Smith.

During the hearing, the Panel reviewed and considered the positions of the parties relative to Respondent's motion to exclude Merrill Lynch's analyst research reports and motion for directed verdict on suitability. The Panel denied the motions.

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) All claims by Claimant, including the claim for punitive damages, are dismissed.
- 2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Angela K. Adler and Stephen B. Smith's registration records maintained by the CRD, with the understanding that pursuant to NASD Notice to Members 99-09, Respondents Angela K. Adler and Stephen B. Smith must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 3) Each party shall bear its own costs, including attorney's fees.
- 4) All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD-DR 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, Merrill Lynch 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/Panel. The following fees are assessed:

(2) Pre-hearing conference sessions with the Panel @ \$1,125.00/session = \$2,250.00

Pre-hearing conferences: September 25, 2003 1 session  
November 20, 2003 1 session

(9) Hearing sessions @ \$1,125.00/session = \$10,125.00

Hearing: February 26, 2004 2 sessions  
February 27, 2004 2 sessions  
February 28, 2004 2 sessions  
March 12, 2004 2 sessions  
March 17, 2004 1 session

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**Total Forum Fees = \$12,375.00**

The Panel assessed the \$12,375.00 in forum fees to Respondent Merrill Lynch.

**Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and other requests.

Merrill Lynch requested copies of audio transcripts: = \$165.00

**Fee Summary**

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

Initial Filing Fee	= \$ 300.00
<u>Less Payments</u>	= \$ (1,425.00)
Refund Due Claimant	= \$ (1,125.00)

2. Respondent, Merrill Lynch, is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 12,375.00
<u>Administrative Costs</u>	= \$ 165.00
Total Fees	= \$ 17,740.00
<u>Less Payments</u>	= \$ (11,700.00)
Balance Due NASD-DR	= \$ 6,040.00

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

**ARBITRATION PANEL**

Laurel Littman Githelf, MPH	-	Public Arbitrator, Presiding Chair
Peter Kassel	-	Public Arbitrator
Rudy E. Thorwirth	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Laurel Littman Githelf, MPH  
Chair, Public Arbitrator

3-26-04  
Signature Date

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Peter Kassel  
Public Arbitrator

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

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Rudy E. Thorwirth  
Non-Public Arbitrator

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Signature Date

3/29/04  
Date of Service

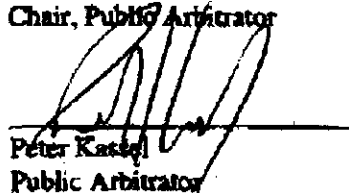
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Laurel Littman Gothelf, MPH  
Peter Kassel  
Rudy E. Thorwirth

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Laurel Littman Gothelf, MPH  
Chair, Public Arbitrator



Peter Kassel  
Public Arbitrator

Signature Date

MARCH 26/14  
Signature Date

Rudy E. Thorwirth  
Non-Public Arbitrator

Signature Date

3/29/04  
Date of Service

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Peter Kassel	-	Public Arbitrator
Rudy E. Thorwirth	-	Non-Public Arbitrator

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Chair, Public Arbitrator

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Signature Date

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Peter Kassel  
Public Arbitrator

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Signature Date

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Rudy E. Thorwirth  
Non-Public Arbitrator

March 26 2004  
Signature Date

3/29/04  
Date of Service