

**STIPULATED AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimants

G. Dewitt Boice, Individually and  
on behalf of the G. Dewitt Boice Trust  
and Lorraine R. Boice

v.

02-07882  
Denver, Colorado

Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.,  
Michael B. Weinberg and Edward L. Winpenny, Jr.

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Nature of Dispute: Customers v. Member and Associated Persons

**REPRESENTATION OF PARTIES**

G. Dewitt Boice, Individually and on behalf of the G. Dewitt Boice Trust and Lorraine R. Boice, hereinafter referred to as ("Claimants") were represented by Alan C. Friedberg, Esq., Pendelton, Friedberg, Wilson & Henessey, P.C., Denver, Colorado.

Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"), Michael B. Weinberg ("Weinberg") and Edward L. Winpenny, Jr. ("Winpenny"), hereinafter referred to as "Respondents", were represented by Neil S. Baritz, Esq., of Baritz & Coleman LLP, Boca Raton, Florida.

**CASE INFORMATION**

The Statement of Claim was filed on or about December 31, 2002. The Submission Agreements of Claimants were signed on or about December 26, 2002.

A Joint Statement of Answer was filed by Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., Michael B. Weinberg and Edward L. Winpenny, Jr., on or about December 17, 2002. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about April 23, 2003. The Submission Agreement of Respondent, Michael B. Weinberg, was signed on or about May 1, 2003.

Respondent, Edward L. Winpenny, Jr., filed a Motion to Dismiss on or about March 19, 2003.

### **CASE SUMMARY**

Claimants asserted causes of action including the following: breach of contract, breach of fiduciary duty, failure to supervise, and respondeat superior. The causes of action related to Claimants' allegations that Respondents failed to honor an agreement to implement 10% trailing stops on all positions held in their accounts. Claimants alleged that Respondents agreed to do this as a condition of managing their accounts.

Respondents denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimants failed to state a claim upon which relief can be granted; Claimants' damages were proximately caused by their own reckless conduct, failure to conduct their own due diligence; Claimants' claims are barred under the doctrines of waiver, equitable estoppel, ratification, indemnification and contribution; to the extent, if any, losses or diminution in the value of the Claimants' account occurred, it was the result of market fluctuations, actions or inactions of third parties and/or within the risk assumed by Claimants; and beyond the control of Respondents and Respondents, at all times, discharged their responsibilities properly and in good faith.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$117,989.30 in compensatory damages, interest, costs, attorney's fees and any other relief that the panel deemed just and equitable.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. In addition, Respondents requested that this matter be expunged from Respondents, Michael B. Weinberg's and Edward L. Winpenny, Jr.'s, permanent registration record maintained by the Central Registration Depository ("CRD").

### **OTHER ISSUES CONSIDERED & DECIDED**

On or about April 22, 2003, Claimants voluntarily withdrew all claims asserted against Respondent Edward L. Winpenny, Jr.

Prior to the hearing, the parties fully and finally settled all claims by and between them. The parties have stipulated that Respondent, Edward L. Winpenny, Jr., had no direct contact with Claimant and/or had no involvement with the accounts at issue. As such, Claimants agreed voluntarily withdraw their claims against Respondent, Edward L. Winpenny, Jr., and did not object to Winpenny's request for expungement.

### **AWARD**

After considering the pleadings and the parties' submissions and representations, but without making any findings of fact or conclusions of law, the undersigned arbitrators orders as follows:

1. Claimants' claims having been withdrawn, are hereby dismissed with prejudice in their entirety;
2. The arbitration panel recommends the expungement of all reference to the above captioned arbitration from Respondent, Edward L. Winpenny, Jr.'s registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent, Edward L. Winpenny, Jr., must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. Respondent, Michael B. Weinberg's request for expungement is denied in its entirety;
4. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, including punitive damages, are denied with prejudice; and
5. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee	= \$ 300.00
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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. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,750.00

**Adjournments granted during these proceedings:**

Hearing Dates, July 7-9, 2004

Adjournment requested by all parties

(Fee Waived By Panel)

= \$ 1,125.00

**Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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:

One (1) Pre-hearing sessions with the chairperson x \$ 450.00 = \$ 450.00

Pre-hearing conference: 06/18/2004 1 session

One (1) Pre-hearing sessions with the panel x \$ 1,125.00 = \$ 1,125.00

Pre-hearing conference: 12/12/2003 1 session

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Total Forum Fees = \$ 1,575.00

The Arbitration Panel has assessed \$ 787.50 of the forum fees jointly and severally to G. Dewitt Boice, Individually and on behalf of the G. Dewitt Boice Trust and Lorraine R. Boice.

The Arbitration Panel has assessed \$ 787.50 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith, Inc., and Michael B. Weinberg.

**Fee Summary**

Claimant, G. Dewitt Boice, Individually and on behalf of the G. Dewitt Boice Trust and Lorraine R. Boice and Lorraine R. Boice are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 787.50
Total Fees	= \$ 1,087.50
Less payments	= \$ 1,425.00
Balance Refunded By NASD Dispute Resolution	= \$ 337.50

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., is liable for:

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

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., and Michael B. Weinberg, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 787.50
<u>Total Fees</u>	= \$ 787.50
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 787.50

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

**ARBITRATION PANEL**

Peter G. Bowen - Public Arbitrator, Presiding Chair  
Avery B. Goodman - Public Arbitrator  
Albert T.T. Cook, Jr.- Non-Public Arbitrator

Concurring Arbitrators:

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Peter G. Bowen  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Avery B. Goodman  
Public Arbitrator

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

\_\_\_\_\_  
Albert T.T. Cook, Jr.  
Non-Public Arbitrator

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

1/25/05  
\_\_\_\_\_  
Date of Service (NASD use only)

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., is liable for:

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<u>Less payments</u>	= \$ 5,200.00
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Peter G. Bowen  
Peter G. Bowen  
Public Arbitrator, Presiding Chair

1.24.05  
Signature Date

Avery B. Goodman  
Avery B. Goodman  
Public Arbitrator

Signature Date

Albert T.T. Cook, Jr.  
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Non-Public Arbitrator

Signature Date

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Public Arbitrator, Presiding Chair

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Signature Date

  
\_\_\_\_\_  
Avery B. Goodman  
Public Arbitrator

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01-25-05  
Signature Date

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Avery B. Goodman - Public Arbitrator

Albert T.T. Cook, Jr. - Non-Public Arbitrator

Concurring Arbitrators:

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Peter G. Bowen  
Public Arbitrator, Presiding Chair

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

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Avery B. Goodman  
Public Arbitrator

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Signature Date

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Albert T.T. Cook, Jr.  
Non-Public Arbitrator

1.25.2005  
Signature Date

1/25/05  
Date of Service (NASD use only)