

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

David and Jackie Bornstein

Case Number: 03-00066

Name of the Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Customers v. Member Firm

REPRESENTATION OF PARTIES

Claimants David and Jackie Bornstein, hereinafter collectively referred to as "Claimants": David L. McGee, Esq. of the firm of Beggs & Lane, located in Pensacola, Florida..

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": James P. Lucking, Esq. of the firm of Bingham McCutchen LLP, located in Boston, Massachusetts.

CASE INFORMATION

Statement of Claim filed: January 6, 2003.

Claimants signed the Uniform Submission Agreement: December 4, 2002.

Statement of Answer filed by Respondent on: March 20, 2003.

Respondent signed the Uniform Submission Agreement: February 18, 2003.

Claimants' Pre-Hearing Brief filed on: November 23, 2004.

Respondent's Pre-Hearing Brief filed: December 8, 2004.

Respondent's Post Hearing Submission of January 21, 2005.

Claimants' Post-Hearing Submission of January 27, 2005.

Respondent's Post-Hearing Submission of January 31, 2005.

Claimants' Post-Hearing Submission of February 1, 2005.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty; fraud; negligent

misrepresentation; negligence; violation of the Blue Sky Laws; and violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. These claims related to allegations that Merrill Lynch failed to recommend hedging strategies, causing the Claimants to lose their entire portfolio, and Merrill Lynch's fraudulent analyst reports which recommended the purchase of, and set target prices for the common stock of companies without any reasonable factual basis.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim for which relief can be granted;
2. Claimants suffered no damages by reason of any acts of Merrill Lynch;
3. Claimants failed to mitigate damages, if any, by failing to sell stock positions even as they continued to decline over the life of their account and by purchasing more;
4. Claimants assumed the risk of these transactions and therefore may not recover;
5. Claimants' alleged loses were proximately caused by Mr. Bornstein's own conduct, negligence, comparative or contributory negligence in relation to the transactions complained of by him and, therefore, Claimants are precluded from recovery;
6. Claimants knew and were on notice of the transactions in their account and in fact authorized these transactions, and they may not recover;
7. Claimants' claims are barred by the applicable statutes of limitations;
8. Claimants' alleged claims are barred by the defenses of estoppel, waiver and laches;
9. Respondent is not liable to Claimants in any amount because, at all times relevant herein, it acted properly, in good faith and in a commercially reasonable manner with respect to Claimant's account;
10. All transactions upon which Claimants base their alleged claims against Respondent were conducted in accordance with all applicable Exchange rules and regulations and in compliance with all applicable provisions of state and federal law;
11. Claimants are not entitled to any recovery because their alleged claims are barred by the equitable doctrine of unclean hands;
12. There is no legal basis for a damage claim based on the theory that an investor decided not to sell a stock based on the statement of another;
13. Claimants' claims are barred because Respondent did not cause, legally, proximately or otherwise, their injuries; and,
14. Claimants are not entitled to an award of attorneys' fees, punitive damages, interest or the costs of this proceeding.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages
Punitive Damages

\$12,600,000.00
In an amount to be determined from
the evidence accumulated during

Interest	discovery
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary/Non-Monetary Relief if any:	As the Panel deemed appropriate.

Respondent requested that the Statement of Claim be dismissed with prejudice and that it be awarded costs.

OTHER ISSUES CONSIDERED AND DECIDED

At hearing, Respondent moved to dismiss the claim as part of final argument. The Panel denied this Motion.

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, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted by the Claimants, David and Jackie Bornstein, against Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. are hereby dismissed and denied in their entirety;
2. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
3. 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	= \$ 600.00
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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 and the following member fees are assessed:

Member surcharge	= \$ 3,750.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,500.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

February 2-6, 2004 adjournment by both parties	= \$ 1,200.00
June 1-4, 2004 adjournment by Merrill Lynch	= \$ 1,200.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) Pre-hearing sessions with a single arbitrator @ \$450.00	= \$ 1,800.00
Pre-hearing conferences:	
October 10, 2003	1 session
November 4, 2003	1 session
November 13, 2003	1 session
February 5, 2004	1 session

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences:	
July 22, 2003	1 session
May 27, 2004	1 session

Twelve (12) Hearing sessions @ \$1,200.00	= \$14,400.00
Hearing Dates:	
December 13, 2004	2 sessions
December 14, 2004	2 sessions
December 15, 2004	2 sessions
December 16, 2004	2 sessions
December 17, 2004	2 sessions
January 20, 2005	2 sessions

Total Forum Fees	= \$18,600.00
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The Panel has assessed \$9,300.00 of the forum fees to Claimants David and Jackie Bornstein and has assessed the remaining \$9,300.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

SEE SUMMARY

Claimants David and Jackie Bornstein are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
Adjournment Fee	= \$ 600.00
Forum Fees	= \$ 9,300.00
Total Fees	= \$10,500.00

NASD

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Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 8,700.00

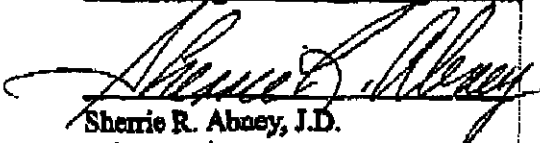
Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$10,000.00
Adjournment Fee	= \$ 1,800.00
Forum Fees	= \$ 9,300.00
Total Fees	= \$21,100.00
Less payments	= \$10,600.00
Balance Due NASD Dispute Resolution	= \$10,500.00

ARBITRATION PANEL

Andrea U. Calve, JD - Public/Non-Public Arbitrator, Presiding Chairperson
Sherrie R. Abney, J.D. - Public/Non-Public Arbitrator
Robert E. Otto - Non-Public Arbitrator

Concurring Arbitrators' Signatures


Sherrie R. Abney, J.D.
Public Arbitrator

3/21/05
Signature Date

Robert E. Otto
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature
I dissent from this decision.

Andrea U. Calve, JD
Public Arbitrator, Presiding Chairperson

Signature Date

3/21/05 
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
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Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 8,700.00

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

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Adjournment Fee	= \$ 1,800.00
Forum Fees	= \$ 9,300.00
Total Fees	= \$21,100.00
Less payments	= \$10,600.00
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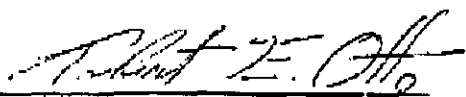
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Sherrie R. Abney, J.D. - Public/Non-Public Arbitrator
Robert E. Otto - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Sherrie R. Abney, J.D.
Public Arbitrator

Signature Date



Robert E. Otto
Non-Public Arbitrator

3/18/05

Signature Date

Dissenting Arbitrator's Signature
I dissent from this decision.

Andrea U. Calve, JD
Public Arbitrator, Presiding Chairperson

Signature Date

3/21/05 

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

Arbitration No. 03-00066

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Andrea U. Calve, JD - Public/Non-Public Arbitrator, Presiding Chairperson

Sherrie R. Abney, J.D. - Public/Non-Public Arbitrator

Robert E. Otto - Non-Public Arbitrator

Concurring Arbitrators' Signatures


Sherrie R. Abney, J.D.
Public Arbitrator

Signature Date

Robert E. Otto
Non-Public Arbitrator

Signature Date**Dissenting Arbitrator's Signature**

I dissent from this decision.


Andrea U. Calve, JD
Public Arbitrator, Presiding Chairperson

3-10-05
Signature Date

3/21/05 
Date of Service (For NASD Dispute Resolution office use only)