

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

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In the Matter of the Arbitration Between

Claimant

Spencer J. Reppe

v.

03-01334

Minneapolis, Minnesota

Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.  
and Peter G. Opp

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Nature of Dispute: Customer v. Member and Associated Person

**REPRESENTATION OF PARTIES**

Spencer J. Reppe ("**Claimant**") was represented by Geoffrey P. Jarpe, Esq., of Maslon Edelman Borman & Brand, Minneapolis, Minnesota.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Merrill**") and Peter G. Opp ("**Opp**"), hereinafter referred to as ("**Respondents**"), were represented by Thomas Janick, Esq., of Dorsey & Whitney, LLP, Minneapolis, Minnesota.

**CASE INFORMATION**

The Statement of Claim was filed on or about February 17, 2003. Submission Agreement of Claimant was signed on or about February 14, 2003.

A Joint Statement of Answer was filed by Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Peter G. Opp on or about May 7, 2003. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Inc. was signed on or about May 2, 2003. Submission Agreement of Respondent Peter G. Opp was signed on or about June 8, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty, negligence and violation of Minn. Stat. § 80A.01. The causes of action related to Claimant's allegation that after he rolled over his IRA account into a "Merrill Lynch Unlimited Advantage Account," Respondents' invested his holdings mostly into technology and high-risk stocks. Claimant alleged that given his request for a moderate-risk investment objective, this strategy was unsuitable and caused his portfolio to take a heavy loss upon the market downturn.

Respondents denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimant knowingly assumed the risk of his investment decisions in exchange for a higher rate of return; Opp's recommendations were made in good faith and were based on sound facts; Claimant directed all trades made in his accounts, and accordingly, is precluded from asserting claims based on those decisions as a basis for recovery; Merrill maintained an adequate and reasonable system of supervision and control of its registered representatives, including Mr. Opp, and at all times acted in good faith, in accordance with industry standards of conduct and in compliance with all applicable securities laws and regulations; and Claimant's losses were caused by his own investment decisions and general stock market movements for which Respondents are not responsible.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$150,000 in actual damages, in addition to punitive damages, attorney's fees, costs 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 Respondent Opp's permanent registration record maintained by the Central Registration ("CRD").

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

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Peter G. Opp, are jointly and severally liable for and shall pay to Claimant, Spencer J. Reppe, the sum of Forty Five Thousand Dollars and No Cents (\$45,000.00) as compensatory damages;
2. 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

3. 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

#### **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  
Pre-hearing process fee = \$ 750  
Hearing process fee = \$ 2,750

#### **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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$ 1,125 = \$ 1,125

Pre-hearing conference: 10/27/2003 1 session

Three (3) Hearing sessions with Panel x \$ 1,125 = \$ 3,375

Hearing Dates: 02/17/2004 2 sessions  
02/18/2004 1 session

**Total Forum Fees** = \$ 4,500

The Arbitration Panel has assessed \$ 2,250 of the forum fees to Spencer J. Reppe

The Arbitration Panel has assessed \$ 2,250 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith, Inc. and Peter G. Opp.

Fee Summary

Claimant, Spencer J. Reppe is liable for:

Initial Filing Fee	= \$ 300
<u>Forum Fees</u>	<u>= \$ 2,250</u>
Total Fees	= \$ 2,550
<u>Less payments</u>	<u>= \$ 1,425</u>
Balance Due NASD Dispute Resolution	= \$ 1,125

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

<u>Member Fees</u>	<u>= \$ 5,200</u>
Total Fees	= \$ 5,200
<u>Less payments</u>	<u>= \$ 5,200</u>
Balance Due NASD Dispute Resolution	= \$ 0

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Peter G. Opp are jointly and severally liable for:

<u>Forum Fees</u>	<u>= \$ 2,250</u>
Total Fees	= \$ 2,250
<u>Less payments</u>	<u>= \$ 0</u>
Balance Due NASD Dispute Resolution	= \$ 2,250

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**

Terrence J. Fleming, Esq. – Non - Public Arbitrator, Presiding Chair  
Harry J. Haynsworth, IV - Public Arbitrator  
Jeffrey W. Jacobs, Esq.- Public Arbitrator

Concurring Arbitrators:

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Terrence J. Fleming, Esq.  
Non-Public Arbitrator, Presiding Chair

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Signature Date

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Harry J. Haynsworth, IV  
Public Arbitrator

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Signature Date

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Jeffrey W. Jacobs, Esq.  
Public Arbitrator

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Signature Date

2/26/04  
Date of Service (NASD use only)

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Public Arbitrator

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Jeffrey W. Jacobs, Esq.  
Public Arbitrator

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Signature Date

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*2/25/04*  
Signature Date

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*2/26/04*  
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2-25-04