

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Names of the Claimants

Richard E. McInnes, in his individual capacity,
and in his capacity as trustee, and
Robin A. McInnes, in her individual capacity,
and in her capacity as trustee

Case Number: 03-02110

Name of the Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

Hearing Site: Chicago, Illinois

NATURE OF THE CONTROVERSY

Customers v. Member Firm

REPRESENTATION OF PARTIES

David L. McGee, Esq., Peter J. Mougey, Esq., Jack W. Lurton, III, Esq., and Steven R. Griffin, Esq., of the firm Beggs & Lane, LLP, located in Pensacola, Florida represented Claimants Richard E. McInnes and Robin A. McInnes, "McInnes" or "Claimants." The firm Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, was also listed as representing Claimants.

John R. Snyder, Esq., and Robert B. Baker, Esq., of the firm Bingham McCutchen, LLP, located in Boston, Massachusetts represented Respondent Merrill Lynch Pierce Fenner & Smith, "Merrill Lynch" or "Respondent."

CASE INFORMATION

The McInneses filed a Statement of Claim on March 23, 2003. They subsequently filed an Amended Statement of Claim on December 23, 2003. Richard E. McInnes signed the Uniform Submission Agreement on January 13, 2003. On the same date, Robin A. McInnes also signed the Uniform Submission Agreement.

Respondent filed a Statement of Answer on July 7, 2003. On February 13, 2004, Respondent filed an Answer to the Amended Statement of Claim. Respondent Merrill Lynch signed the Uniform Submission Agreement on May 6, 2003.

On January 20, 2004, Merrill Lynch filed a Motion to Dismiss the Claimants' Analyst Fraud Claims, or, in the Alternative, to Order the Claimants to Identify the Specific Securities and Alleged Misrepresentations that are the Subject of their Analyst Fraud Allegations and Claims.

Merrill Lynch filed a Motion for More Definitive Statement of Facts on August 12, 2003. Claimants filed a Response to said Motion on September 8, 2003. On October 3, 2003, Merrill Lynch filed a Memorandum in Support of its Motion.

Merrill Lynch also filed a Motion to Strike the Dinallo Affidavit and Settlement Agreement with the New York Attorney General on August 12, 2003. Claimants filed a Response to said Motion on September 8, 2003. Merrill Lynch filed a Memorandum in Support of its Motion on October 3, 2003.

CASE SUMMARY

Claimants asserted the following causes of action: unsuitability; breach of fiduciary duty; violation of NASD Rules 2310 and 2110, violation of NYSE Rule 405; research analyst conflict of interest; fraud; negligent misrepresentation; negligence; and violation of Blue Sky Laws. The causes of action relate to unspecified bonds and the Ziff Davis; Allstate Corp.; Compaq; K-Mart; 24/7 Media; Wisconsin Cent. Trans. stocks.

Unless specifically admitted in its Answer and Answer to the Amended Statement of Claim, Respondent denied the allegations made in the Statement of Claim Amended Statement of Claim and asserted the following defenses: failure to state a claim upon which relief can be granted; Claimant suffered no damages because of the acts of Merrill Lynch; the statement of claim is barred, in whole or in part, because Claimants failed to mitigate damages, if any; Claimants assumed the risk of the subject transactions and therefore may not recover; pursuant to the terms of the customer agreements executed by Claimants, all substantive claims raised by Claimants with respect to their accounts are to be determined under New York law; Claimants' alleged losses were proximately caused by their own conduct, negligence, comparative or contributory negligence in relation to the transactions complained of by them, and therefore, Claimants are precluded from recovery; all risks inherent in the investments at issue were fully disclosed and/or known to Claimants; moreover, any losses incurred by Claimants were the direct result of adverse economic or market conditions and/or the acts of third parties and cannot be attributed to Respondent; to the extent Claimants knew or were on notice of the transactions in their accounts and in fact authorized these transactions, they may not recover; Claimants directed, approved and/or authorized each and every transaction for their accounts at issue and/or ratified, accepted, acquiesced and confirmed in all respects such transactions; therefore, Claimants' claims are barred by the equitable doctrines of estoppel, laches, ratification, and waiver; Claimants' allegations of securities fraud are barred by the applicable statutes of limitations; Claimants were well aware of the declining status of their investments, and therefore were on actual or inquiry notice of any potential claims they may have had, the limitations periods for all of which have now expired; at all relevant times, Merrill Lynch maintained an adequate and reasonable strategy of supervision and control over its employees, and at all relevant times acted in good faith and did not at any time, directly or indirectly, induce any act or acts constituting a violation or cause of action; thus, Merrill Lynch is not subject either to "control person" or *respondeat superior* liability; Claimants are not entitled to an award of attorney's fees, punitive damages, interest or the costs of this proceeding; all transactions upon which

Claimants based 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 laws; Claimants are not entitled to recovery because their alleged claims are barred by the equitable doctrine of unclean hands; 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; Claimants' claims are barred because Respondent did not cause, legally, proximately or otherwise, any losses; to the extent Claimants assert claims for alleged violations of NASD or NYSE rules, no such private right of action exists; all activity in the Claimants' accounts was suitable for and consistent with Claimants' stated investment objectives.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$1 million, punitive damages, interest, attorney's fees, costs, and any such relief the panel deems appropriate.

Respondent requested attorney's fees, costs, and denial and dismissal of the claims.

OTHER ISSUES CONSIDERED AND DECIDED

On January 27, 2004, parties notified NASD that Claimant had agreed to limit the Analyst Fraud Claims to the 24/7 Media stock, and, on that basis, Merrill Lynch withdrew its Motion to Dismiss. As a result, Panel did not rule on said Motion.

In a November 2003 Order, the Panel granted Merrill Lynch's Motion for a More Definite Statement of the Relevant Facts upon which the Claimants Base their Claims.

The Panel did not rule on Merrill Lynch's Motion to Strike.

AWARD

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

1. Any and all claims asserted by Claimants Richard E. McInnes and Robin A. McInnes Merrill Lynch Pierce Fenner & Smith are denied in their entirety.
2. Except for the forum fees, which are specified herein, parties shall bear their own costs, including attorney's fees.
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	= \$ 375.00
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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 is assessed the following fees:

Member surcharge	= \$2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$4,000.00

Forum Fees and Assessments

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

Four (4) Pre-hearing sessions with a single arbitrator at \$450.00	= \$ 1,800.00
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Pre-hearing conferences:

November 14, 2003	1 session
March 3, 2004	1 session
March 5, 2004	1 session
April 14, 2004	1 session

Three (3) Pre-hearing sessions with Panel at \$1,200.00	= \$ 3,600.00
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Pre-hearing conferences:

September 22, 2003	1 session
April 8, 2004	1 session
May 17, 2004	1 session

Eighteen (18) Hearing sessions at \$1,200.00 = \$21,600.00

Hearing Dates:

May 24, 2004	2 sessions
May 25, 2004	2 sessions
May 26, 2004	2 sessions
May 27, 2004	2 sessions
May 28, 2004	2 sessions
August 2, 2004	3 sessions
August 3, 2004	2 sessions
August 4, 2004	3 sessions

Total Forum Fees = \$27,000.00

The Panel assessed \$13,500.00 of the forum fees to Richard E. McInnes and Robin A. McInnes, jointly and severally, and assessed \$13,500.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith.

FEE SUMMARY

Claimants Richard E. McInnes and Robin A. McInnes are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Administrative Cost	= \$ 17.50
Forum Fees	= \$13,500.00
Total Fees	= \$13,892.50
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$12,317.50

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

Member Fees	= \$ 7,000.00
Forum Fees	= \$13,500.00
Total Fees	= \$20,500.00
Less payments	= \$ 7,000.00
Balance Due NASD Dispute Resolution	= \$13,500.00

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

ARBITRATION PANEL

Frank A. Dusek	-	Public Arbitrator, Presiding Chairperson
Robert L. Nichols, Sr.	-	Public Arbitrator
Anthony P. Pecora	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ Frank A. Dusek

08/25/04

Frank A. Dusek
Public Arbitrator, Presiding Chairperson

Signature Date

/s/ Robert L. Nichols, Sr.

08/24/04

Robert L. Nichols, Sr.
Public Arbitrator

Signature Date

/s/ Anthony P. Pecora

08/24/04

Anthony P. Pecora
Non-Public Arbitrator

Signature Date

08/25/04

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

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Public Arbitrator, Presiding Chairperson

8-25-04

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Public Arbitrator

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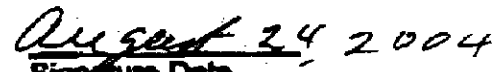
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