

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

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In the Matter of the Arbitration Between:

Marc Desbans, Individually and as Co-Trustee of the Desbans Family Trust Dated 4/5/01, and  
Judith Desbans, Individually and as Co-Trustee of the Desbans Family Trust Dated 4/5/01,  
Claimants v. Merrill Lynch, Pierce, Fenner & Smith Inc. and John R. Heinze, Respondents

Case Number: 03-02554

Hearing Site: Los Angeles, California

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Nature of the Dispute: Customers v. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimants:

Mitchell J. Albert, Esq.  
Albert & Will, LLP  
Torrance, California

For Respondents:

Ted Poretz, Esq.  
Bingham McCutchen LLP  
New York, New York

**CASE INFORMATION**

Statement of Claim filed: April 4, 2003

Claimants' Joint Uniform Submission Agreement signed: April 3, 2003

Joint Statement of Answer filed by Respondents: July 10, 2003

**CASE SUMMARY**

Claimants alleged breach of fiduciary duty, fraud, negligent misrepresentation, professional negligence, negligent supervision, misrepresentations, omissions, unsuitable recommendations, breach of securities laws, and statutory violations, involving securities in Ariba and Commerce One.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested \$4,000,000.00 in compensatory damages, unspecified punitive damages, prejudgment interest at the rate of 10% per annum through the date of payment of the actual damages, disgorgement of all fees and costs, and costs including filing fees, NASD forum fees, and attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety, an Award directing that the registration files of Respondent John R. Heinze be expunged of any reference to this claim, and costs including hearing fees, attorney's fees, and sanctions.

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

Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and John R. Heinze did not file with NASD Dispute Resolution properly executed submission agreements, however, all said Respondents are required to submit to arbitration and, having answered the claim and appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

On April 21, 2003, Claimants and Claimants' 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 August 12, 2003, Respondents' counsel signed a Waiver Agreement on Respondents' behalf expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

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) Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. is found liable for failure to supervise.
- 2) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and John R. Heinze are found liable for negligence.
- 3) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and John R. Heinze are jointly and severally liable to and shall pay Claimants the sum of \$3,762,935.00 in compensatory damages.
- 4) Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and John R. Heinze are jointly and severally liable to and shall pay Claimants interest on \$3,762,935.00 at the rate of 10% per annum from March 10, 2005 to the date that payment of this Award is made in full.
- 5) Claimants' request for punitive damages is denied.
- 6) Respondent John R. Heinze's request for expungement is denied.
- 7) The parties shall bear their respective costs, including attorney's fees.
- 8) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 600.00
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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, the member firm Merrill Lynch, Pierce, Fenner & Smith Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,000.00
<b>Total Member Fees</b>	<b>= \$ 8,550.00</b>

**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:

1 Pre-hearing conference session with a single arbitrator @ \$ 450.00/session = \$ 450.00  
Pre-hearing conference: April 19, 2004 1 session

1 Pre-hearing conference session with the Panel @ \$1,200.00/session = \$ 1,200.00  
Pre-hearing conference: November 7, 2003 1 session

22 Hearing sessions @ \$1,200.00/session = \$26,400.00

Hearings:

July 13, 2004	2 sessions
July 14, 2004	2 sessions
July 15, 2004	2 sessions
July 16, 2004	2 sessions
November 15, 2004	2 sessions
November 16, 2004	2 sessions
November 17, 2004	2 sessions
November 18, 2004	2 sessions
November 19, 2004	2 sessions
March 8, 2005	2 sessions
March 9, 2005	2 sessions

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**Total Forum Fees** = **\$28,050.00**

1. The Panel assessed \$14,025.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$14,025.00 of the forum fees jointly and severally to Respondents.

**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 sundry other requests.

Claimants requested copies of 22 audio transcripts @ \$15.00 each:	= \$ 330.00
Respondents requested copies of 4 audio transcripts @ \$15.00 each:	= \$ 60.00

**Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$14,025.00
<u>Administrative Costs</u>	= \$ 330.00
Total Fees	= \$14,955.00
<u>Less payments</u>	= \$( 2,130.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$12,825.00</b>

2. Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Less payments</u>	= \$( 8,550.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

3. Respondents are charged jointly and severally with the following fees and costs:

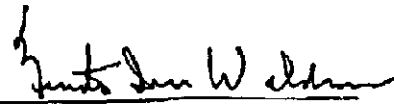
Forum Fees	= \$14,025.00
<u>Administrative Costs</u>	= \$ 60.00
Total Fees	= \$14,085.00
<u>Less payments made by Merrill Lynch, Pierce, Fenner &amp; Smith Inc.</u>	= \$( 60.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$14,025.00</b>

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

**ARBITRATION PANEL**

Newton Ira Waldman	-	Public Arbitrator, Presiding Chair
Deborah Rothman	-	Public Arbitrator
Blaine Smith	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Newton Ira Waldman  
Chair, Public Arbitrator

3/14/05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Deborah Rothman  
Public Arbitrator

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

**Dissenting Arbitrator's Signature**

This Arbitrator dissents from the Award.

\_\_\_\_\_  
Blaine Smith  
Non-Public Arbitrator

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

3/14/05  
\_\_\_\_\_  
Date of Service

**ARBITRATION PANEL**

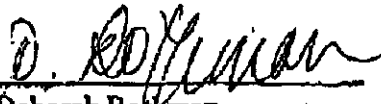
Newton Ira Waldman  
Deborah Rothman  
Blaine Smith

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Newton Ira Waldman  
Chair, Public Arbitrator

Signature Date



Deborah Rothman  
Public Arbitrator

3-14-05  
Signature Date

**Dissenting Arbitrator's Signature**

This Arbitrator dissents from the Award.

Blaine Smith  
Non-Public Arbitrator

Signature Date

3/14/05  
Date of Service

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Deborah Rothman	-	Public Arbitrator
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Chair, Public Arbitrator

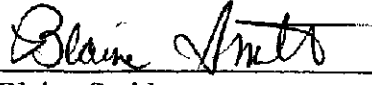
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Signature Date

\_\_\_\_\_  
Deborah Rothman  
Public Arbitrator

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

**Dissenting Arbitrator's Signature**

This Arbitrator dissents from the Award.

  
\_\_\_\_\_  
Blaine Smith  
Non-Public Arbitrator

3-11-05  
Signature Date

3/14/05