

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Brian P. Olsen and Kari E. Olsen, Claimants v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Respondent

Case Number: 03-02870

Hearing Site: Seattle, Washington

Nature of the Dispute: Customers vs. Member

REPRESENTATION OF PARTIES

For Claimants:

Benjamin A. Schwartzman, Esq.
Lovell Stewart Halebian & Barth, LLP
Seattle, Washington

For Respondent:

Matthew C. Applebaum, Esq.
Bingham McCutchen, LLP
Boston, Massachusetts

CASE INFORMATION

Statement of Claim filed: April 14, 2003

Amended Statement of Claim filed: January 23, 2004

Claimants' Opposition to Respondent's Motion to Dismiss and Motion to Strike filed:
August 7, 2003

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

Statement of Answer, Motion to Dismiss, and Motion to Strike filed by Respondent:
July 21, 2003

Memorandum in Support of Answer, Motion to Dismiss, and Motion to Strike filed by
Respondent: September 5, 2003

Respondent's Uniform Submission Agreement filed: July 24, 2003

CASE SUMMARY

In their Initial and Amended Statements of Claim, Claimants alleged:

- (a) That as their investment advisor, Merrill Lynch, Pierce, Fenner & Smith, Inc., had a fiduciary relationship with the Olsens, which Merrill Lynch, Pierce, Fenner & Smith, Inc. breached by deceiving and inducing the Olsens to purchase Infospace, Inc. stock at inflated prices.
- (b) That Merrill Lynch, Pierce, Fenner & Smith, Inc. was obligated to provide the Olsens with truthful and accurate information regarding their financial affairs and instead gave the Olsens inaccurate representations which were material and were relied upon by the Olsens causing the Olsens to buy Infospace, Inc. stock at inflated prices.
- (c) That Merrill Lynch, Pierce, Fenner & Smith, Inc. violated the Washington State Securities Act (RCW 21.20.020 et seq.)¹ when it engaged in dishonest acts by deceiving the Olsens as to the value of Infospace, Inc. stock.
- (d) That Merrill Lynch, Pierce, Fenner & Smith, Inc. published false and misleading research reports for Infospace, Inc. which was a violation of the Washington Consumer Protection Act (RCW 19.86.010 et seq.)². The Olsens were damaged when relying on the false reports they purchased Infospace shares at grossly inflated prices.

Respondent denied the allegations of wrongdoing set forth in the Claimant's Initial and Amended Statements of Claim.

1. 21.20.010. Unlawful offers, sales, purchases. It is unlawful for any person in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
- (2) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice or course of business which operates or would operate as fraud or deceit upon any person.
- (4)

21.20.020. Unlawful acts of person advising another. It is unlawful for any person who receives any consideration from another party primarily for advising the other person as the value of securities or their purchases or sale, whether through the issuance of analyses or reports or otherwise:

- (a) To employ any device, scheme, or artifice to defraud the other person;
- (b) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person;
- (c) To engage in any dishonest or unethical practice as the director may define by rule.

2. 19.86.020. Unfair competition, practices, declared unlawful. Unfair methods of competition and unfair deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RELIEF REQUESTED

In their Initial Statement of Claim, Claimants requested compensatory damages in the amount of \$332,054.00, punitive damages in the amount of \$75,000.00, attorney's fees, and costs.

In their Amended Statement of Claim, Claimants requested unspecified compensatory damages, punitive damages, interest, attorney's fees, and costs.

Respondent requested dismissal of the Claimants' Initial and Amended Statements of Claim in their entirety, attorney's fees, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

Claimants moved for Partial Summary Judgment on the Issues of Relevance. Respondent moved to strike an affirmative defense and to dismiss. The Claimants moved to request judicial notice of NASD settlement. Following due consideration, the Arbitrators unanimously denied all preliminary motions and the presentations of testimony and other evidence went forward.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

FINDINGS AND CONCLUSIONS

The Panel is convinced by a preponderance of the evidence that the Respondent violated RCW 21.20.020 and RCW 19.86.010 and that Claimants are entitled to recover based upon a common law claim of negligent misrepresentation. The Panel also finds that the Claimants justifiably relied on ratings given to Infospace, Inc. stock of "Buy-Buy" when Respondent believed Infospace, Inc. stock should be rated lower. The Panel finds that the proof showed that Respondent did not believe its rating of Infospace, Inc. stock during the latter half of the year 2000. During this period, the Claimants purchased Infospace stock for \$117,549.00 on November 27, 2000.

AWARD

After considering the pleadings, testimony, evidence presented at the hearing, and the post-hearing submissions, 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 liable to and shall pay Claimants \$83,867.00 in compensatory damages.
- 2) Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable to and shall pay Claimants \$86,500.00 in attorney's fees.³
- 3) Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable to and shall pay Claimants \$16,906.00 in arbitration costs.
- 4) Claimants' request for punitive damages is denied.
- 5) Except as noted in #2 and #3 above, the parties shall bear their respective costs, including attorney's fees.
- 6) All other relief requested and not expressly granted is denied.⁴

3. Travis v. Washington Horse Breeders Assn. 111 Wn 2d 396, 759 P2d 418 (1988)

4. Burgess v. Premier Corp. 727 F2d826 (9th Cir. 1984)

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	= \$ 300.00
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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	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
Total Member Fees	= \$ 5,200.00

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 Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the Panel @ \$1,125.00/session	= \$ 1,125.00
Pre-hearing conference: November 13, 2003 1 session	

Six (6) Hearing sessions @ \$1,125.00/session	= \$ 6,750.00
Hearings:	
April 12, 2004 2 sessions	
April 13, 2004 2 sessions	
April 14, 2004 2 sessions	

Total Forum Fees	= \$ 7,875.00
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The Panel assessed \$7,875.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

Fee Summary

1. Claimants Brian P. Olsen and Kari E. Olsen are charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Less payments	= \$(1,425.00)
Refund Due Claimants	= \$(1,125.00)

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

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 7,875.00
Total Fees	= \$13,075.00
Less payments	= \$(5,200.00)
Balance Due NASD Dispute Resolution	= \$ 7,875.00

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

Keith M. Callow	-	Public Arbitrator, Presiding Chair
G. E. Craig Doupe, Esq.	-	Public Arbitrator
Jan Aalbrecht Slinn, J.D.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Keith M. Callow
Chair, Public Arbitrator

Signature Date



G. E. Craig Doupe, Esq.
Public Arbitrator

May 26, 2004
Signature Date

Jan Aalbrecht Slinn, J.D.
Non-Public Arbitrator

Signature Date

5/26/04
Date of Service

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Keith M. Callow	-	Public Arbitrator, Presiding Chair
G. E. Craig Doupe, Esq.	-	Public Arbitrator
Jan Aalbregtse Slinn, J.D.	-	Non-Public Arbitrator

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Chair, Public Arbitrator

Signature Date

G. E. Craig Doupe, Esq.
Public Arbitrator

Signature Date



Jan Aalbregtse Slinn, J.D.
Non-Public Arbitrator

5/26/04

Signature Date

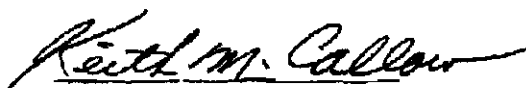
5/26/04

Date of Service

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Jan Aalbrektse Slinn, J.D.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Keith M. Callow
Chair, Public Arbitrator

May 27, 2004
Signature Date

G. E. Craig Doupe, Esq.
Public Arbitrator

Signature Date

Jan Aalbrektse Slinn, J.D.
Non-Public Arbitrator

Signature Date

Date of Service