

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Wayne L. Britz

Case Number: 03-03209

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc. and
James W. Lewis

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Public Customer v. Member Firm and Associated Person

REPRESENTATION OF PARTIES

Claimant Wayne L. Britz, hereinafter referred to as "Claimant": Jeffrey I. Nicodemus, Esq. of the firm of Cowles & Thompson, located in Dallas, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and James W. Lewis ("Lewis"), hereinafter collectively referred to as "Respondents": Bradley M. Gordon, Esq., of the firm of Winstead Sechrest & Minick, located in Dallas, Texas.

CASE INFORMATION

Statement of Claim filed: May 1, 2003.

Claimant signed the Uniform Submission Agreement: April 25, 2003.

Joint Statement of Answer filed by Respondents on: July 1, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: May 12, 2003.

Respondent Lewis signed the Uniform Submission Agreement: June 26, 2003.

Claimant's Motion for Leave to Amend Petition and Claimant's First Amended Petition filed on: September 8, 2004.

Respondents' Response to Claimant's Motion for Leave to Amend Petition filed on: September 16, 2004.

Respondents' Hearing Memorandum filed on: September 13, 2004.

Respondents' Motion to Dismiss Claimant's Claim for Attorneys' Fees filed on: September 23, 2004.

Claimant's Response to Respondents' Motion to Dismiss Claimant's Claim for Attorneys' Fees filed on: October 13, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: negligence; gross negligence; breach of

fiduciary duty; misrepresentation; omission; and unsuitability. In addition, Claimant alleged that Merrill Lynch had negligently supervised Lewis. The above causes of action resulted from Respondents recommending and purchasing for Claimant stocks in the technology and telecom sector that were unsuitable for the risk objectives Claimant provided Respondents. In addition, Lewis placed Claimant at this unsuitable risk without informing him of the risk, or that the recommendations were contrary to Claimant's directives.

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

1. The Statement of Claim failed to state a claim upon which relief could be granted;
2. The Statement of Claim fails to particularize facts establishing a legal theory under which Respondents could be held liable for any damages;
3. Claimants claims are barred by all applicable statutes of limitations and/or statutes of repose;
4. Claimant is barred from any recovery because he instructed, directed, authorized, consented to, acquiesced in, and/or ratified all transactions in his account;
5. Any monetary losses Claimant allegedly suffered were caused by the investment decisions he made and/or are due to historical, market or economic conditions that were beyond the control of Merrill Lynch or Lewis;
6. Neither Merrill Lynch or Lewis is liable to Claimant because, at all times relevant herein, Merrill Lynch and Lewis acted properly, in good faith, and in a commercially reasonable manner with respect to Claimant's Account;
7. Merrill Lynch and Lewis never guaranteed any level of return on Claimant's investments;
8. Claimant's claims are barred in whole or in part by reason of his contributory and/or comparative negligence. Any losses suffered by Claimant resulted from his own actions, inactions, or the actions of persons or entities that were not affiliated with Respondents;
9. Claimant's claims are barred in whole or in part by the principles of waiver, satisfaction, estoppel, and laches. Claimant is estopped from asserting the claims set forth in the Statement of Claim due to his own acts and conduct;
10. Merrill Lynch is not liable to Claimant for negligent supervision because Merrill Lynch had established procedures and a system for applying those procedures that were designed to prevent and detect the alleged violations at issue in this case. Merrill Lynch reasonably discharged its duties and obligations under its supervisory procedures without reasonable cause to believe that its procedures and systems were allegedly not being followed. Moreover, no private cause of action exists based upon a securities firm's alleged failure to comply with its own supervisory rules. Thus, a firm's failure to follow its own internal policies and procedures does not give rise to a cause of action. Accordingly, even assuming that Merrill Lynch failed to comply with its supervisory requirements, which Merrill Lynch does not admit and in fact specifically denied, any purported lack of compliance will not serve as a basis to grant relief to Claimant;
11. Claimant is barred from recovery because he failed to mitigate his alleged losses or damages and failed to exercise the degree of diligence required in the handling

- of his investments;
12. Claimant is barred from recovery because Claimant was apprised fully of the nature of his investments, and all facts material to his investment claims; and,
 13. Claimant is barred from recovery in whole or in part because of his "unclean hands."

RELIEF REQUESTED

Claimant requested:

Compensatory Damages	\$ 55,400.00
Punitive Damages	\$ 40,000.00

Upon acceptance of the Amended Statement of Claim, Claimant amended his damages claim to:

Compensatory Damages	\$ 30,000.00-\$50,000.00
Punitive Damages	Unspecified amount
Attorneys' Fees	Unspecified amount
Other Costs	Unspecified amount
Other Monetary/Non-Monetary Relief if any:	Unspecified amount

Respondents requested:

1. That Claimant's Statement of Claim be dismissed with prejudice;
2. That Claimant take nothing;
3. That Lewis' CRD be expunged of any reference to Claimant's claims; That Merrill Lunch and Lewis be awarded their reasonable and necessary attorney fees, forum fees and arbitration costs; and
4. All other relief to which they may be entitled.

OTHER ISSUES CONSIDERED AND DECIDED

At hearing, the Panel granted Claimant's Motion for Leave to Amend Petition and accepted Claimant's First Amended Petition in to the record.

In addition, at hearing Respondents presented a Motion to Dismiss the Claim for Attorneys' Fees. After consideration of the arguments presented by the parties, the Panel took the matter under advisement. This Motion is rendered moot by the Panel's decision in the merits.

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted by Claimant Wayne L. Britz against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and James W. Lewis are dismissed and denied in their entirety;
2. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those specifically enumerated in this decision; 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	= \$ 225.00
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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	= \$ 1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 1,700.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

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:

One (1) Pre-hearing session with Panel @ \$750.00	= \$ 750.00
Pre-hearing conference: February 4, 2004 1 session	
Eight (8) Hearing sessions @ \$750.00	= \$ 6,000.00
Hearing Dates: September 21, 2004 2 sessions	
September 22, 2004 2 sessions	
September 23, 2004 2 sessions	
November 16, 2004 2 sessions	
<hr/> Total Forum Fees	<hr/> = \$ 6,750.00

The Panel has assessed \$6,750.00 of the forum fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

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SEE SUMMARY

Claimant Wayne L. Britz is solely liable for:

Initial Filing Fee	= \$ 225.00
Less payments	= \$ 975.00
Refund Due from NASD Dispute Resolution	= \$ 750.00

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


Member Fees	= \$ 3,550.00
Forum Fees	= \$ 6,750.00
Total Fees	= \$10,300.00
Less payments	= \$ 3,550.00
Balance Due NASD Dispute Resolution	= \$ 6,750.00

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

ARBITRATION PANEL

Jeff Abrams - Public Arbitrator, Presiding Chairperson
Susan Y. Chin, JD - Public Arbitrator
Gary Utkov - Non-Public Arbitrator

Concurring Arbitrators' Signatures



Jeff Abrams
Public Arbitrator, Presiding Chairperson

11-18-04

Signature Date

Susan Y. Chin, JD
Public Arbitrator

Signature Date

Gary Utkov
Non-Public Arbitrator

Signature Date

11/22/04 

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

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NET SUMMARY

Claimant's Joe L. Brown is liable for

Legal	Attorney Fees	= \$ 225.00
Legal	Costs	= \$ 975.00
Ref	Due from NAED Dispute Resolution	= \$ 750.00

Responder Erroll Lynch, Jr. et al. Formerly Smith, Inc. is solely liable for

Med	Arbitration Fees	= \$ 3,550.00
Legal	Attorney Fees	= \$ 6,750.00
Legal	Costs	= \$10,300.00
Legal	Settlements	= \$ 3,550.00
Ref	Due NAED Dispute Resolution	= \$ 6,750.00

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ARBITRATION PANEL

Jeff Abramson - Public Arbitrator, Presiding Chairperson
Susan Y. Chen, JD - Public Arbitrator
Gary Utkin - Non-Public Arbitrator

Consent: Arbitrators' Award

Jeff Abramson
Public Arbitrator, Presiding Chairperson

Signature Date

Susan Y. Chen

11/19/2004

Susan Y. Chen, JD
Public Arbitrator

Signature Date

Gary Utkin
Non-Public Arbitrator

Signature Date

11/22/04 Man
Date of Settlement (For Dispute Resolution office use only)

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Susan Y. Chin, JD - Public Arbitrator
Gary Utkov - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Jeff Abrams
Public Arbitrator, Presiding Chairperson

Signature Date

Susan Y. Chin, JD
Public Arbitrator

Signature Date



Gary Utkov
Non-Public Arbitrator

 11-19-04

Signature Date

11/22/04 

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