

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

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In the Matter of the Arbitration Between:

Robert R. Heller (Claimant) v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Manly K. Church (Respondents)

Case Number: 03-03967

Hearing Site: New York, New York

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

Claimant Robert R. Heller ("Heller") hereinafter referred to as "Claimant": J. Anklowitz, Esq., Bohemia, NY.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): William L. Parker, Esq., Fitzhugh, Parker & Alvaro, LLP, Boston, MA.

Respondent Manly K. Church ("Church"): Robert J. Hausen, Esq., New York, NY.

Respondents Merrill Lynch and Church are hereinafter collectively referred to as "Respondents".

**CASE INFORMATION**

Statement of Claim filed on or about: May 31, 2003.

Claimant signed the Uniform Submission Agreement: May 30, 2003.

Joint Statement of Answer filed by Respondents on or about: September 12, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: June 30, 2003.

Respondent Church signed the Uniform Submission Agreement: July 18, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: unsuitability; negligence; fraud/misrepresentation; breach of contract; overconcentration; churning; and unauthorized trading. The causes of action relate to shares of Calpine, Circuit City, EMC Corp., Enron, H Power Corp., Immulabs, Impath, Inhale Therapeutic, Intel Netro Corp., Patterson UTI, Prima Energy Corp., Questar Corp., Sanmina Corp., Silocon Storage Tech., Solelectron, Sun Micro., Worldcom, and Xilinx.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$275,000.00; interest; costs; fees; reasonable attorneys' fees; punitive damages; and such other and further relief as the Panel deems just and proper.

Respondents requested that the Panel dismiss the Statement of Claim in its entirety; that the claim be expunged from Respondent Church's registration files; and such other, further, and different relief as the Panel may deem appropriate.

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

At the hearing, Claimant made a motion to recuse Arbitrator Ellen R. Badinelli. The arbitrator denied the motion.

Respondents made a motion to dismiss at the conclusion of Claimant's case. The Panel withheld their decision until the conclusion of both sides' presentations of evidence to be determined as part of the award.

Respondents made a motion to challenge the qualification of Claimant's expert as an expert in the issues on which he was to testify. The Panel determined that the expert was qualified only on the issues of damages calculations and schedules.

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.

### **AWARD**

After considering the pleadings, and 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. Respondent Merrill Lynch is liable on Claimant's claims and shall pay to Claimant the sum of \$300.00, to reimburse Claimant for the filing fee previously paid to NASD Dispute Resolution, and shall be liable for all forum fees.
2. Respondent Church is solely liable for and shall pay to Claimant an amount equal to the MLUA account fees for the period commencing when the account was opened through October 31, 2001.
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 = \$300.00

#### **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:

Member surcharge = \$1,700.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$2,750.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 30, July 1-2, 2004, adjournment by Respondents = \$1,125.00

#### **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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00 = \$ 450.00

Pre-hearing conference: March 29, 2004 1 session

One (1) Pre-hearing session with Panel @ \$1,125.00 = \$ 1,125.00

Pre-hearing conference: December 29, 2003 1 session

Eight (8) Hearing sessions @ \$1,125.00 = \$ 9,000.00

Hearing Dates: May 16, 2005 2 sessions

May 17, 2005 2 sessions

May 18, 2005 2 sessions

May 19, 2005 2 sessions

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Total Forum Fees = \$10,575.00

1. The Panel has assessed \$10,575.00 of the forum fees against Respondent Merrill Lynch.

**Fee Summary**

1. Claimant is solely liable for:

<u>Initial Filing Fee</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 1,425.00
<u>Refund Due Claimant</u>	= \$ 1,125.00

*As stated in the "Award" section above, Respondent Merrill Lynch is solely liable for and shall reimburse Claimant for the \$300.00 filing fee.*

2. Respondent Merrill Lynch is solely liable for:

<u>Member Fees</u>	= \$ 5,200.00
<u>Forum Fees</u>	= \$10,575.00
<u>Total Fees</u>	= \$15,775.00
<u>Less payments</u>	= \$ 5,200.00
<u>Balance Due NASD Dispute Resolution</u>	= \$10,575.00

3. Respondents are jointly and severally liable for:

<u>Adjournment Fee</u>	= \$ 1,125.00
<u>Total Fees</u>	= \$ 1,125.00
<u>Less payments</u>	= \$ 1,125.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00


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

**ARBITRATION PANEL**

Jan Louise Ulman, Esq.	-	Public Arbitrator, Presiding Chairperson
Ellen R. Badinelli	-	Public Arbitrator
William E.S. Browning, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
Jan Louise Ulman, Esq.  
Public Arbitrator, Presiding Chairperson

6/6/05  
Signature Date

**William E.S. Browning, Esq.**  
**Non-Public Arbitrator**

**Signature Date**

**Dissenting Arbitrator's Signature**

I hereby dissent from Concurring Arbitrators and dismiss all claims against respondents Merrill Lynch and Church.

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

**Ellen R. Badinelli**  
**Public Arbitrator**

**Signature Date**

June 7, 2005  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

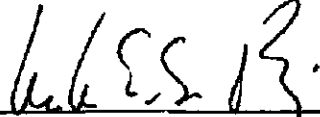
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Public Arbitrator

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