

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Eugene Lebovitz and Kate Lebovitz

Case Number: 03-05520

Name of the Respondents

Merrill Lynch Pierce Fenner & Smith
and Christian E. Toman

Hearing Site: Chicago, Illinois

Type of Controversy: Customers v. Member Firm and Associated Person

REPRESENTATION OF PARTIES

Claimants Eugene Lebovitz and Kate Lebovitz were represented by Jane L. Stafford, Esq. of the firm Stafford & Associates located in Kansas City, Missouri.

Respondents Merrill Lynch Pierce Fenner & Smith and Christian E. Toman, hereinafter collectively referred to as "Respondents," were represented by Gordon E. Gee, Esq. of the firm Seigfreid Bingham Levy Selzer & Gee located in Kansas City, Missouri.

CASE INFORMATION

Statement of Claim filed on or about: July 28, 2003.

Claimants each signed the Uniform Submission Agreement: July 23, 2003.

Respondents' Motion to Dismiss filed on or about: September 17, 2003.

Claimants' Response to Respondents' Motion to Dismiss filed on or about: October 23, 2003.

CASE SUMMARY

Claimants asserted the following causes of action: Violation of the Kansas Blue Sky Laws; Violation of Federal Securities Laws; Negligence; Breach of Fiduciary Duty; Conflict of Interest; Violation of NASD and NYSE Rules; and Agency Doctrine.

The causes of action relate to equities and options trading in the Lebovitz accounts and eventual reinvestment in mutual funds.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim.

RELIEF REQUESTED

Claimant Lebovitz requested:

Compensatory Damages	\$ 778,961.00
Punitive Damages	\$5,000,000.00
Interest	15% per annum
Attorneys' Fees	reasonable
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	any relief the panel deems just and equitable

Respondents requested:

Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	denial and dismissal of claims

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Merrill Lynch Pierce Fenner & Smith and Christian E. Toman did not file with NASD Dispute Resolution a properly executed submission agreements to arbitration but are required to submit to arbitration pursuant to the Code and having appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The panel denies the Respondents' Motion to Dismiss.

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. Merrill Lynch Pierce Fenner & Smith is solely liable for and shall pay to Eugene Lebovitz and Kate Lebovitz the sum of \$80,000.00 as compensatory damages.
2. Merrill Lynch Pierce Fenner & Smith is solely liable for and shall pay to Eugene Lebovitz and Kate Lebovitz the sum of \$5,700.46 as costs.
3. Merrill Lynch Pierce Fenner & Smith is solely liable for and shall pay to Eugene Lebovitz and Kate Lebovitz the sum of \$600.00 as reimbursement of the non-refundable NASD filing fee.
4. Eugene Lebovitz and Kate Lebovitz's request for punitive damages is denied.
5. Eugene Lebovitz and Kate Lebovitz's request for interest is denied.
6. All claims against Respondent Christian E. Toman are denied in their entirety.
7. The Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Christian E. Toman's records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Christian E. Toman must obtain

confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

8. Except as specified herein, parties shall bear their own costs.
9. Any and all relief not specifically addressed herein 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	= \$ 600.00
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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	= \$ 3,350.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,500.00
Total	= \$ 9,600.00

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 sessions with a single arbitrator at \$450.00	= \$ 450.00
Pre-hearing conference: May 5, 2004	1 session

Two (2) Pre-hearing sessions with Panel at \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: February 5, 2004	1 session
May 26, 2004	1 session

Seven (7) Hearing sessions at \$1,200.00	= \$ 8,400.00
Hearing Dates: June 01, 2004	2 sessions
June 02, 2004	2 sessions
June 03, 2004	3 sessions

Total Forum Fees	= \$11,250.00
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The Panel has assessed \$11,250.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith.

FEE SUMMARY

1. Claimant Eugene Lebovitz and Kate Lebovitz is solely liable for:

<u>Initial Filing Fee</u>	= \$ 600.00
<u>Total Fees</u>	= \$ 600.00
<u>Less payments</u>	= \$ 1,800.00
<u>Refund Due from NASD Dispute Resolution</u>	= \$ 1,200.00

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

<u>Member Fees</u>	= \$ 9,600.00
<u>Forum Fees</u>	= \$11,250.00
<u>Total Fees</u>	= \$20,850.00
<u>Less payments</u>	= \$ 9,600.00
<u>Balance Due NASD Dispute Resolution</u>	= \$11,250.00

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

ARBITRATION PANEL

James C. Morrow, Esq.	-	Public Arbitrator, Presiding Chairperson
David A. Nixon, Esq.	-	Public Arbitrator
Will B. Tschudy	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ James c. Morrow

08/11/04

James C. Morrow, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

/s/ David A. Nixon

08/10/04

David A. Nixon, Esq.
Public Arbitrator

Signature Date

/s/ Will B. Tschudy

08/15/04

Will B. Tschudy
Non-Public Arbitrator

Signature Date

08/26/04

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

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Concurring Arbitrators' Signatures


James C. Morrow, Esq.
Public Arbitrator, Presiding Chairperson

8/11/04
Signature Date

David A. Nixon, Esq.
Public Arbitrator

Signature Date

Will B. Tschudy
Non-Public Arbitrator

Signature Date

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David A. Nixon, Esq.	-	Public Arbitrator
Will B. Tschudy	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

James C. Morrow, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

David A. Nixon, Esq.
Public Arbitrator

Signature Date

Will B. Tschudy
Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution
 Arbitration No. 03-05520
Award Page 4 of 4

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David A. Nixon, Esq.	-	Public Arbitrator
Will B. Tschudy	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

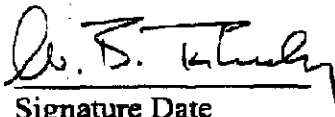
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 Public Arbitrator, Presiding Chairperson

 Signature Date

 David A. Nixon, Esq.
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 Signature Date
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