
**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimant
Mike Kelly

Case Number: 03-05651

Name of the Respondent
Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Indianapolis, Indiana

Nature of the Dispute: Customer vs. Member Firm

REPRESENTATION OF PARTIES

Mike Kelly ("Kelly"), hereinafter referred to as "Claimant": Wm. Jemison Mims, Jr., Esq. and Kristian Rasmussen, Esq. of the law firm Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A. ("Levin Papantonio") located in Pensacola, Florida. On December 29, 2004, Levin Papantonio withdrew as counsel. On February 10, 2005, Mark Maddox, Esq. of the law firm Maddox, Hargett & Caruso, located in Fishers, Indiana filed his appearance for Kelly.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Respondent": S. Lawrence Polk, Esq. of the law firm Sutherland Asbill & Brennan, LLP, located in Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed on or about: August 4, 2003
Claimant signed the Uniform Submission Agreement: May 30, 2003
First Amended Statement of Claim filed on or about March 25, 2005

Statement of Answer filed by Respondent on or about: October 10, 2003
Statement of Answer to Claimant's First Amended Statement of Claim filed on or about:
May 10, 2005
Respondent signed the Uniform Submission Agreement: August 14, 2003

Respondent filed a Motion for Sanctions for Claimant's failure to comply with the Chairman's Orders issued July 27, 2004 and August 18, 2004 relating to discovery on or about: September 15, 2004. Claimant filed a response to Motion for Sanctions and request for reconsideration on or about: October 22, 2004

A Supplement to Motion for Sanctions and for Dismissal filed by Respondent on or about: November 23, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty, constructive fraud, suitability, breach of contract, negligent supervision, misrepresentations and omissions and violation of NASD Conduct Rules. The causes of action relate to various securities including but not limited to, shares in technology companies such as JDS Uniphase, eToys, Sycamore Networks and Ariba. Claimant asserted that these securities were high-risk and volatile, and unsuitable to Claimant's investment needs and objectives.

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

1. The Statement of Claim fails to state a cause of action upon which relief may be granted.
2. The Statement of Claim is barred, in whole or in part, by the equitable doctrines of laches, unclean hands and estoppel.
3. Claimant, by his actions and inactions, waived the right to pursue a claim.
4. Claimant authorized, directed and ratified all of the transactions in Claimant's account.
5. All activity in the account was suitable for and consistent with Claimant's stated investment objectives.
6. At all times mentioned in the Statement of Claim, Respondent acted in good faith.
7. The loss, if any, was sustained as a result of Claimant's own negligence and/or contributory negligence.
8. Claimant failed to use the requisite due care in monitoring, trading, managing and handling Claimant's account.
9. Claimant is barred from recovery because he knowingly assumed the risks of his investments.
10. To the extent that Claimant asserts claims for alleged violations of NASD or NYSE Rules, no such private right of action exists.
11. Claimant's claims, if any, are barred, in whole or in part, by the doctrine of setoff.
12. The Statement of Claim is barred, in whole or in part, based upon Claimant's failure to mitigate damages.
13. Claimant is not entitled to recover attorney's fees or punitive damages in this arbitration under applicable law.
14. Claimant's claims, if any, are barred, in whole or in part, by the applicable statute of limitations.

RELIEF REQUESTED

Claimant requested \$316,470.00 in compensatory damages; pre- and post-judgment interest at 8%; costs of arbitration (including NASD filing fees, expert witness fees, reasonable attorney's fees, forum fees and expenses); alternatively damages measured by the "well-managed account" standard; and punitive damages.

Respondent requested that all claims asserted against it be dismissed in its entirety, and for costs to be assessed against Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to Respondent's Motion for Sanctions, the Panel issued an Order on September 27, 2004, which ordered Claimant to pay Respondent's counsel a total of \$5,122.71 for reasonable attorney's fees for work relating to discovery from November 30, 2003 until August 18, 2004.

On or about November 24, 2004, Claimant notified NASD of his dismissal *without prejudice* all claims against Merrill Lynch, and NASD proceeded to close this matter on December 1, 2004. On December 2, 2004, Merrill Lynch filed an Opposition to Claimant's request for dismissal *without prejudice* and requested that said opposition be forwarded to the Panel for review and decision. On December 17, 2004, NASD notified Claimant that it made an error in closing this matter without the Panel's permission to withdraw all claims *without prejudice* against Merrill Lynch. Claimant then filed a response to Merrill Lynch's Opposition on December 20, 2005.

On December 29, 2005, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A. withdrew as counsel for Claimant. On the same date, Claimant sent notice to NASD that he was retracting his dismissal *without prejudice* against Respondent, that he wished to proceed with this arbitration and requested that this matter be re-opened. On January 18, 2005, Respondent filed a response to Claimant's request to re-open the arbitration.

Claimant then filed on January 17, 2005 a Reply to Respondent's opposition to the request for dismissal. On January 20, 2005, Respondent filed a Motion to Strike Claimant's Reply to Respondent's Opposition to the request for dismissal and all references to settlement negotiations. Claimant filed an Opposition to Respondent's Motion to Strike Claimant's Reply on January 28, 2005.

In an Order dated January 28, 2005, the Panel granted Respondent's Motion to Strike. The Panel also granted Claimant's request to re-open this matter.

Lastly, the Panel makes the following findings:

Mr. Kelly is a speculator, a gambler, and has even used a known conservative hedge provided by the market (covered calls) in a manner never envisaged, to drive his choices in speculative stocks. The Panel found Claimant's claim that Mr. Kelly was influenced and controlled by Paul Hebert an incredible statement and very likely untrue. Many of the statements made by Mr. Kelly under oath were contradicted by his own testimony or were, in the most charitable understanding of it, very unlikely. The evidence presented by Claimant that Paul Hebert controlled the account at one point and aggressively solicited certain trades (without any remunerative motive) was weak. Paul Hebert served as an order taker rather than a full-service broker, and decisions in the account were made by Mike Kelly.

The Panel, however, did find that Merrill, Lynch, provided insufficient supervision in this account. Paul Hebert was an inexperienced and reticent broker, and if he warned Mr. Kelly of the latter's irresponsible trading strategies, as was asserted at the hearing, he should have memorialized that in writing to Mr. Kelly and involved his superiors, which he did not do. However, Merrill, Lynch, should have had procedures in place to warn such clients whose actions are so irresponsible,

even when its own FA fails to communicate that information to superiors.

The Award, therefore, is for Merrill's failure to supervise, not for assertions of unsuitable trades or trading activities, misrepresentation, or other breaches of conduct.

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. Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for and shall pay to Claimant, Mike Kelly, the sum of \$30,000.00 as compensatory damages.
2. Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees, expert witness fees, and other fees associated with the cost of this arbitration.
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 to this proceeding and is assessed the following fees:

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:

February 22-25, 2005, adjournment by Claimant	= \$ 1,125.00 (waived by the Panel)
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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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00	= \$ 900.00
Pre-hearing conferences: August 18, 2004 1 session	

November 9, 2004 1 session

Three (3) Pre-hearing sessions with Panel @ \$1,125.00 = \$ 3,375.00

Pre-hearing conferences: March 26, 2004 1 session
January 28, 2005 1 session
March 14, 2005 1 session

Five (5) Hearing sessions @ \$1,125.00 = \$ 5,625.00

Hearing Dates: November 7, 2005 2 sessions
November 8, 2005 2 sessions
November 9, 2005 1 session

Total Forum Fees = \$ 9,900.00

1. The Panel assessed 50% of the total forum fees in the amount of \$4,950.00 solely to Claimant, Mike Kelly.
2. The Panel assessed 50% of the total forum fees in the amount of \$4,950.00 solely to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

FEE SUMMARY

1. Claimant, Mike Kelly, is solely liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$ 4,950.00</u>
Total Fees	= \$ 5,250.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Total Fees	= \$ 3,825.00
<u>Plus amount refunded to Claimant 12/1/04</u>	<u>= \$ 112.50</u>
Balance Due NASD Dispute Resolution	= \$ 3,937.50

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

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	<u>= \$ 4,950.00</u>
Total Fees	= \$10,150.00
<u>Less payments</u>	<u>= \$ 6,212.50</u>
Balance Due NASD Dispute Resolution	= \$ 3,937.50

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

ARBITRATION PANEL

Bruce M. Fingerhut	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Timothy V. Young	-	Non-Public Arbitrator

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Bruce M. Fingerhut	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Timothy V. Young	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce M. Fingerhut
 Public Arbitrator, Presiding Chairperson

Signature Date

Daniel P. Urban
 Public Arbitrator

Daniel P. Urban 12/4/05
 Signature Date

Timothy V. Young
 Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution

Arbitration No. 03-05651

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Concurring Arbitrators' Signatures

Bruce M. Fingerhut

Public Arbitrator, Presiding Chairperson

Signature Date

Daniel P. Urban

Public Arbitrator



Signature Date

Timothy V. Young

Non-Public Arbitrator

15 November 2005

Signature Date

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Concurring Arbitrators' Signatures

/s/ Bruce M. Fingerhut

Bruce M. Fingerhut

Public Arbitrator, Presiding Chairperson

11/15/05

Signature Date

/s/ Daniel P. Urban

Daniel P. Urban

Public Arbitrator

11/14/05

Signature Date

/s/ Timothy V. Young

Timothy V. Young

Non-Public Arbitrator

11/15/05

Signature Date

11/15/05

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