

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

---

In the Matter of the Arbitration Between:

Name of the Claimant  
Abe J. Goldsmith

Case Number: 04-00600

Name of the Respondents  
Merrill Lynch Pierce Fenner & Smith, Inc.  
and E. Stanley O'Neal

Hearing Site: Chicago, Illinois

---

**NATURE OF THE DISPUTE**

Customer v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Claimant Abe J. Goldsmith ("Goldsmith") appeared *pro se*.

Corin R. Swift, Esq., Timothy P. Burke, Esq., and Jennifer Corinis, Esq., of the firm Bingham McCutchen, LLP, located in Boston, Massachusetts, represented Respondents Merrill Lynch Pierce Fenner & Smith, Inc., ("Merrill Lynch") and E. Stanley O'Neal ("O'Neal"), hereinafter collectively referred to as "Respondents."

**CASE INFORMATION**

Claimant filed the Statement of Claim on or about January 30, 2004. Claimant Goldsmith signed an undated Uniform Submission Agreement on March 14, 2004.

Respondent Merrill Lynch filed a Statement of Answer on June 14, 2004.

Respondent Merrill Lynch signed the Uniform Submission Agreement: June 17, 2004.

Respondent O'Neal filed a Motion to Dismiss on June 14, 2004 and Claimant filed a Response in Opposition on October 18, 2004.

Claimant filed a Pre-Hearing Argument on December 15, 2004.

**CASE SUMMARY**

Claimant Goldsmith asserted the following causes of action: fraud and misrepresentation. The causes of action relate to Enron stock.

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

state a claim; Claimant suffered no damages because of the acts of Merrill Lynch; failure to mitigate; assumption of risk; New York law applies pursuant to the Customer Agreements executed by Claimant; comparative or contributory negligence; losses incurred were due to adverse economic or market conditions; authorization; ratification; estoppel; laches; waiver; no legal basis for attorney's fees, punitive damages, interest, or costs; unclean hands; no proximate cause; no private cause of action for alleged violation of NASD or NYSE Rules; and account activity was suitable for and consistent with Claimant's stated investment objectives.

### **RELIEF REQUESTED**

Claimant Goldsmith requested compensatory damages in the amount of \$61,768.04, punitive damages, interest, attorney's fees, costs, rescission, and any such relief the Panel deems just and equitable.

Respondents requested denial and dismissal of claims.

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

Respondent O'Neal did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

The Panel granted Respondent O'Neal's Motion to Dismiss on November 22, 2004. As a consequence, any and all claims asserted by Goldsmith against O'Neal are dismissed with prejudice.

### **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 Abe J. Goldsmith the sum of \$26,850.00 as compensatory damages.
2. Except for the forum fees associated with this matter, which are specified herein, the parties shall bear their own costs, including attorney's fees.
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

**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, as a party, is assessed the following fees:

|                         |               |
|-------------------------|---------------|
| Member surcharge        | = \$ 1,100.00 |
| Pre-hearing process fee | = \$ 750.00   |
| Hearing process fee     | = \$1,700.00  |
| Total                   | = \$3,550.00  |

**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:

|   |               |
|---|---------------|
| Two (2) Pre-hearing sessions with Panel at \$750.00 | = \$ 1,500.00 |
| Pre-hearing conferences: October 12, 2004           | 1 session     |
| November 22, 2004                                   | 1 session     |

|                                      |               |
|--------------------------------------|---------------|
| Two (2) Hearing sessions at \$750.00 | = \$ 1,500.00 |
| Hearing Date: January 18, 2005       | 2 sessions    |
| Total Forum Fees                     | = \$ 3,000.00 |

The Panel assessed \$3,000.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

**FEE SUMMARY**

Claimant Abe J. Goldsmith is solely liable for:

|   |             |
|---|-------------|
| Initial Filing Fee                      | = \$ 225.00 |
| Total Fees                              | = \$ 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                          | = \$ 3,000.00 |
| Total Fees                          | = \$ 6,550.00 |
| Less payments                       | = \$ 1,850.00 |
| Balance Due NASD Dispute Resolution | = \$ 4,700.00 |

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

**ARBITRATION PANEL**

|                         |   |  |
|-------------------------|---|--|
| Joseph O. Kostner, Esq. | - | Public Arbitrator, Presiding Chairperson |
| Philip J. Glick, Esq.   | - | Public Arbitrator                        |
| Eva Videckis            | - | Non-Public Arbitrator                    |

**Concurring Arbitrators' Signatures**

/s/ Joseph O. Kostner

January 28, 2005

Joseph O. Kostner, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

/s/ Philip J. Glick

February 14, 2005

Philip J. Glick, Esq.  
Public Arbitrator

Signature Date

/s/ Eva Videckis

February 14, 2005

Eva Videckis  
Non-Public Arbitrator

Signature Date

02/15/05

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

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

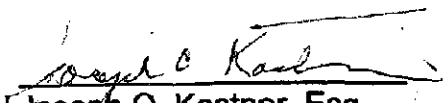
|                                     |               |
|-------------------------------------|---------------|
| Member Fees                         | = \$ 3,550.00 |
| Forum Fees                          | = \$ 3,000.00 |
| Total Fees                          | = \$ 6,550.00 |
| Less payments                       | = \$ 1,850.00 |
| Balance Due NASD Dispute Resolution | = \$ 4,700.00 |

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

**ARBITRATION PANEL**

|                         |   |  |
|-------------------------|---|--|
| Joseph O. Kostner, Esq. | - | Public Arbitrator, Presiding Chairperson |
| Philip J. Glick, Esq.   | - | Public Arbitrator                        |
| Eva Videckis            | - | Non-Public Arbitrator                    |

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Joseph O. Kostner, Esq.  
Public Arbitrator, Presiding Chairperson

  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Philip J. Glick, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Eva Videckis  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

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

## NASD Dispute Resolution

Application No. 04-00300

Page 4 of 4

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

|                                     |               |
|-------------------------------------|---------------|
| Member Fees                         | = \$ 3,300.00 |
| Forum Fees                          | = \$ 3,000.00 |
| Total Fees                          | = \$ 6,300.00 |
| Less payments                       | = \$ 4,450.00 |
| Balance Due NASD Dispute Resolution | = \$ 1,850.00 |

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

ARBITRATION PANEL

Joseph D. Kosiner, Esq.

Philip J. Glick, Esq.

Eva Vlachakis

Public Arbitrator, Presiding Chairperson

Public Arbitrator

Non-Public Arbitrator

Consenting Arbitrators' Signatures

Joseph D. Kosiner, Esq.

Public Arbitrator, Presiding Chairperson

Signature Date

Philip J. Glick, Esq.

Public Arbitrator

Signature Date

Eva Vlachakis

Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution  
Arbitration No. 04-00600  
Award Page 4 of 4

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

|                                     |               |
|-------------------------------------|---------------|
| Member Fees                         | = \$ 3,550.00 |
| Forum Fees                          | = \$ 3,000.00 |
| Total Fees                          | = \$ 6,550.00 |
| Less payments                       | = \$ 1,850.00 |
| Balance Due NASD Dispute Resolution | = \$ 4,700.00 |

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

**ARBITRATION PANEL**

|                         |   |  |
|-------------------------|---|--|
| Joseph O. Kostner, Esq. | - | Public Arbitrator, Presiding Chairperson |
| Phillip J. Glick, Esq.  | - | Public Arbitrator                        |
| Eva Videckis            | - | Non-Public Arbitrator                    |

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Joseph O. Kostner, Esq.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Phillip J. Glick, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Eva Videckis  
Non-Public Arbitrator

  
\_\_\_\_\_  
Signature Date

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