

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

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In the Matter of the Arbitration Between:

Names of the Claimants

Victor and Barbara Rudkin

Case Number: 04-04015

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.

David T. Foster

Wade M. Wilson

Hearing Site: Pittsburgh, Pennsylvania

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Nature of the Dispute: Customers vs. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimants, Victor and Barbara Rudkin, hereinafter collectively referred to as "Claimants", were represented by Arnold Y. Steinberg, Esq., Arnold Y. Steinberg, P.C., Pittsburgh, Pennsylvania.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), David T. Foster ("Foster") and Wade M. Wilson ("Wilson"), hereinafter collectively referred to as "Respondents", were represented by G. Jeffrey Boujoukos, Esq., Morgan, Lewis & Brockius, LLP, Philadelphia, Pennsylvania.

**CASE INFORMATION**

Statement of Claim filed on June 1, 2004.

Claimants submitted a signed, undated Uniform Submission Agreement.

Statement of Answer filed by Respondents on August 16, 2004.

A representative of Respondent Merrill Lynch filed an executed, undated Uniform Submission Agreement.

Respondent Wilson signed the Uniform Submission Agreement on August 11, 2004.

Respondent Foster signed the Uniform Submission Agreement on August 11, 2004.

At the hearing on the merits, Claimants made a Motion to Amend the Statement of Claim. The Panel granted this Motion.

**CASE SUMMARY**

Claimants, in their Statement of Claim asserted the following causes of action, among others: fraud, deceit, breach of fiduciary duty, negligent supervision, and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Laws. In the Amended Statement of Claim, Claimants added a cause of action for breach of contract. The causes of action relate to the purchase and sale of various unspecified securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: failure to state a claim upon which

relief may be granted; contributory negligence; failure to mitigate damages; any losses were due to market conditions; authorization; Claimants' claims are barred by the doctrines of ratification, waiver and estoppel; Claimants' claims are barred by the applicable statutes of limitations; and Respondents are not fiduciaries of Claimants.

### **RELIEF REQUESTED**

Claimants in their Statement of Claim requested:

Compensatory Damages	\$ 300,000.00
Punitive Damages	amount unspecified
Interest	amount unspecified
Other Costs	amount unspecified

In their Amended Statement of Claim, Claimants reduced the amount in controversy to \$180,000 in compensatory damages.

Respondents, in their Statement of Answer requested that the Statement of Claim be dismissed in its entirety, that all references to this claim be expunged from the Central Registration Depository Records ("CRD") records of Respondents Foster and Wilson, that all forum fees and costs be assessed against Claimants, that Respondents be awarded attorneys' fees and expenses incurred in defending this action, and any such other and further relief which the Arbitration Panel (the "Panel") deem just and proper.

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

At the hearing on the merits, Claimants made a Motion for Leave to Conform the Pleadings to the Facts. The Panel granted this Motion.

At the close of Claimants' case-in-chief at the hearing on the merits, Respondents made a Motion to Dismiss Claimants' Claims. The Panel denied this Motion.

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, the testimony and evidence presented at the hearing, a majority of the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are denied in their entirety;
2. Claimants' claims for punitive damages are denied in their entirety;
3. The Panel recommends the expungement of all reference to the above captioned

arbitration from Respondents Foster and Wilson's registration records maintained by CRD, with the understanding that pursuant to NASD Notices to Members 04-16, Respondents Foster and Wilson must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;

Unless specifically waived in writing by the NASD, parties seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party and serve NASD with all appropriate documents;

Pursuant to Rule 2130, the Panel has made the following affirmative findings of fact: the claim, allegation, or information is false;

4. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
5. Any and all relief not specifically addressed herein is denied in its entirety.

Arbitrator Marc Winters dissents from the majority opinion to the effect that he finds Claimants entitled to some compensation from Merrill Lynch based on the delay in transferring Claimants' positions in their entirety from Merrill Lynch to PNC dated from July 2001 to on or about June 2002.

### **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
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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 firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch is a party.

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,750.00
Total Member Fees	= \$ 5,200.00

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the 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 @ \$ 1,125.00 = \$ 1,125.00  
Pre-hearing conference: November 1, 2004 1 session  
July 19, 2005 1 session (fee waived)

Eleven (11) Hearing sessions @ \$ 1,125.00 = \$ 12,375.00  
Hearing Dates: July 12, 2005 2 sessions  
July 13, 2005 2 sessions  
July 14, 2005 2 sessions  
August 2, 2005 2 sessions  
August 3, 2005 3 sessions

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Total Forum Fees = \$ 13,500.00

1. The Panel has assessed \$ 6,750.00 of the forum fees jointly and severally to Claimants.
2. The Panel has assessed \$ 6,750.00 of the forum fees to Respondent Merrill Lynch.

#### **EEE SUMMARY**

Claimants are jointly and severally assessed and shall pay:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 6,750.00
Total Fees	= \$ 7,050.00
Less payments	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 5,625.00

Respondent Merrill Lynch is assessed and shall pay:

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 6,750.00
Total Fees	= \$ 11,950.00
Less payments	= \$ 5,200.00
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**

Beth Rackley Hesselson	-	Public Arbitrator, Presiding Chairperson
Marc A. Winters	-	Public Arbitrator, Panelist
Bert Cliff	-	Non-Public Arbitrator, Panelist

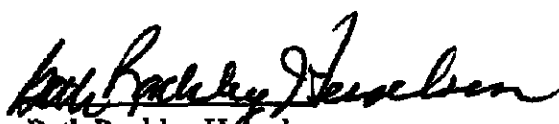
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**Concurring Arbitrators' Signatures**



Beth Rackley Hesselton

Public Arbitrator, Presiding Chairperson

8-10-05

Signature Date

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Bert Cliff

Non-Public Arbitrator, Panelist

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Signature Date

Concurring Arbitrators' Signatures

Beth Rackley Hesselton  
Public Arbitrator, Presiding Chairperson

Signature Date

Ben Cliff  
Non-Public Arbitrator, Panelist

8-8-05  
Signature Date

**Dissenting Arbitrator's and Signature**



Marc A. Winters  
Public Arbitrator, Panelist



Signature Date

August 10, 2005  
Date of Service (For NASD Dispute Resolution office use only)