

**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimant
Ronald G. Mackley

Case Number: 04-07438

Names of the Respondents
Merrill Lynch, Pierce, Fenner & Smith, Inc.
Barry Mitchell Barbush

Hearing Site: Philadelphia, PA

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

REPRESENTATION OF PARTIES

Claimant, Ronald G. Mackley, hereinafter referred to as "Claimant", was represented by Joseph C. Korsak, Esq., Attorney at Law, York, Pennsylvania.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Barry Mitchell Barbush ("Barbush"), hereinafter collectively referred to as "Respondents", were represented by William E. Mahoney, Esq., Stradley Ronon Stevens & Young, LLP, Philadelphia, Pennsylvania.

CASE INFORMATION

Statement of Claim filed on October 25, 2004.

Claimant signed the Uniform Submission Agreement on October 16, 2004.

Statement of Answer filed by Respondents on February 15, 2005.

A representative of Respondent Merrill Lynch executed the Uniform Submission Agreement on March 30, 2005.

Respondent Barbush signed the Uniform Submission Agreement on April 1, 2005.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action, among others: violations of section 10(b), section 20, and section 15 of the Securities Exchange Act of 1934, violations of the securities laws of the commonwealth of Pennsylvania, *respondeat superior*, fraud, negligence, violations of the provisions of the Pennsylvania Unfair Trade Practices Act, and breach of fiduciary duty. The causes of action relate to the purchase and sale of the ML Focus 20 Fund, the ML Fundamental Growth Fund and the ML Global Tech Fund.

Unless specifically admitted in their Statement of Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: failure to state a claim for breach of fiduciary duty; failure to state a claim upon which relief may be granted; estoppel; authorization; ratification; approval; failure to exercise due diligence; failure to mitigate damages; and Claimants' claims are barred by the statute of limitations.

RELIEF REQUESTED

Claimant requested \$273,414.53 in compensatory damages, treble damages, punitive damages, attorney's fees, and other costs.

Respondent requested that the Statement of Claim be dismissed in its entirety and that an award be entered in their favor including costs and any other relief the Arbitration Panel (the "Panel") deemed just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

At the hearing on the merits, Claimant presented a Trial Brief to the Panel requesting that Respondent Merrill Lynch be required to permit Claimant to open an IRA account within its system to the full extent of the award rendered by the Panel.

The parties 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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Merrill Lynch and Barbush are jointly and severally liable to and shall pay to Claimant the sum of \$96,844.66 in compensatory damages, plus simple interest at a rate of 6% per annum accruing from October 10, 2003 until the award is paid in full;
2. Respondents Merrill Lynch and Barbush are jointly and severally liable to and shall pay to Claimant the sum of \$22,337.22 in attorneys' fees, pursuant to case law and the Pennsylvania Unfair Trade Practices and Consumer Protection Law;
3. Respondent Merrill Lynch is required to permit Claimant to open an IRA account within their system to the full extent of the award rendered by this Panel;
4. The parties shall bear their respective costs, except as Fees are specifically addressed below;
and
5. Any and all relief not specifically addressed herein, including treble damages, is denied in its entirety.

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 = \$ 375.00

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, Respondent Merrill Lynch is a party.

Member surcharge = \$ 2,250.00
Pre-hearing process fee = \$ 750.00
Hearing process fee = \$ 4,000.00

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:

Two (2) Pre-hearing sessions with the Panel @ \$ 1,200.00 = \$ 2,400.00
Pre-hearing conferences: April 11, 2005 1 session
August 30, 2005 1 session

Eight (8) Hearing sessions @ \$ 1,200.00 = \$ 9,600.00
Hearing Dates: September 20, 2005 2 sessions
September 21, 2005 2 sessions
September 22, 2005 2 sessions
September 23, 2005 2 sessions

Total Forum Fees = \$ 12,000.00

1. The Panel has assessed \$ 6,000.00 of the forum fees to Claimant.
2. The Panel has assessed \$ 6,000.00 of the forum fees jointly and severally to Respondents.

Fee Summary

1. Claimant is assessed and shall pay:

Initial Filing Fee = \$ 375.00
Forum Fees = \$ 6,000.00
Total Fees = \$ 6,375.00
Less payments = \$ 1,575.00
Balance Due NASD Dispute Resolution = \$ 4,800.00

2. Respondent Merrill Lynch is assessed and shall pay:

<u>Member Fees</u>	= \$	<u>7,000.00</u>
Total Fees	= \$	7,000.00
<u>Less payments</u>	= \$	<u>7,000.00</u>
Balance Due NASD Dispute Resolution	= \$	0.00

3. Respondents are jointly and severally assessed and shall pay:

<u>Forum Fees</u>	= \$	<u>6,000.00</u>
Total Fees	= \$	6,000.00
<u>Less payments</u>	= \$	<u>0.00</u>
Balance Due NASD Dispute Resolution	= \$	6,000.00

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

ARBITRATION PANEL

Richard F. Bieker, PhD	-	Public Arbitrator, Presiding Chairperson
Demetrio S. Timban, Jr., Esq.	-	Public Arbitrator, Panelist
Glenn J. Hansen, CFP	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

Richard F. Bieker

Richard F. Bieker, PhD
Public Arbitrator, Presiding Chairperson

9/30/05

Signature Date

Demetrio S. Timban, Jr., Esq.
Public Arbitrator, Panelist

Signature Date

Glenn J. Hansen, CFP
Non-Public Arbitrator, Panelist

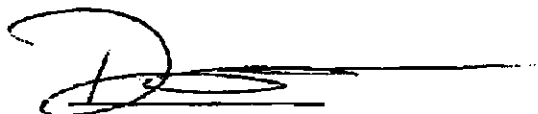
Signature Date

October 4, 2005
Date of Service (For NASD Dispute Resolution office use only)

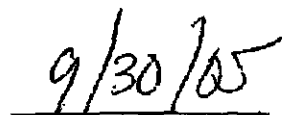
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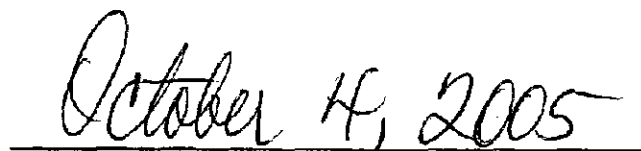
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Glenn J. Hansen, CFP
Non-Public Arbitrator, Panelist

10-3-05

Signature Date

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