

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

S. NEAL and PHYLLIS J. GRAHAM,
FOR THEIR JOINT ACCOUNT AND CO-TRUSTEES
OF THEIR LIVING TRUST ACCOUNT,
PHYLLIS GRAHAM AS TRUSTEE OF HER IRA
AND NEAL GRAHAM AS TRUSTEE OF HIS IRRA,
Claimants,

Case Number: 05-00624

Hearing Site: Indianapolis, Indiana

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Respondents.

Nature of the Dispute: Customers vs. Member Firm

REPRESENTATION OF PARTIES

Claimants, S. Neal and Phyllis J. Graham, for their Joint Account and Co-Trustees of their Living Trust Account, Phyllis Graham as Trustee of her IRA and Neal Graham as Trustee of his IRRA ("the Grahams"), hereinafter collectively referred to as "Claimants": Mark E. Maddox, Esq. of Maddox Hargett & Caruso, P.C. located in Fishers, Indiana.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Respondent": Anne N. DePrez, Esq. of Barnes & Thornburg located in Indianapolis, Indiana.

CASE INFORMATION

Statement of Claim filed on or about February 4, 2005. The Grahams jointly signed the Uniform Submission Agreement on January 27, 2005.

Statement of Answer filed by Merrill Lynch on or about April 28, 2005. Merrill Lynch signed the *Uniform Submission Agreement* on February 17, 2005.

CASE SUMMARY

Claimants asserted the following causes of action: suitability, negligence, misrepresentations, omissions, failure to supervise, breach of fiduciary duty, breach of contract and Respondeat superior. The causes of action relate to mutual funds such as Putnam New Opportunities B, Putnam Growth Opportunities B, Putnam Voyager B, Putnam Investors B, Putnam Voyager II B, Hancock John Investment Trust B, Putnam Research B; and common stocks including, Qualcomm, Corning, Enron, Cisco Systems, Advanced Digital Information, Sun Microsystems, JDS Uniphase, EMC, Oracle, Tyco International, Westell Tech, Yahoo, Nortel Networks, Scientific Atlanta, Ericsson Telefonab, Dynegy, GTE, Intel, Motorola and Nokia. Claimants asserted that these were volatile securities and unsuitable for their investment needs and objectives.

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

1. Many of the claims have no foundation under Indiana law.
2. All of the claims premised on alleged negligence, breach of fiduciary duty or other torts (other than common law fraud) are barred by the two-year statute of limitation found in Indiana Code § 34-11-2-4.
3. All of the Indiana Securities Act claims for investments made before February 2, 2002, are barred by the three-year statute of limitation found in Indiana Code § 23-2-1-19.
4. Mr. Graham (or, in the case of her IRA, Mrs. Graham) initiated or authorized every transaction in the accounts, with full knowledge or the risks. Even if the allegations of wrongdoing were true (which they are not), the Grahams had numerous opportunities to cease trading with Merrill Lynch financial advisors, and/or complain to Merrill Lynch management. Accordingly, the Grahams have ratified the transactions in their accounts, have waived any claims and are estopped from seeking to recover any losses from Merrill Lynch.
5. The Grahams' contributory fault is greater than fifty percent of the total fault involved in causing their losses. In the alternative, their contributory fault was a proximate cause of the losses, and the damages, if any, should be diminished in proportion as the losses are attributable to their fault.
6. The Grahams failed to mitigate their damages.
7. The Grahams are not entitled to an award of punitive damages.

RELIEF REQUESTED

The Grahams requested compensatory damages in the amount of \$1,520,430.00, unspecified amount in punitive damages, 8% interest per year, costs, expert witness fees, attorney's fees and expenses.

Merrill Lynch requested that the Panel deny the Grahams any recovery, and that the Panel award Merrill Lynch its attorney's fees.

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, is solely liable for and shall pay to Claimants, S. Neal and Phyllis J. Graham, for their Joint Account and Co-Trustees of their Living Trust Account, Phyllis Graham as Trustee of her IRA and Neal Graham as Trustee of his IRA, the sum of \$70,000.00 as compensatory damages.
2. Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees.
3. Any and all relief not specifically addressed herein, including punitive damages, are 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 = \$ 500.00

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:

Member surcharge = \$ 2,800.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 5,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

February 21-23, 2006, adjournment by Claimants = \$ 1,200.00
(Fee waived by Panel)

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

Seven (7) Hearing sessions @ \$1,200.00 = \$ 8,400.00

Hearing Dates:	July 24, 2006	2 sessions
	July 25, 2006	2 sessions
	July 26, 2006	3 sessions

Total Forum Fees = \$ 8,400.00

1. The Panel has assessed 100% of the total forum fees in the amount of \$8,400.00 solely to Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc.

Fee Summary

1. Claimants, the Grahams, are jointly liable for:

Initial Filing Fee = \$ 500.00

Less payments = \$ 1,700.00

Refund Due from NASD Dispute Resolution = \$ 1,200.00

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

Member Fees = \$ 8,550.00

Forum Fees = \$ 8,400.00

Total Fees = \$16,950.00

<u>Less payments</u>	<u>= \$ 9,300.00</u>
Balance Due NASD Dispute Resolution	= \$ 7,650.00

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

ARBITRATION PANEL

Daniel P. Urban	-	Public Arbitrator, Presiding Chairperson
David Williams Russell, Esq.	-	Public Arbitrator
Tim Young	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ Daniel P. Urban
Daniel P. Urban
Public Arbitrator, Presiding Chairperson

8/1/06
Signature Date

/s/ David Williams Russell, Esq.
David Williams Russell, Esq.
Public Arbitrator

8/1/06
Signature Date

/s/ Tim Young
Tim Young
Non-Public Arbitrator

8/1/06
Signature Date

8/1/06
Date of Service (For NASD Dispute Resolution use only)

NASD Dispute Resolution
 Arbitration No. 05-00624
Award Page 4 of 4

<u>Less payments</u>	= \$ 2,300.00
Balance Due NASD Dispute Resolution	= \$ 7,650.00

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David Williams Russell, Esq.	-	Public Arbitrator
Tim Young	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


 Daniel P. Urban
 Public Arbitrator, Presiding Chairperson

8/1/02
 Signature Date

 David Williams Russell, Esq.
 Public Arbitrator

 Signature Date

 Tim Young
 Non-Public Arbitrator

 Signature Date

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Public Arbitrator, Presiding Chairperson

Signature Date



David Williams Russell, Esq.
Public Arbitrator

8-1-6

Signature Date

Tim Young
Non-Public Arbitrator

Signature Date

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Non-Public Arbitrator

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