

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

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In the Matter of the Arbitration Between:

Mason Nicoll, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated,  
Respondent

Case Number: 05-02033

Hearing Site: Seattle, Washington

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Nature of the Dispute: Customer v. Member

**REPRESENTATION OF PARTIES**

For Claimant:

Lawrence L. Klayman, Esq.  
Klayman & Toskes, P.A.  
Boca Raton, Florida

For Respondent:

Troy P. Sauro, Esq.  
Bingham McCutchen  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: April 20, 2005

Claimant Mason Nicoll's Uniform Submission Agreement signed: April 20, 2005

Statement of Answer filed by Respondent: October 28, 2005

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: July 14, 2005

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary and contractual duties, constructive fraud, failure to supervise and control, negligence, gross negligence, violation of federal securities laws, violation of NYSE Rules, and violation of NASD Conduct Rules. Claimant's allegations involved Respondent's recommendation of an "exercise and hold" strategy with respect to Claimant's Microsoft stock options without employing risk management strategies to protect his concentrated stock position.

Unless specifically admitted in its Answer, Respondent denied the allegations of wrongdoing set forth in Claimant's Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested \$175,000.00 in compensatory damages, unspecified punitive damages, pre- and post-judgment interest, assessment of forum fees to Respondent, and costs, including attorney's fees.

Respondent requested dismissal of Claimant's Statement of Claim in its entirety and costs.

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

On April 26, 2006, Respondent filed a Motion to Dismiss and for Sanctions for Asserting Claims in Bad Faith (hereinafter "Respondent's Motion to Dismiss"). On May 9, 2006, Claimant filed an Opposition and Motion to Strike Respondent's Motion to Dismiss (hereinafter "Claimant's Opposition"). On May 10, 2006, Claimant filed a Supplement to Claimant's Opposition. The parties and the Panel participated in a telephonic pre-hearing conference on May 11, 2006 during which the Panel heard oral argument regarding Respondent's Motion to Dismiss. During the pre-hearing conference, the Panel ordered the parties to submit additional documentation. Claimant filed additional submissions on May 11 and May 15, 2006. Respondent filed additional submissions on May 12 and May 15, 2006. On May 16, 2006, the Panel deliberated and decided to grant Respondent's Motion to Dismiss.

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, Respondent's Motion to Dismiss, Claimant's Opposition, additional documents that were filed in connection with the motion, and the parties' oral arguments at the May 11, 2006 pre-hearing conference, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) *Claimant's claims are dismissed with prejudice.*
- 2) The parties shall bear their respective 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 received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 300.00
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### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch Pierce Fenner & Smith Incorporated is a party, and the following fees are assessed:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,750.00
<b>Total Member Fees</b>	<b>= \$ 5,200.00</b>

### **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. The following forum fees are assessed:

Two (2) pre-hearing conference sessions with the Panel @ \$1,125.00/session		= \$2,250.00
Pre-hearing conferences:	December 28, 2005	1 session
	May 11, 2006	1 session
<b>Total Forum Fees</b>		<b>= \$2,250.00</b>

The Panel assessed \$2,250.00 of the forum fees to Claimant.

**Fee Summary**

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 2,250.00
Total Fees	= \$ 2,550.00
<u>Less payments</u>	<u>= \$(1,425.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 1,125.00</b>

2. Respondent is charged with the following fees and costs:


Member Fees	= \$ 5,200.00
<u>Less payments</u>	<u>= \$(5,200.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

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

**ARBITRATION PANEL**

<b>Joseph C. Roberts</b>	-	<b>Public Arbitrator, Presiding Chair</b>
<b>John P. Paysano</b>	-	<b>Public Arbitrator</b>
<b>Ronald E. Lorentsen</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**



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Joseph C. Roberts  
Chair, Public Arbitrator

5/17/06  
Signature Date

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John P. Paysano  
Public Arbitrator

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Signature Date

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Ronald E. Lorentsen  
Non-Public Arbitrator

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Signature Date

5/18/06  
Date of Service

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<b>Ronald E. Lorentsen</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**

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Joseph C. Roberts  
Chair, Public Arbitrator

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Signature Date



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John P. Paysano  
Public Arbitrator

*May 17, 2006*

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Signature Date

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Ronald E. Lorentsen  
Non-Public Arbitrator

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Signature Date

*5/18/06*

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Date of Service

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