

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

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In the Matter of the Arbitration Between:

Bernhard Heine, Individually and on Behalf of the Bernhard Heine IRA, and Silke Heine (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Thomas A. Hand (Respondents)

Case Number: 05-02694

Hearing Site: Boston, Massachusetts

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Nature of the Dispute: Customer vs. Members and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimants Bernhard Heine, Individually and on Behalf of the Bernhard Heine IRA, and Silke Heine hereinafter referred to as "Claimants": Liam O'Brien, Esq., and Ronald Miller, Esq., McCormick & O'Brien, LLP, New York, NY.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Thomas A. Hand ("Hand") hereinafter collectively referred to as "Respondents": Sonya L. Skinner, Esq., and Michael A. Fitzhugh, Esq., Fitzhugh, Parker & Alvaro, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: May 23, 2005.

Claimant signed the Uniform Submission Agreement: May 1, 2005.

Claimant signed the Uniform Submission Agreement: May 1, 2005.

Statement of Answer filed by Respondents on or about: July 14, 2005.

Respondent Merrill Lynch filed the Uniform Submission Agreement: June 10, 2005.

Respondent Hand filed the Uniform Submission Agreement: August 9, 2005.

**CASE SUMMARY**

Claimant asserted the following causes of action: suitability, breach of contract, misrepresentation, omissions of fact, fraud, breach of fiduciary duty, failure to supervise, respondeat superior and negligence.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$176,097.98, interest, costs, consulting fees, attorneys' fees and other and further relief the arbitration panel deems just and proper.

Respondents requested the dismissal of the Statement of Claim, that the prayers for relief be denied, and that Merrill Lynch be awarded its costs, reasonable attorneys' fees and such other and further relief as the Panel deems appropriate.

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

At the hearing, Respondent Merrill Lynch filed a Motion for Summary Judgment. After due deliberation, the Panel denied the 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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are dismissed in their entirety.
2. Any and all relief not specifically addressed herein 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	= \$ 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 persons at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch Pierce, Fenner & Smith, Inc. is a party.

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

### **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, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: January 18, 2006	1 session
Two (2) Pre-hearing sessions with Panel @ \$1,125.00	= \$2,250.00
Pre-hearing conferences: September 20, 2005	1 session
May 19, 2006	1 session
Six (6) Hearing sessions @ \$1,125.00 per session	= \$6,750.00
Hearing Dates: April 25, 2006	1 session
June 19, 2006	2 sessions
June 20, 2006	1 session
June 21, 2006	2 sessions
<b>Total Forum Fees</b>	<b>= \$9,450.00</b>

1. The Panel has assessed \$4,725.00 of the forum fees jointly and severally to Claimants.
2. The Panel has assessed \$4,725.00 of the forum fees jointly and severally to Respondents

### **Fee Summary**

1. Claimants are jointly and severally liable for:	
Initial Filing Fee	= \$ 300.00
Forum Fees	= \$4,725.00
Total Fees	= \$5,025.00
Less payments	= \$1,425.00
Balance Due NASD Dispute Resolution	= \$3,600.00
2. Respondent Merrill Lynch is solely liable for:	
Member Fees	= \$5,200.00
Total Fees	= \$5,200.00
Less payments	= \$5,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00
3. Respondents are jointly and severally liable for:	
Forum Fees	= \$4,725.00
Total Fees	= \$4,725.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$4,725.00

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

**ARBITRATION PANEL**

Mark J. Gianno, CPA	-	Non-Public Arbitrator, Presiding Chairperson
Colette Manoil, Esq.	-	Public Arbitrator
Constantine Alexander	-	Public Arbitrator

**Concurring Arbitrators' Signatures**



Mark J. Gianno, CPA  
Non-Public Arbitrator, Presiding Chairperson

7/7/06  
Signature Date

Colette Manoil, Esq.  
Public Arbitrator

Signature Date

Constantine Alexander  
Public Arbitrator

Signature Date

July 10, 2006  
Date of Service (For NASD Dispute Resolution use only)

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