

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Claimant

Josephine H. Berger

and

Case Number: 05-03065

Hearing Site: Southfield, Michigan

Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.,
Merrill Lynch, and Robert James Valenti

NATURE OF DISPUTE

Customer v. Member, Non-Member and Associated Person

REPRESENTATION OF PARTIES

Josephine H. Berger ("Claimant") was represented by Anthony V. Trogan, Esq., and Lysa Postula-Stein, Esq., Anthony V. Trogan PLLC, West Bloomfield, Michigan.

Merrill Lynch Pierce Fenner & Smith, Inc. ("MLPFS") and Robert James Valenti ("Valenti"), hereinafter collectively referred to as "Respondents," were represented by Keith Guilfoyle, Esq., Merrill Lynch Pierce Fenner & Smith, Inc., New York, New York.

Merrill Lynch did not participate in the arbitration.

CASE INFORMATION

The Statement of Claim was filed on or about June 13, 2005. The Submission Agreement of Claimant was signed on or about June 3, 2005.

The Statement of Answer was filed jointly by MLPFS and Valenti on or about August 16, 2005. The Submission Agreement of MLPFS was signed on or about August 12, 2005, by Robert Goldberg, Director and Senior Counsel. The Submission Agreement of Valenti was signed on or about August 16, 2005.

CASE SUMMARY

Claimant asserted the following legal theories: breach of contract, common law fraud, promissory estoppel, negligence, malpractice, breach of fiduciary duty, and breach of Michigan securities law. The causes of action related to the recommendation and sale of the Merrill Lynch Focus 20 Fund, which Claimant asserted was filled with high risk "tech" securities, highly concentrated in a few stocks and largely unmanaged. Claimant alleged that Focus 20 was not suitable for her situation and investment objectives.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: the Claim fails to state a cause of action upon which relief may be granted; Respondents did not guarantee Claimant any specific level of return on her investments, and any "losses" of principal sustained by Claimant resulted solely from the volatility of the securities market over which Respondents had no control, and not from any wrongdoing on the part of Respondents.

RELIEF REQUESTED

Claimant requested an award in the amount of \$77,000.00, plus exemplary and punitive damages, interest, costs, rescission, alternative damages, attorneys' fees, and any other relief as is just and proper.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs, attorneys' fees, and any other relief as is just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Merrill Lynch is not an NASD Member Firm. Merrill Lynch did not voluntarily submit to NASD arbitration, nor was a contract to arbitrate disputes with Merrill Lynch presented. Therefore, Merrill Lynch is not compelled by NASD rules to arbitrate disputes in this forum. In the absence of Merrill Lynch's voluntary submission, NASD does not have jurisdiction over this party.

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. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Dispute Resolution ("NASD").

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., and Robert James Valenti, are jointly and severally liable for and shall pay to Claimant, Josephine H. Berger, the sum of \$50,000.00 in compensatory damages;
- 2.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 3.) Any relief not specifically enumerated, including punitive damages and attorneys' fees, is hereby denied with prejudice.

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 = \$ 225.00

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. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge = \$ 1,100.00
Pre-hearing process fee = \$ 750.00
Hearing process fee = \$ 1,700.00

Forum Fees and Assessments

The Panel has assessed forum fees for each hearing session conducted and each decision rendered on a discovery-related motion on the papers. A hearing 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 a single arbitrator x \$450.00	= \$ 450.00
Pre-hearing conference: February 21, 2006 1 session	
One (1) Pre-hearing session with Panel x \$750.00	= \$ 750.00
Pre-hearing conference: November 1, 2005 1 session	
Two (2) Hearing sessions x \$750.00	= \$ 1,500.00
Hearing Date: April 4, 2006 2 sessions	
Total Forum Fees	= \$ 2,700.00

The Arbitration Panel has assessed \$1,350.00 of the forum fees to Josephine H. Berger.

The Arbitration Panel has assessed \$1,350.00 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith, Inc., and Robert James Valenti.

Fee Summary

Claimant, Josephine H. Berger, is liable for:

Initial Filing Fee	= \$ 225.00
Forum Fees	= \$ 1,350.00
Total Fees	= \$ 1,575.00
Less payments	= \$ 975.00
Balance Due NASD Dispute Resolution	= \$ 600.00

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

Member Fees	= \$ 3,550.00
Total Fees	= \$ 3,550.00
Less payments	= \$ 3,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., and Robert James Valenti, are jointly and severally liable for:

Forum Fees	= \$ 1,350.00
Total Fees	= \$ 1,350.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 1,350.00

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

ARBITRATION PANEL

William P. Thorpe, Esq. - Public, Presiding Chair
Leonard R. Present - Public Arbitrator
Ann D. Kuhna - Non-Public Arbitrator

Concurring Arbitrators:

/s/ William P. Thorpe, Esq.

William P. Thorpe, Esq.
Public Arbitrator, Presiding Chair

04/05/06

Signature Date

/s/ Leonard R. Present

Leonard R. Present
Public Arbitrator

Signature Date

/s/ Ann D. Kuhna

Ann D. Kuhna
Non-Public Arbitrator

04/05/06

Signature Date

04/05/06

Date of Service (For NASD office use only)

ARBITRATION PANEL

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Leonard R. Present - Public Arbitrator
Ann D. Kuhna - Non-Public Arbitrator

Concurring Arbitrators:



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Public Arbitrator, Presiding Chair

4/5/06
Signature Date

Leonard R. Present
Public Arbitrator

Signature Date

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