

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Allen Adler

95-02145

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
Stanley Heilbronn

REPRESENTATION

For Claimant Allen Adler ("Adler") appeared Bruce Handler, Esq. of the law firm Jones Hirsch Connors & Bull, located in New York City, New York.

For Respondents Merrill, Lynch, Pierce, Fenner & Smith ("Merrill Lynch") and Stanley Heilbronn ("Heilbronn") appeared Laurel J. Southworth, Esq. of the law firm Brown & Wood.

CASE INFORMATION

The Statement of Claim was filed on May 16, 1995.

Claimant's Submission Agreement was signed on May 1, 1995.

A Joint Statement of Answer was filed by Respondents on August 11, 1995.

Respondent Merrill Lynch's Submission Agreement was signed on August 16, 1995.

Respondent Heilbronn's Submission Agreement was signed on November 17, 1995.

HEARING INFORMATION

Pre-Hearing Conference:	February 28, 1996	-	1 Session
Hearing Dates/Sessions:	March 11, 1996	-	2 Sessions
	March 12, 1996	-	2 Sessions
	June 11, 1996	-	2 Sessions
	June 12, 1996	-	2 Sessions
	June 19, 1996	-	2 Sessions
	June 20, 1996	-	2 Sessions
	November 5, 1996	-	2 Sessions
	November 6, 1996	-	2 Sessions

November 7, 1996 - 2 Sessions  
November 11, 1996 - 2 Sessions

The hearings were held in New York City, New York.

### CASE SUMMARY

Claimant alleged that he initiated a relationship with Respondent Heilbronn in 1973 when Heilbronn was employed by A.G. Becker. In the early 1980s, Respondent Heilbronn became employed by Merrill Lynch and urged Claimant to transfer his account to Merrill Lynch. Claimant alleged that his equity at the time of opening his Merrill Lynch account was in excess of one million dollars. (\$1,000,000.00).

Claimant alleged that he executed trades with other brokers but transferred his holdings to Merrill Lynch making his account there custodial in nature. Claimant contended that Merrill Lynch would receive and deliver his trades and provide him with daily and monthly reporting with respect to his account. Additionally, Claimant asserted that he purchased significant amounts of securities on margin and therefore maintained substantial margin balances at Merrill Lynch.

Claimant also alleged that he made his own investment decisions and generated substantial commissions for Merrill Lynch during the years of 1988 - 1994. Claimant contended that these commissions plus the interest on his margin balances made him a desired Merrill Lynch customer. Claimant also asserted that he relied upon and trusted both Heilbronn and Merrill Lynch and wanted to maintain his long standing relationship with them.

Claimant alleged that between June of 1982 and March of 1995, his equity increased from \$1 million to \$28 million while his margin balances also increased steadily, totalling more than \$18 million in March of 1995. Claimant contended that beginning in the middle of 1988 when his margin balance reached approximately \$5 million, he began to question Heilbronn about possible lower rates of interest on his margin balance. Claimant alleged that Heilbronn advised him that lower margin rates were not available to him at Merrill Lynch and that, in fact, he was receiving the most favorable margin interest rates for customers in his position.

Claimant contended that he became increasingly concerned over the rate of interest he was being charged (approximately 10%) as his margin balance increased and asked Heilbronn if any other division at Merrill Lynch could offer a more favorable rate of margin interest or if any Merrill Lynch executive was in a position to lower the rates for a customer in his position. Claimant contended that after much delay, Heilbronn told him that there was no other division that could offer a lower rate and that no firm executive was in a position to reduce his margin interest rate. Claimant alleged that he learned later that Regional and National Sales Managers could indeed lower interest rates.

Claimant asserted that he paid the high interest charges each year because he trusted that Heilbronn was working in his best interest and believed the assurances that he was getting the best rate possible. Claimant contended that in 1992, Heilbronn finally found it possible to lower the interest rate by 0.5% and represented that nothing more could be done and, when Claimant

asked to speak to the Regional and National Sales Managers, Heilbronn blocked access to these executives. Claimant further alleged that all the time he paid high interest rates on his margin balance, he was receiving low interest rates on his credit balances. Claimant contended that he was also looking for more favorable rates but was told that no better rates were available.

Claimant asserted that after years of trying to obtain higher interest rates and better service his account, Heilbronn put him in contact with James Sciacca ("Sciacca") of Merrill Lynch's Hedge Fund Department. Claimant alleged that on or about November 2, 1994, he spoke to Sciacca and found that his account did qualify for servicing by the Hedge Dept. and a margin rate of 5.3% was available to him, lower than the 6.625% rate that the retail division was then charging him. Claimant asserted that the Hedge Dept. was available to him during the six years that he unsuccessfully sought lower rates.

Claimant alleged that Heilbronn's misrepresentations with respect to the availability of more favorable interest rates were clearly motivated by his desire to maximize his compensation from Adler's business and to maintain his standing as one of the "big producers" at Merrill Lynch. Claimant contended that not only was the Hedge Dept. available to him, but that the National Sales Manager and Regional Sales Manager could have lowered the margin rates as evidenced by their offer in late 1994.

Respondents denied all allegations of wrongdoing asserted by the claimant in the statement of claim. Respondents maintained that other than the belated claims regarding the margin interest rates, Adler acknowledged that he had received prompt and professional attention in the handling of the account. Respondents further maintained, that contrary to Adler's allegations, Heilbronn did not receive compensation from Merrill Lynch based in any manner on Adler's debit balances or the amount of interest paid at any time relevant to Adler's claim.

Respondents also maintained that Heilbronn did not know that hedge fund departments of brokerage firms, including Merrill Lynch's, dealing with institutional clients, generally offer lower margin interest rates in competition with other firms and that Heilbronn did not know that Adler's account could be serviced in the hedge fund area. Respondents further maintained that Merrill Lynch had no obligation to affirmatively offer hedge fund interest rates to Adler, who was, at all relevant times, a retail customer.

Finally, Respondents maintained that Adler was free to investigate Merrill Lynch's competitors to determine whether he could obtain a lower interest rate elsewhere, and, if so, to move his account from Merrill Lynch. Respondents contended that Adler was treated honestly and with professional dedication at all times by Heilbronn and all other employees of Merrill Lynch.

### **RELIEF REQUESTED**

Claimant requested:

1. the difference between the margin interest paid from June 1, 1988 to October 31, 1994 and the margin interest that would have been paid had the margin interest rate charged by the Hedged Fund Support Department been applied to him (an amount greater than \$1 million);

2. the reasonable return on the above amount had it been properly invested rather than used for margin interest payments;
3. the difference between the credit balance interest he would have received had the normal interest rate paid by the Hedge Fund Support Department been paid to him from June 1, 1988 to October 1, 1994 and the credit balance interest he actually received during that period (an amount greater than \$185,000.00);
4. the reasonable return on that amount had it been properly invested;
5. punitive damages in an amount to be determined at the hearing;
6. costs, fees, and expenses of this arbitration;
7. all applicable interest; and
8. such other and further relief as to the Tribunal seems just and proper.

Respondents requested the Statement of Claim be dismissed in its entirety.

#### **OTHER ISSUES CONSIDERED & DECIDED**

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 originals remain on file with the NASD.

In his Statement of Claim, Claimant requested compensatory damages, punitive damages and attorneys' fees. Prior to the commencement of the hearings in this matter, Respondents moved to stay Adler's claims for punitive damages and attorneys' fees before the Supreme Court, New York County. Respondent's motion was granted by Order of Justice Jane Solomon on February 2, 1996. Claimant appealed the Order to the Appellate Division, First Department. On December 17, 1996, the Appellate Division reversed Justice Solomon's February 2, 1996 Order. The Appellate Division ruled that claims for punitive damages and attorneys fees are within the scope of the arbitration agreement in this matter.

Claimant requested that the arbitrators consider, and grant, Claimant's punitive damages and attorneys' fees claims. Claimant maintained that the record developed over the course of the proceedings clearly established that Respondent Merrill Lynch engaged in egregious and inexcusable conduct.

Respondents requested that the arbitration panel include in its award a finding denying all claims for punitive damages and granting to respondents reasonable attorneys' fees.

#### **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 deter-

mination as follows:

1. All claims asserted against Respondents Merrill Lynch and Heilbronn be and hereby are dismissed with prejudice.
2. All claims for punitive damages asserted against Respondents Merrill Lynch and Heilbronn be and hereby are dismissed with prejudice.
3. All claims for attorneys' fees asserted against Respondents Merrill Lynch and Heilbronn be and hereby are dismissed with prejudice.
4. All claims for attorneys' fees asserted against Claimant be and hereby are dismissed with prejudice.
5. All claims for costs, fees and expenses incurred in connection with this arbitration be and hereby are dismissed with prejudice.
6. All claims for interest be and hereby are dismissed with prejudice.
7. After a hearing on the merits of this case, the Panel determined that Mr. Heilbronn was unjustly named as a respondent to this arbitration. The Panel determined that all references of this arbitration are to be immediately expunged from Stanley Heilbronn's permanent CRD record.

#### **FORUM FEES**

Pursuant to Rule 10332 (c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$250.00 non-refundable filing fee previously deposited by Claimant and have assessed the following forum fees:

1 prehearing conference	x	\$300.	=	300.00
20 hearing sessions	x	\$1000.	=	20000.00
Total Forum Fees Assessed:			=	\$20,300.00

Claimant is liable and shall pay to NASD Regulation, Inc. the sum of \$10,150.00 which represents one-half of the forum fees assessed in this matter. However, Claimant previously deposited \$1,000.00 with NASD Regulation. Therefore, the amount due from Claimant is \$9,150.00.

Respondents be and hereby are jointly and severally liable and shall pay to NASD Regulation, Inc. the sum of \$10,150.00.

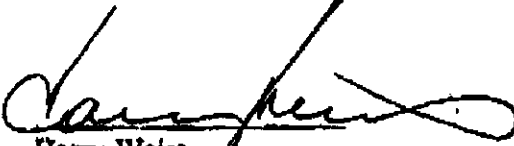
Fees are payable to NASD Regulation, Inc.

**ARBITRATORS' SIGNATURES**

I, Krishna Vempaty, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter.

\_\_\_\_\_  
Krishna Vempaty, Esq.  
Public Arbitrator - Chairperson

I, Harry Weiss, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter.

  
Harry Weiss  
Public Arbitrator

I, Clifford J. Friedman, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules that this is my decision in the above-captioned matter.

\_\_\_\_\_  
Clifford J. Friedman  
Industry Arbitrator

Date of Decision: February 14, 1997

**ARBITRATORS' SIGNATURES**

I, Krishna Vempaty, do hereby affirm pursuant to Article 7607 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter

Krishna M. Vempaty  
Krishna Vempaty, Esq.  
Public Arbitrator - Chairperson

I, Harry Weiss, do hereby affirm pursuant to Article 7607 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter

Harry Weiss  
Harry Weiss  
Public Arbitrator

I, Clifford J. Friedman, do hereby affirm pursuant to Article 7607 of the Civil Practice Law & Rules that this is my decision in the above-captioned matter.

Clifford J. Friedman  
Clifford J. Friedman  
Industry Arbitrator

Date of Decision: February 14, 1997

**ARBITRATORS' SIGNATURES**


I, **Krishna Vempaty**, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter.

\_\_\_\_\_  
**Krishna Vempaty, Esq.**  
Public Arbitrator - Chairperson

I, **Harry Weiss**, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules, that this is my decision in the above-captioned matter.

\_\_\_\_\_  
**Harry Weiss**  
Public Arbitrator

I, **Clifford J. Friedman**, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules that this is my decision in the above-captioned matter.

  
\_\_\_\_\_  
**Clifford J. Friedman**  
Industry Arbitrator

Date of Decision: February 14, 1997