

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Roger Boesky, Claimant v. Merrill Lynch Pierce Fenner & Smith, Inc., Respondent

Case Number: 99-02450

Hearing Site: Los Angeles, California

REPRESENTATION OF PARTIES

For Claimant:

John H. L'Estrange, Jr., Esq.
Wright & L'Estrange
San Diego, California

For Respondent:

Kenneth C. Mennemeier, Esq.
Mennemeier, Glassman & Stroud, LLP
Sacramento, California

CASE INFORMATION

Statement of Claim filed: May 25, 1999

Amended Statement of Claim filed: March 28, 2000

Claimant's Uniform Submission Agreement signed: May 25, 1999

Statement of Answer filed by Respondent: August 6, 1999

Statement of Answer to Amended Statement of Claim filed by Respondent: December 17, 2001

Respondent's Uniform Submission Agreement signed: August 6, 1999

CASE SUMMARY

Claimant alleged misrepresentation, omissions, and unsuitable recommendations in violation of section 12(2) of the Securities Act of 1933; section 10(b) of the Securities Exchange Act of 1934; section 25401 of the California Corporations Code, and the "Know Your Customer" rule 405 of the New York Stock Exchange. Claimant also alleged breach of fiduciary duty and failure to disclose a material fact involving options in Qualcomm and Leap Wireless.

Respondent denied the allegations of wrongdoing set forth in the Claimant's Claims.

RELIEF REQUESTED

Claimant's Amended Statement of Claim requested rescission of the September 18, 1998 transaction or, in the alternative, money damages to compensate Claimant for his losses, alleged to be in excess of \$5,000,000.00, plus costs.

Respondent requested dismissal of the Claimant's Claims in their entirety, and that costs, including attorneys' fees and forum fees, be assessed against Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have stipulated to a settlement the terms of which are contained in Claimant's Offer to Compromise Pursuant to Section 998(b)(1) of the California Code of Civil Procedure. The terms of the offer and acceptance are included in the award. The only remaining issue submitted to the panel by stipulation of the parties is the meaning of item two contained in Claimant's Offer to Compromise as follows: "2. Merrill Lynch will bear all pre-hearing costs and fees, (not including attorney fees)". The unanimous conclusion of the panel is that there is uncertainty in the language drafted by counsel for Claimant; that California Civil Code Section 1654 requires resolution of the ambiguity in favor of Merrill Lynch Pierce Fenner & Smith, Inc.; that "pre-hearing costs" have a special meaning in connection with an NASD Dispute Resolution, Inc. proceeding; and, therefore, under California Civil Code Section 1644 the interpretation of the disputed language by Merrill Lynch Pierce Fenner & Smith, Inc. is correct.

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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall pay Claimant Roger Boesky the sum of \$370,976.00 as proposed in paragraph 1 of Claimant's Offer to Compromise Pursuant to Section 998 of the California Code of Civil Procedure.
2. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall pay to Claimant Roger Boesky the sum of \$2,231.02 representing deposition transcript costs and travel expenses.
3. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall pay to Claimant Roger Boesky the sum of \$125.00 representing filing fees paid by Claimant to NASD Dispute Resolution, Inc.
4. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall pay all NASD Dispute Resolution, Inc. forum fees.

5. Except as provided above, the parties shall bear their respective costs, including attorneys' fees.
6. All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee (based on original Statement of Claim)	= \$ 125.00
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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 which gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch Pierce Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge (based on original Statement of Claim)	= \$ 400.00
Pre-Hearing Process Fee	= \$ 600.00
Hearing Process Fee	= \$ 5,000.00
Total Member Fees	= \$ 6,000.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair or Panel. The following fees are assessed:

(4) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 4,800.00
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Pre-hearing conferences:	October 25, 2000	1 session
	March 22, 2001	1 session
	September 14, 2001	1 session
	October 2, 2001	1 session

(2) Hearing sessions @ \$1,200.00/session	= \$ 2,400.00
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Hearings:	April 29, 2002	2 sessions
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Total Forum Fees	= \$ 7,200.00
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The Panel assessed \$ 7,200.00 of the forum fees to Respondent Merrill Lynch Pierce Fenner & Smith, Inc.

Fee Summary

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

Initial Filing Fee	= \$ 125.00
<u>Less payments</u>	<u>= \$(1,325.00)</u>
Refund due Claimant	= \$(1,200.00)

2. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is charged with the following fees and costs:

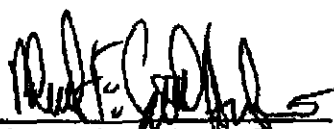
Member Fees	= \$ 6,000.00
<u>Forum Fees</u>	<u>= \$ 7,200.00</u>
Total Fees	= \$13,200.00
<u>Less payments plus \$175.00 transfer from Mediation</u>	<u>= \$(6,175.00)</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 7,025.00

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

ARBITRATION PANEL

<i>Robert F. Saint-Aubin, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>David Menaker</i>	-	<i>Public Arbitrator</i>
<i>Patricia J. Branco</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signature(s)



Robert F. Saint-Aubin, Esq.
Chair, Public Arbitrator

5-31-2002

Signature Date

David Menaker
Public Arbitrator

Signature Date

Patricia J. Branco
Non-Public Arbitrator

Signature Date

5.31.02

Date of Service

NASD Dispute Resolution, Inc.
Arbitration No. 99-02450
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ARBITRATION PANEL

Robert F. Saint-Aubin, Esq.
David Menaker
Patricia J. Branco

Public Arbitrator, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signature(s)

Robert F. Saint-Aubin, Esq.
Chair, Public Arbitrator

Signature Date

David Menaker
Public Arbitrator

David Menaker 6/1/02
Signature Date

Patricia J. Branco
Non-Public Arbitrator

Signature Date

6.3.02
Date of Service

ARBITRATION PANEL

<i>Robert F. Saint-Aubin, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>David Menaker</i>	-	<i>Public Arbitrator</i>
<i>Patricia J. Branco</i>	-	<i>Non-Public Arbitrator</i>


Concurring Arbitrators' Signature(s)

Robert F. Saint-Aubin, Esq.
Chair, Public Arbitrator


Signature Date

David Menaker
Public Arbitrator

Signature Date


Patricia J. Branco
Non-Public Arbitrator

5-31-02
Signature Date

5-31-02 
Date of Service