

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

---

In the Matter of the Arbitration Between:

Nicholas Fusaro, Nancy Fusaro, the Nicholas Fusaro, Jr. Revocable Trust, and Nancy Fusaro as Custodian for Nicole M. Fusaro and Nicholas M. Fusaro, (Claimants) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Richard F. Greene, (Respondents)

Case Number: 99-04357

Hearing Site: Boston, Massachusetts

---

**REPRESENTATION OF PARTIES**

Claimants, Nicholas Fusaro, Nancy Fusaro, the Nicholas Fusaro, Jr. Revocable Trust, and Nancy Fusaro as Custodian for Nicole M. Fusaro and Nicholas M. Fusaro, hereinafter collectively referred to as "Claimants": Matthew J. Tuttle, Esq., Perkins, Smith & Cohen, LLP, Boston, MA.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill"): Brien T. O'Connor and Rua M. Kelly, Esq., Ropes & Gray, Boston, MA. Previously represented by: Marianne Bretton-Granatoor, Esq., Vice President and Senior Counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

Respondent, Richard F. Greene ("Greene"): Timothy P. Burke, Esq., Bingham Dana LLP, Boston, MA. Previously represented by: Marianne Bretton-Granatoor, Esq., Vice President and Senior Counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: September 22, 1999.

Nancy Fusaro signed the Uniform Submission Agreement: August 25, 1999.

Nicholas Fusaro signed the Uniform Submission Agreement: August 25, 1999

Nancy Fusaro signed the Uniform Submission Agreement as Custodian for Nicholas M. Fusaro on September 16, 2002.

Nancy Fusaro Signed the Uniform Submission Agreement as Custodian for Nicole Fusaro on September 16, 2002.

Nicholas Fusaro signed the Uniform Submission Agreement on behalf of the Nicholas Fusaro Jr. Revocable trust on September 16, 2002.

Joint Statement of Answer filed by Respondents on or about: February 10, 2000.

Merrill signed the Uniform Submission Agreement: February 10, 2000.

Greene signed the Uniform Submission Agreement: February 15, 2000.

### CASE SUMMARY

Claimants asserted the following causes of action: breach of contract; breach of the covenant of good faith and fair dealing; breach of fiduciary duty; breach of a broker's duty of reasonable care; fraud and deceit; conversion; tortious malpractice as a licensed securities professional; violations of various State and Federal Securities Laws; violations of State Consumer Protection Laws, including Mass. Gen. Laws ch. 93A; violations of the NASD Rules of Fair Practice, NYSE, and American Stock Exchange Rules; mismanagement of account; failure to diversify; unauthorized trading; churning; excessive commissions; unsuitability; misrepresentations; negligence; and failure to supervise. Claimants' claims also involved the unsuitability of the over concentrated positions of Genesis Health Ventures, Inc., Indymac Mortgage Holdings, Orbital Sciences Corp., and Tower Realty Trust, Inc.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants fail to state a claim upon which relief may be granted; Claimants suffered no damages by reason of the acts complained of in the Statement of Claim; Respondents are not liable to Claimants in any amount because, at all times relevant herein, Respondents acted properly and in good faith with respect to Claimants' accounts; pursuant to the terms of the Customer Agreement executed by Claimants, all substantive claims raised by Claimants with respect to their accounts are to be determined under New York law; all transactions recommended to and made for or on behalf of Claimants were suitable for and in accordance with Claimants' stated investment objectives and financial condition; Claimants failed to mitigate their damages, if any; some or all of Claimants' claims are barred by the applicable statutes of limitation and/or the eligibility requirement set forth in Section 10304 of the NASD Code of Arbitration Procedure; Claimants directed, approved, and/or authorized each and every transaction for their accounts and/or ratified, accepted, acquiesced, and confirmed in all respects such transactions; Claimants' claims are barred by the equitable doctrines of estoppel, laches, ratification, and waiver; all risks inherent in the investments at issue were fully disclosed and/or known to Claimants; any alleged losses incurred by Claimant were the direct result of adverse market conditions and/or the acts of the issuer of the securities at issue and cannot be attributed to Respondents; at all relevant times, Merrill maintained an adequate and reasonable system of supervision and control over its employees, and at all relevant times acted in good faith and did not at any time, directly or indirectly, induce any act or acts constituting a violation or cause of action; and Claimants are not entitled to an award of attorneys' fees, punitive damages, interest, or the costs of this proceeding.

### **RELIEF REQUESTED**

**Claimants requested:**

- a. Disbursement of commissions, margin interest, insurance premiums and fees in the approximate amount of \$1,500,000.00;
- b. Loss of investment capital in the approximate amount of \$2,620,000.00;
- c. Market-adjusted damages in the approximate amount of \$4,800,000.00;
- d. Punitive damages;
- e. Attorneys' fees and costs; and
- f. Such other relief as the Panel deems just and proper.

**Respondents requested that the Panel:**

- a. Issue an Award dismissing the Statement of Claim in its entirety and directing that the registration file of Greene be expunged of any reference to this claim; and
- b. Grant Respondents such other, further, and different relief as the Panel deems appropriate.

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

On September 24, 2002 Respondent Merrill Lynch submitted a recent court decision for the Panels review. The Panel was advised of the submission, however a majority of the Panel consider the record closed and declined to review the submission.

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. Merrill is solely liable for and shall pay to Claimant Nancy Fusaro individually, the sum of \$129,000.00 as compensatory damages.
2. Claimants' claims against Greene are hereby dismissed.
3. All other requests for relief are hereby 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 = \$ 600.00

#### **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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge = \$ 3,000.00

Pre-hearing process fee = \$ 600.00

Hearing process fee = \$ 5,000.00

#### **Adjournment Fees**

Adjournments requested during these proceedings:

July 9 - 13, 2001, adjournment by Claimants = WAIVED

Dec. 3 - 7, 2001, adjournment by Respondents = WAIVED

#### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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 x \$450.00 = \$ 450.00

Pre-hearing conference: July 8, 2002 1 session

Two (2) Pre-hearing sessions with Panel x \$1,200.00 = \$ 2,400.00

Pre-hearing conferences: January 11, 2001 1 session

November 5, 2001 1 session

Thirteen (13) Hearing sessions x \$1,200.00 = \$15,600.00

Hearing Dates: July 15, 2002 2 sessions

July 16, 2002 2 sessions

July 17, 2002 2 sessions

July 18, 2002 2 sessions

	July 19, 2002	2 sessions	
	August 17, 2002	2 sessions	
	August 19, 2002	1 session	
Total Forum Fees			= \$18,450.00

1. The Panel has assessed \$6,150.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$6,150.00 of the forum fees against Merrill.
3. The Panel has assessed \$6,150.00 of the forum fees against Greene.

**Fee Summary**

1. Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
<u>Forum Fees</u>	= \$ 6,150.00
Total Fees	= \$ 6,750.00
<u>Less payments</u>	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 4,950.00
2. Merrill be and hereby is solely liable for:

Member Fees	= \$ 8,600.00
<u>Forum Fees</u>	= \$ 6,150.00
Total Fees	= \$14,750.00
<u>Less payments</u>	= \$ 9,800.00
Balance Due NASD Dispute Resolution	= \$ 4,950.00
3. Greene be and hereby is solely liable for:

<u>Forum Fees</u>	= \$ 6,150.00
Total Fees	= \$ 6,150.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 6,150.00

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

**ARBITRATION PANEL**

Mary C. Kelleher	-	Public Arbitrator, Presiding Chair
Bennett Fisch	-	Public Arbitrator
Richard O. Hansen	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Mary C. Kelleher  
Mary C. Kelleher  
Public Arbitrator, Presiding Chair

9-18-02  
Signature Date

Bennett Fisch  
Bennett Fisch  
Public Arbitrator

Signature Date

**Dissenting Arbitrator's Signature**

Richard O. Hansen  
Richard O. Hansen  
Non-Public Arbitrator

Signature Date

September 26, 2002  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Mary C. Kelleher	-	Public Arbitrator, Presiding Chair
Bennett Fisch	-	Public Arbitrator
Richard O. Hansen	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

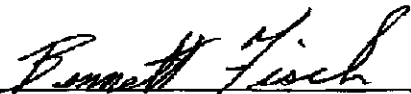
---

Mary C. Kelleher  
Public Arbitrator, Presiding Chair

---

Signature Date

---



Bennett Fisch  
Public Arbitrator

---

*September 19, 2002*  
Signature Date

**Dissenting Arbitrator's Signature**

---

Richard O. Hansen  
Non-Public Arbitrator

---

Signature Date

---

September 26, 2002  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Mary C. Kelleher	-	Public Arbitrator, Presiding Chair
Bennett Fisch	-	Public Arbitrator
Richard O. Hansen	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

---

Mary C. Kelleher  
Public Arbitrator, Presiding Chair

---

Signature Date

---

Bennett Fisch  
Public Arbitrator

---

Signature Date

**Dissenting Arbitrator's Signature**



Richard O. Hansen  
Non-Public Arbitrator

9/18/02  
\_\_\_\_\_  
Signature Date

September 26, 2002  
Date of Service (For NASD Dispute Resolution use only)