

**AWARD**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between

Phillip Labarbera  
Claimant

and

99-05307  
Dallas, Texas

Jay Kent and Merrill Lynch Pierce Fenner & Smith, Inc.  
Respondents

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**REPRESENTATION OF PARTIES**

Phillip Labarbera ("**Claimant**") was represented by Edward J. Hennessy, Esq., Hennessy Gardner & Garth, Houston, Texas.

Jay Kent and Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondents**") were represented by Charles Gall, Esq. and Genna Stephens, Esq., Jenkins & Gilcrest, Dallas, Texas.

**CASE INFORMATION**

The Statement of Claim was filed on or about November 24, 1999. The Amended Statement of Claim was filed on or about May 1, 2000. The Second Amended Statement of Claim was filed on or about June 12, 2000. Submission Agreement of Claimant Phillip Labarbera was signed on November 18, 1999.

Statement of Answer was filed by Respondents Jay Kent and Merrill Lynch Pierce Fenner & Smith on or about April 14, 2000. Submission Agreement of Respondent Jay Kent was signed on March 24, 2000. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith was signed on March 31, 2000 by William J. Manning, Jr.

**CASE SUMMARY**

Claimant alleged that he is an unsophisticated investor who, in reliance upon the Respondents' negligent investment advice that he sell short several stocks, was severely damaged. Claimant shorted stocks including Yahoo and Amazon. Claimant asserted causes of action including: Negligence; Suitability; Material Omission of Fact; Failure to Supervise; Breach of Fiduciary Duty.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant was a knowledgeable investor who made all decisions in all his accounts and that any losses were due to market fluctuations. Respondents asserted affirmative defenses including: Failure to State a Legal Theory of Liability Against Respondents; Claimant is barred from any recovery because he directed, authorized, consented to and ratified all transactions; Claimant made all the investment decisions in regard to this account and any losses which may have been suffered by Claimant were caused by the investment decisions made by Claimant and due to market conditions outside the control of Respondents; Respondents acted properly and in good faith with regard to Claimant's accounts.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$269,116.25, plus interest, costs, and attorneys' fee.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

### **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 original(s) remain on file with the NASD Dispute Resolution, Inc. (the "NASD").

### **AWARD**

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

- (1). That all claims and requests for relief by Claimant Philip Labarbera against Jay Kent and Merrill Lynch Pierce Fenner & Smith, Inc. are hereby dismissed and denied.
- (2). That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
- (3). That other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

**FEES**

Pursuant to the Code, the following fees are assessed:

**Filing Fees**

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

Initial claim filing fee = \$300.00

**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 = \$1500.00

Pre-hearing process fee = \$600.00

Hearing process fee = \$2,500.00

**Adjournment Fees**

Adjournments requested during these proceedings:

Hearing Dates, February 6-9, 2001 adjournment by party Phillip Labarbera = \$1,125.00

**Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. 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: July 25, 2000 1 session

One (1) Pre-hearing session with Panel x \$1,125.00 = \$1,125.00

Pre-hearing conference: June 12, 2000 1 session

Six (6) Hearing sessions x \$1125.00			= \$6,750.00
Hearing Dates:	June 26, 2001	2 sessions	
	June 27, 2001	2 sessions	
	June 28, 2001	<u>2 sessions</u>	
Total Forum Fees			= \$8,325.00

The Arbitration Panel has assessed \$4,162.50 of the forum fees to Phillip Labarbera.  
The Arbitration Panel has assessed \$4,162.50 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

**Fee Summary**

Claimant, Phillip Labarbera, shall be and hereby is liable for:

Initial Filing Fee	= \$300.00
Adjournment Fee	= \$1,125.00
<u>Forum Fees</u>	= \$4,162.50
Total Fees	= \$5,587.50
<u>Less payments</u>	= \$1,425.00
Balance Due NASD Dispute Resolution, Inc.	= \$4,162.50

Respondent, Merrill Lynch Pierce Fenner & Smith shall be and hereby is liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	= \$4,162.50
Total Fees	= \$8,762.50
<u>Less payments</u>	= \$4,600.00
Balance Due NASD Dispute Resolution, Inc.	= \$4,162.50

**All balances are due to NASD Dispute Resolution, Inc.**

**ARBITRATION PANEL**

Alice A. Waters - Public, Presiding Chair  
William Ben Utley -Public Arbitrator  
K. Steve Kimball -Non-Public Arbitrator

**Concurring Arbitrators:**

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Alice A. Waters  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
William Ben Utley  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
K. Steve Kimball  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

Page 3 of 3

**ARBITRATION PANEL**

**K. Steve Kimball - Non-Public Arbitrator**

**Concurring Arbitrators:**

Public Arbitrator, Presiding Chair

**Signature Date**

Public Arbitrator

Signature Date

### Non-Public Arbitrator

**Signature Date**

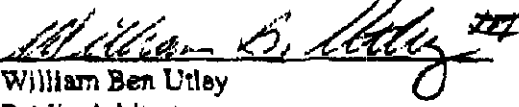
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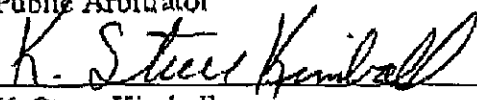
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William Ben Utley  
Public Arbitrator

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Signature Date

  
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K. Steve Kimball  
Non-Public Arbitrator

9-20-2001  
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Signature Date