

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Justin Ort
Dr. Michael Ostad
Patrick Melnik
Thomas Themistocles

Case Number: 18-03274

vs.

Respondents

Empire Asset Management Company
Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: New York, New York

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customers vs. Members

This case was decided by an all-public panel.

The evidentiary hearing was conducted in-person and by videoconference.

REPRESENTATION OF PARTIES

For Claimants Justin Ort (“Ort”), Dr. Michael Ostad (“Ostad”), Patrick Melnik (“Melnik”), and Thomas Themistocles (“Themistocles”): Jenice L. Malecki, Esq., Malecki Law, New York, New York.

For Respondent Empire Asset Management Company (“Empire Asset”): Barry M. Bordetsky, Esq., Law Offices of Barry M. Bordetsky, Morristown, New Jersey.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch”): T. Peter R. Pound, Esq., Morgan, Lewis & Bockius LLP, Boston, Massachusetts.

CASE INFORMATION

Statement of Claim filed on or about: September 18, 2018.

Justin Ort signed the Submission Agreement: September 12, 2018.

Dr. Michael Ostad signed the Submission Agreement: September 13, 2018

Patrick Melnik signed the Submission Agreement: September 17, 2018.

Thomas Themistocles signed the Submission Agreement: September 12, 2018

Statement of Answer filed by Respondent Empire Asset on or about: November 7, 2018
Amended Statement of Answer filed by Respondent Empire Asset on or about: December 13, 2018.

Empire Asset signed the Submission Agreement: November 7, 2018.

Statement of Answer filed by Merrill Lynch on or about: December 10, 2018.

Merrill Lynch signed the Submission Agreement: September 27, 2018.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: negligence; breach of implied and actual contracts; violation of FINRA Rules 2010 - Commercial Honor and Good Faith, 3110 - Supervision, 2090 - Know Your Customer, and 2111 - Suitability; failure to supervise; and, common law and statutory fraud: aiding and abetting. The causes of action relate to investments in a ticket investment scheme which Claimants alleged turned out to be a Ponzi scheme.

Unless specifically admitted in the Statement of Answer and Amended Statement of Answer, Respondent Empire Asset denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in the Statement of Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested compensatory damages in an amount not less than \$1,136,906.89 plus statutory interest at the rate of 9% per annum from the date of filing the Statement of Claim; punitive damages; lost bond interest on the relevant bonds; attorneys' fees; and costs.

In the Statement of Answer and the Amended Statement of Answer, Respondent Empire Asset requested that the Panel reject Claimants' claims in their entirety and award Empire Asset any and all remedies and relief as permitted under the law.

In the Statement of Answer, Respondent Merrill Lynch requested that the Panel dismiss the Statement of Claim in its entirety; assess all forum fees and costs against Claimants; and for such other, further, and different relief as the Panel may deem appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

On December 5, 2019, Claimants filed a notice of settlement in which they advised that the claims against Respondent Merrill Lynch were voluntarily dismissed with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim against Respondent Merrill Lynch.

The Panel conducted in-person hearings on January 21-23, 2020; February 4, 5, and 26, 2020; and March 5, 2020. The Panel conducted hearings by videoconference on October 7 and 14, 2020; November 11, 16, 19, and 20, 2020; December 21, 2020; and February 11, 2021.

The Award in this matter may be executed in counterpart copies.

AWARD

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

1. Respondent Empire Asset is liable for and shall pay to Claimant Themistocles the sum of \$86,022.00.00 in compensatory damages.
2. Claimant Ort's claims are denied in their entirety.
3. Claimant Ostad's claims are denied in their entirety.
4. Claimant Melnik's claims are denied in their entirety.
5. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and attorneys' fees, are denied.

FEES

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	=\$ 2,000.00
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**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents Empire Asset Management Company and Merrill Lynch, Pierce, Fenner & Smith, Inc. are each assessed the following:

Member Surcharge	=\$ 3,025.00
Member Process Fee	=\$ 6,175.00

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

November 12-13, 2020, postponement requested by Respondent Empire Asset	=\$ 1,400.00
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Total Postponement Fees	=\$ 1,400.00

The Panel has assessed the total postponement fees to Respondent Empire Asset.

Last-Minute Cancellation Fees

Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

November 12-13, 2020 cancellation requested by Respondent Empire Asset	=\$ 1,800.00
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Total Last-Minute Cancellation Fees	=\$ 1,800.00

The Panel has assessed the total last-minute cancellation fees to Respondent Empire Asset.

Discovery-Related Motion Fees

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with one (1) Arbitrator @ \$200.00/decision	=\$ 200.00
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Total Discovery-Related Motion Fees	=\$ 200.00

The Panel has assessed the total discovery-related motion fees to Respondent Merrill Lynch.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Panel, including a pre-hearing conference with the Panel, which lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) pre-hearing sessions with a single Arbitrator @ \$450.00/session	=\$ 1,350.00
Pre-Hearing Conferences: February 27, 2019	1 session
November 25, 2019	1 session
January 6, 2020	1 session

Eight (8) pre-hearing sessions with the Panel @ \$1,400.00/session	=\$ 11,200.00
Pre-Hearing Conferences: January 17, 2019	1 session
March 4, 2020	1 session
April 3, 2020	1 session
July 1, 2020	1 session
August 4, 2020	1 session
September 9, 2020	1 session
September 23, 2020	1 session
January 19, 2021	1 session

Twenty-nine (29) hearing sessions @ \$1,400.00/session		= \$ 40,600.00
Hearings:		
	January 21, 2020	2 sessions
	January 22, 2020	2 sessions
	January 23, 2020	2 sessions
	February 4, 2020	2 sessions
	February 5, 2020	1 session
	February 26, 2020	2 sessions
	March 5, 2020	2 sessions
	October 7, 2020	2 sessions
	October 14, 2020	2 sessions
	November 11, 2020	2 sessions
	November 16, 2020	2 sessions
	November 19, 2020	2 sessions
	November 20, 2020	2 sessions
	December 21, 2020	2 sessions
	February 11, 2021	2 sessions

Total Hearing Session Fees	= \$ 53,150.00
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The Panel has assessed \$26,575.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$25,425.00 of the hearing session fees to Respondent Empire Asset.

The Panel has assessed \$1,150.00 of the hearing session fees jointly and severally to Respondents Empire Asset and Merrill Lynch.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Michael S. Lazan	-	Public Arbitrator, Presiding Chairperson
Martin Izaak	-	Public Arbitrator
Evonne WJ Tolbert	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Michael S. Lazan

Michael S. Lazan
Public Arbitrator, Presiding Chairperson

03/16/2021

Signature Date

Martin Izaak

Martin Izaak
Public Arbitrator

03/15/2021

Signature Date

Evonne WJ Tolbert

Evonne WJ Tolbert
Public Arbitrator

03/15/2021

Signature Date

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March 19, 2021

Date of Service (For FINRA Dispute Resolution Services use only)