

**AWARD**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Names of Claimants

Douglas A. Mirabelli and Kristin L. Mirabelli

vs.

Case Number: 10-03400  
Hearing Site: Detroit, Michigan

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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**NATURE OF THE DISPUTE**

Customers vs. Member

**REPRESENTATION OF PARTIES**

Douglas A. Mirabelli and Kristin L. Mirabelli ("Claimants") were represented by John J. Miller, Esq., Swanson Midgley LLC, Kansas City, Missouri, and Barry R. Lax, Esq., Lax & Neville, LLP, New York, New York.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent") was represented by Nathan T. Alexander, Esq., Dorsey & Whitney LLP, Seattle, Washington, and J. David Jackson, Esq., Dorsey & Whitney LLP, Minneapolis, Minnesota.

**CASE INFORMATION**

The Statement of Claim was filed on or about July 26, 2010. The Submission Agreement of Douglas A. Mirabelli was signed on or about June 17, 2010. The Submission Agreement of Kristin L. Mirabelli was signed on or about June 17, 2010.

The Statement of Answer was filed by Respondent on or about October 29, 2010. The Submission Agreement of Respondent was signed on or about October 28, 2010, by Hassan Abedi, Asst. General Counsel.

**CASE SUMMARY**

Claimants asserted the following causes of action: violations of Michigan and Washington Securities Acts; misrepresentation and omission; negligence; breach of contract; and breach of fiduciary duty. The causes of action related to Claimants' allegation that Respondent's employee, Phil Scott, provided inappropriate investment advice, including

the recommendation and purchase of various securities, including Alliance Resource Partners LP, Apollo Investment Corp., and Copano Energy LLC.

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

### **RELIEF REQUESTED**

Claimants requested an award in the amount of:

|                             |                |
|-----------------------------|----------------|
| Actual/Compensatory Damages | \$1,000,000.00 |
| Exemplary/Punitive Damages  | Unspecified    |
| Interest                    | Unspecified    |
| Attorneys' Fees             | Unspecified    |
| Other Costs                 | Unspecified    |
| Other Monetary Relief       | Unspecified    |
| Specific Performance        | Rescission     |

Respondent requested that the claims asserted against it be denied in their entirety.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Claimants moved for sanctions on the record at the hearing. The Panel took the Motion under advisement and it is denied herein.

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

- 1.) Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimants, Douglas A. Mirabelli and Kristin L. Mirabelli, the sum of \$800,219.00 in compensatory damages;

- 2.) Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimants, Douglas A. Mirabelli and Kristin L. Mirabelli, interest on the above-stated sum at the rate of 6% per annum from and including July 26, 2010, through and including the date this Award is paid in full;
- 3.) Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimants, Douglas A. Mirabelli and Kristin L. Mirabelli, the sum of \$47,339.91 in costs;
- 4.) Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to Claimants, Douglas A. Mirabelli and Kristin L. Mirabelli, the sum of \$391,474.00 in attorneys' fees pursuant to MCL §451.810; and
- 5.) Any relief not specifically enumerated, including punitive damages, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution will retain the non-refundable filing fee\* for each claim:

Initial Claim filing fee = \$ 1,575.00

*\*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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed the following:

Member surcharge = \$ 2,250.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 4,000.00

### **Contested Motion for Issuance of a Subpoena Fees**

Fees apply for each decision on a contested motion for the issuance of a subpoena.

|   |                    |
|---|--------------------|
| One (1) Decision on a contested motion for the issuance of a subpoena |                    |
| One (1) arbitrator @ \$200.00   | = \$ 200.00        |
| <b>Total Contested Motion for Issuance of a Subpoena Fees</b>         | <b>= \$ 200.00</b> |

The Panel has assessed \$200.00 of the contested motion for issuance of a subpoena fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

### **Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each hearing session conducted. A 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: October 7, 2011 1 session               |             |

|   |               |
|---|---------------|
| One (1) Pre-hearing session with Panel x \$1,200.00 | = \$ 1,200.00 |
| Pre-hearing conference: December 14, 2010 1 session |               |

|   |                       |
|---|-----------------------|
| Twenty-Three (23) Hearing sessions x \$1,200.00 | = \$ 27,600.00        |
| Hearing Dates:                                  |                       |
| October 10, 2011                                | 2 sessions            |
| October 11, 2011                                | 2 sessions            |
| October 12, 2011                                | 2 sessions            |
| October 13, 2011                                | 2 sessions            |
| October 14, 2011                                | 2 sessions            |
| November 30, 2011                               | 2 sessions            |
| December 1, 2011                                | 2 sessions            |
| December 2, 2011                                | 2 sessions            |
| January 5, 2011                                 | 2 sessions            |
| January 6, 2011                                 | 2 sessions            |
| January 7, 2012                                 | 3 sessions            |
| <b>Total Hearing Session Fees</b>               | <b>= \$ 29,250.00</b> |

The Panel has assessed \$29,250.00 of the hearing session fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

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

**ARBITRATION PANEL**

Jacqueline R. Fox - Public Arbitrator, Presiding Chair  
John F. Burns - Public Arbitrator  
Larry C. Kreul – Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures:

/s/ Jacqueline R. Fox  
Jacqueline R. Fox  
Public Arbitrator, Presiding Chair

01/13/12  
Signature Date

/s/ John F. Burns  
John F. Burns  
Public Arbitrator

01/13/12  
Signature Date

/s/ Larry C. Kreul  
Larry C. Kreul  
Non-Public Arbitrator

01/13/12  
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01/13/12  
Date of Service (For FINRA office use only)

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