

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimants

Jeff and Kendra Moede

V.

01-01184  
Denver, Colorado

Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.,  
George F. Stahmer III,  
Jeffrey W. Hendley,  
Hendley / Stahmer Group,  
Jones / Hendley / Stahmer Group,  
and Thomas J. Klucsarits

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**REPRESENTATION OF PARTIES**

Jeff and Kendra Moede ("**Claimants**") were represented by Kenneth B. Siegel, Esq., of Sherman & Howard, Denver Colorado.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Merrill Lynch**"), George F. Stahmer III ("**Stahmer**"), Jeffrey W. Hendley ("**Hendley**"), Hendley/Stahmer Group ("**Hendley/Stahmer**"), Jones/Hendley/Stahmer Group ("**Jones/Hendley/Stahmer**"), and Thomas J. Klucsarits ("**Klucsarits**") were represented by Steven D. Bell, Esq., of Dorsey & Whitney LLP, Denver, Colorado.

**CASE INFORMATION**

The Statement of Claim was filed on or about March 14, 2001. Submission Agreement of Claimant Jeff and Kendra Moede was signed on March 6, 2001.

A Joint Statement of Answer was filed by Respondents Merrill Lynch Pierce Fenner & Smith, Inc., George F. Stahmer III, Jeffrey W. Hendley, Hendley / Stahmer Group and Jones / Hendley / Stahmer Group on or about May 9, 2001.

Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Inc. was signed on April 27, 2001. Submission Agreement of Respondent George F. Stahmer III was signed on April 24, 2001. Submission Agreement of Respondent Jeffrey W. Hendley was signed on April 24, 2001. Submission Agreement of Respondent Hendley / Stahmer Group was signed on April 24, 2001. Submission Agreement of Respondent Jones / Hendley / Stahmer Group was signed on April 24, 2001. Submission Agreement of Respondent Thomas J. Klucsarits was signed on August 8, 2002.

Claimants filed an Amended Statement of Claim on or about February 12, 2002.

Respondents submitted an Answer to the Amended Statement of Claim on or about March 29, 2002.

### **CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty, negligence, breach of contract, violations of the Colorado Consumer Protection Act, securities fraud, common law fraud, and failure to supervise. Claimants alleged that Respondents made unsuitable recommendations in connection with a variety of stocks purchased from April 1998 – March 2001 including the liquidation of most of their Dell and marchFIRST securities to invest in the Investing For Growth (IFG) strategy which was unsuitable for Claimants' investment goal of retirement. Claimants also alleged that Respondents gave them unsuitable advice relating to margin accounts, life insurance, mortgage decisions, and estate planning.

Respondents denied the allegations set forth in the Statement of Claim. Respondents asserted the following defenses: recommendations were suitable under applicable rules; no fiduciary duty existed in these non-discretionary accounts; the Colorado Consumer Protection Act is inapplicable to securities claims; no false statements were made in connections with the purchase or sale of securities; appropriate disclosures were made to Claimants; supervision was in compliance with applicable rules; no contract was breached; Claimants made their own trading decisions, and Claimants did not suffer any damages.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$8,000,000 in compensatory damages. In addition, Claimants requested that said award include \$16,000,000 in punitive damages, interest, costs, attorneys' fees and any other fees that Panel deemed appropriate.

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**

Claimants filed a Motion to Consolidate this claim with arbitration claims 01-04111, 01-04157 and 01-04744 on or about August 8, 2001. Respondents filed a response in opposition to the Motion to Consolidate on or about August 28, 2001. The Panel heard oral arguments on the Motion to Consolidate and Response during a pre-hearing conference call held on September 6, 2001 and granted Claimants' Motion to Consolidate by Order dated September 10, 2001.

Claimants filed a Motion to Consolidate this claim with arbitration claim 02-00396 on or about January 18, 2002. Respondents filed a response in opposition to the Motion to Consolidate on or

about February 4, 2002. The Panel heard oral arguments on the Motion to Consolidate and Response during a pre-hearing conference call on March 21, 2002 and granted Claimants' Motion to Consolidate by Order dated March 30, 2002.

Claimant sent to the NASD correspondence on May 1, 2002, stating that all consolidated claims 01-04111, 01-04157, 01-04744 and 02-000396 had been settled through private mediation and that Claimants in matter 01-01184, Jeff and Kendra Moede, still wished to pursue their arbitration claim.

Respondents submitted in their pre-arbitration brief, dated August 12, 2002, a Motion to Dismiss Specific Claims. Claimants filed a response in opposition on August 16, 2002. At the start of the hearing on August 16, 2002, parties engaged in oral arguments on this Motion. The Panel stated that both arguments would be taken into consideration and deferred their ruling to the conclusion of this case.

After conclusion of the first set of hearing dates, Chairman Epstein passed away and parties selected Eugene Osman to chair the remainder of this case. Respondents requested this case resume with a full three-member arbitration panel and a replacement Arbitrator, Richard Haney, was selected.

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 originals remain on file with NASD Dispute Resolution ("NASD").

#### AWARD

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

1. Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. is liable for and shall pay to Claimants, Jeff and Kendra Moede, the sum of Seven Hundred and Two Thousand, Three Hundred and Seventeen Dollars and No Cents (\$702,317.00) as Compensatory Damages.
2. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., George F. Stahmer III, Jeffrey W. Hendley, and the Hendley / Stahmer Group are jointly and severally liable for and shall pay to Claimants, Jeff and Kendra Moede, the sum of Seven Hundred and Two Thousand, Three Hundred and Seventeen Dollars and No Cents (\$702,317.00) as Compensatory Damages.
3. Respondents, Merrill Lynch Pierce Fenner & Smith, Inc., George F. Stahmer III, Jeffrey W. Hendley, and the Hendley / Stahmer Group are jointly and severally liable for and shall pay to Claimants, Jeff and Kendra Moede, the statutory interest rate, per the State of Colorado, of 8% per annum from April 1, 2001 until the award is paid in full.

4. All claims against Respondent Thomas Kluscartis are dismissed in their entirety. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Thomas Kluscartis registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent Thomas Kluscartis must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
5. All claims against Respondent Jones / Hendley / Stahmer Group are dismissed in their entirety.
6. 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.
7. 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 will retain the non-refundable filing fee for each claim:

Initial claim filing fee	= \$ 600
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##### **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 persons 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	= \$ 3,600
Pre-hearing process fee	= \$ 600
Hearing process fee	= \$ 5,000

##### **Adjournment Fees**

Adjournments granted during these proceedings:

Hearing Dates, May 6 – 10, 2002 & May 13-17, 2002

Adjournment requested by Claimants, Jeff and Kendra Moede  
Fee Waived by the Panel

= \$ 0

**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 arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) Pre-hearing sessions with Panel x \$1,200 = \$ 4,800

Pre-hearing conferences:	08/16/2001	1 session
	09/06/2001	1 session
	03/21/2002	1 session
	05/02/2002	1 session

Thirty (30) Hearing sessions x \$1,200 = \$ 36,000

Hearing Dates:	08/19/2002	2 sessions
	08/20/2002	2 sessions
	08/21/2002	2 sessions
	08/22/2002	2 sessions
	08/23/2002	2 sessions
	12/03/2002	2 sessions
	12/04/2002	2 sessions
	12/05/2002	2 sessions
	12/06/2002	2 sessions
	12/16/2002	3 sessions
	12/17/2002	3 sessions
	12/18/2002	2 sessions
	12/19/2002	2 sessions
	12/20/2002	2 sessions

Total Forum Fees = \$ 40,800

The Arbitration Panel has assessed \$16,320 of the forum fees to Jeff and Kendra Moede.

The Arbitration Panel has assessed \$24,480 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

**Fee Summary**

Claimants Jeff and Kendra Moede are liable for:

Initial Filing Fee	= \$ 600
<u>Forum Fees</u>	= \$ 16,320
Total Fees	= \$ 16,920
<u>Less payments</u>	= \$ 1,800
Balance Due NASD Dispute Resolution	= \$ 15,120

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. is liable for:

Member Fees	= \$ 9,200
<u>Forum Fees</u>	= \$ 24,480
Total Fees	= \$ 33,680
<u>Less payments</u>	= \$ 4,200
Balance Due NASD Dispute Resolution	= \$ 29,480

All balances are due to NASD Dispute Resolution

**ARBITRATION PANEL**

Eugene M. Osman - Industry Arbitrator, Presiding Chair  
Bruce W. Brady, CPA - Public Arbitrator  
Richard L. Haney, OD - Public Arbitrator

Concurring Arbitrators:

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Eugene M. Osman  
Industry Arbitrator, Presiding Chair

\_\_\_\_\_  
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Bruce W. Brady, CPA  
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Industry Arbitrator, Presiding Chair

JANUARY 24, 2003  
Signature Date

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Signature Date

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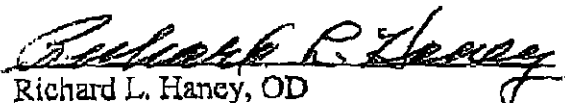
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