

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

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In the Matter of the Arbitration Between

Name of Claimant

James E. Rice

vs.

02-05739  
Nashville, Tennessee

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

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**NATURE OF THE DISPUTE**

Customer vs. Member Firm

**REPRESENTATION OF PARTIES**

James E. Rice ("Claimant" or "Rice") was represented by Mark J. Krudys, Esq., of Mark J. Krudys, PLC, Richmond, Virginia.

Merrill Lynch Pierce Fenner & Smith, Inc. ("Respondent" or "Merrill Lynch") was represented by Julie L. Wilson, Esq., of Maynard, Cooper & Gale, P.C., Birmingham, Alabama.

**CASE INFORMATION**

The Statement of Claim was filed on or about September 26, 2002. The Submission Agreement of Claimant, James E. Rice, was signed on or about September 26, 2002.

The Statement of Answer was filed by Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., on or about December 6, 2002. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about May 5, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; breach of contract; failure to supervise; common law fraud; violations of Tennessee and federal securities statutes; negligence; fraudulent and wrongful conduct; and liability under the principle of respondeat superior. Claimant asserted that Respondent fraudulently sold investment research related to AT&T Corporation to him that was biased and non-objective, which led to losses in his portfolio.

Unless specifically admitted in its Answer, Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., denied the allegations made in the Statement of Claim and asserted affirmative defenses that including the following: Claimant's claims are barred by the applicable statutes of limitation; Claimant's claims are barred by waiver, ratification, acquiescence, and estoppel; Merrill Lynch was not the proximate cause of Claimant's alleged losses; Claimant was contributory negligent; and Claimant's claims are barred by the equitable doctrine of laches.

### **RELIEF REQUESTED**

Claimant requested an award of \$2,800,000.00 in compensatory damages, plus \$8,400,000.00 in punitive damages, interest, costs and attorneys' fees and any other relief that the Panel deemed appropriate.

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded any other relief that the Panel deemed appropriate.

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

At the hearing, the Respondent argued their Motion for Directed Verdict. The Panel took the Motion for Directed Verdict under advisement until the conclusion of all proof.

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 (the "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. Count One. Claimant failed to meet his burden of proof that Respondent breached its duties of due care, utmost faith, integrity and loyalty when recommending the purchase of AT&T common stock and rendering investment advice to Claimant;
2. Count Two. Claimant failed to meet his burden of proof that Respondent engaged in self dealing or failed to disclose any personal interest the Respondent might possess when recommending the subject AT&T common stock;
3. Count Three. Claimant failed to meet his burden of proof that Respondent failed to meet its contractual duties or that its servants and employees failed to comply with all federal and

state statutes, including any regulations promulgated by the State of Tennessee, Securities and Exchange Commission and NASD;

4. Count Four. Claimant failed to meet his burden of proof that Respondent's practices and course of business constituted common law fraud or violated any state or federal securities statutes to which it was contractually bound to follow;
5. Negligent Misrepresentation. To the extent Claimant's "statement of the case" constitutes in whole or in part an allegation of "negligent misrepresentation," the Claimant failed to meet his burden of proof the Respondent made a representation which was false, that the representation was that of a material fact, that the Respondent knew or should have known that its representation of such material fact was false at the time it was made or was reckless in making such representation, and that Claimant relied upon such representation of a material fact, and as a result of the foregoing conduct the Claimant suffered damages;
6. 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; and
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 fees for each claim:

Initial claim filing fee	\$ 600.00
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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 event(s) giving rise to the dispute. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge	\$ 3,750.00
Pre-hearing process fee	\$ 750.00
Hearing process fee	\$ <u>5,500.00</u>

Total Member Fees \$ 10,000.00

**Adjournment Fees**

Adjournment granted during these proceedings:

February 23-March 2, 2004 Hearing Dates, adjournment requested by Claimant =\$ 1,200.00  
(waived by the Panel)

**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:

2	Pre-hearing sessions with Panel	x	1,200.00	\$	2,400.00
	April 25, 2003	1	session		
	February 4, 2004	1	session		
8	Hearing sessions	x	1,120.00	\$	9,600.00
	January 24, 2005	2	sessions		
	January 25, 2005	2	sessions		
	January 26, 2005	2	sessions		
	January 27, 2005	2	sessions		
	Total Forum Fees			\$	12,000.00

The Arbitration Panel has assessed \$6,000.00 of the forum fees to James E. Rice.

The Arbitration Panel has assessed \$6,000.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

**Fee Summary**

Claimant, James E. Rice is liable for:

Initial Filing Fee	= \$	600.00
<u>Forum Fees</u>	= \$	6,000.00
Total Fees	= \$	6,600.00
<u>Less payments</u>	= \$	-1,800.00
Balance Due NASD Dispute Resolution	= \$	4,800.00

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

Member Fees	= \$	10,000.00
<u>Forum Fees</u>	= \$	6,000.00

Total Fees	= \$	16,000.00
<u>Less payments</u>	= \$	-10,000.00
Balance Due NASD Dispute Resolution	= \$	6,000.00

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

**ARBITRATION PANEL**

D. Bruce Shine, Esq. - Public Arbitrator, Presiding Chair  
William P. Ortale, Esq. - Public Arbitrator  
Richard G. Isaac - Non-Public Arbitrator

Concurring Arbitrators:

/s/ D. Bruce Shine, Esq.  
D. Bruce Shine, Esq.  
Public Arbitrator, Presiding Chair

02/09/05  
Signature Date

/s/ William P. Ortale, Esq.  
William P. Ortale, Esq.  
Public Arbitrator

02/16/05  
Signature Date

/s/ Richard G. Isaac  
Richard G. Isaac  
Non-Public Arbitrator

02/09/05  
Signature Date

2/10/05  
Date of service

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Total Fees

= \$ 16,000.00

Less payments

= \$ -10,000.00

Balance Due NASD Dispute Resolution

= \$ 6,000.00

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ARBITRATION PANEL

D. Bruce Shine, Esq. - Public Arbitrator, Presiding Chair  
William P. Ortale, Esq. - Public Arbitrator  
Richard G. Isaac - Non-Public Arbitrator

Concurring Arbitrators:



D. Bruce Shine, Esq.  
Public Arbitrator, Presiding Chair

February 9, 2005  
Signature Date

William P. Ortale, Esq.  
Public Arbitrator

Signature Date

Richard G. Isaac  
Non-Public Arbitrator

Signature Date

Date of service

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Arbitration No. 02-05739  
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Total Fees  
Less payments

= \$ 16,000.00

= \$ -10,000.00

Balance Due NASD Dispute Resolution

= \$ 6,000.00

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

**ARBITRATION PANEL**

D. Bruce Shinn, Esq. - Public Arbitrator, Presiding Chair  
William P. Ortale, Esq. - Public Arbitrator  
Richard G. Isaac - Non-Public Arbitrator

Concurring Arbitrators:

D. Bruce Shinn, Esq.  
Public Arbitrator, Presiding Chair

William P. Ortale

William P. Ortale, Esq.  
Public Arbitrator

Signature Date

2-16-05

Signature Date

Richard G. Isaac  
Non-Public Arbitrator

Signature Date

Date of service

NASD Dispute Resolution  
Arbitration No. 02-05739  
Award Page 5 of 5

Total Fees	= \$	16,000.00
<u>Less payments</u>	= \$	-10,000.00
Balance Due NASD Dispute Resolution	= \$	6,000.00

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

**ARBITRATION PANEL**

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William P. Ortale, Esq. - Public Arbitrator  
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Concurring Arbitrators:

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D. Bruce Shine, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

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William P. Ortale, Esq.  
Public Arbitrator

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

  
\_\_\_\_\_  
Richard G. Isaac  
Non-Public Arbitrator

2-9-05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of service