

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

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In the Matter of the Arbitration Between

Name of Claimant

John McDowell

and

Case Number: 02-07887  
Hearing Site: Southfield, Michigan

Names of Respondents

Merrill Lynch Pierce Fenner & Smith  
and Lee Russell

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**NATURE OF DISPUTE**

Customer v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

John McDowell ("Claimant") was represented by Joel H. Kaufman, Esq., Law Offices of Joel H. Kaufman, Farmington Hills, Michigan.

Merrill Lynch Pierce Fenner & Smith ("MLPFS") and Lee Russell ("Russell"), hereinafter collectively referred to as "Respondents," were represented by Dennis K. Egan, Esq., Butzel Long, Bloomfield Hills, Michigan.

**CASE INFORMATION**

The Statement of Claim was filed on or about December 31, 2002. The Submission Agreement of Claimant John McDowell was signed on or about December 19, 2003.

Statement of Answer was filed jointly by Respondents Merrill Lynch Pierce Fenner & Smith and Lee Russell on or about March 12, 2003. The Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith was signed on or about February 15, 2003, by Michael E. Olney.

**CASE SUMMARY**

Claimant asserted the following legal theories: violation of NASD rules, churning, breach of contract, negligence/misrepresentation, vicarious liability, violation of the Michigan Consumer Protection Act, breach of fiduciary duty, federal and state security law violations, and common law fraud. The causes of action relate to the purchase and sale of various stocks and mutual funds recommended by Respondents as well as the use margin trading in the aforementioned securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted defenses including the following: Respondents' recommendations were suitable for Claimant and the suitability rule does not apply to the transactions engaged in by Claimant, Claimant disregarded Respondents' advice regarding reducing margin, and the account was not excessively traded by Respondents.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$697,634.99, exemplary damages for emotional pain, interest, costs, attorney fees, additional damages and rescission.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and fees, that Respondent Russell's registration file be expunged of all references to this matter, and any other and further relief that the Panel deemed appropriate.

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

Respondent Lee Russell did not file with the NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 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.) Respondents, Merrill Lynch Pierce Fenner & Smith and Lee Russell, are jointly and severally liable for and shall pay to Claimant, John McDowell, the sum of \$500,250.00 in compensatory damages;
- 2.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 3.) That any relief not specifically enumerated, including exemplary damages and attorney fees, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee = \$ 375.00

### **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.

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

### **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: January 9, 2004 1 session	

One (1) Pre-hearing session with Panel x \$1,200.00	= \$ 1,200.00
Pre-hearing conference: July 9, 2003 1 session	

Six (6) Hearing sessions x \$1,200.00	= \$ 7,200.00
Hearing Dates: February 4, 2004 2 sessions	
February 5, 2004 2 sessions	
February 6, 2004 2 sessions	

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Total Forum Fees	= \$ 8,850.00
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The Arbitration Panel has assessed \$4,425.00 of the forum fees to John McDowell.

The Arbitration Panel has assessed \$4,425.00 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner & Smith Lee Russell.

### **Fee Summary**

Claimant, John McDowell, is liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 4,425.00
Total Fees	= \$ 4,800.00
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 3,225.00

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

Member Fees	= \$ 7,000.00
Total Fees	= \$ 7,000.00
Less payments	= \$ 7,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner & Smith and Lee Russell, are jointly and severally liable for:

Forum Fees	= \$ 4,425.00
Total Fees	= \$ 4,425.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,425.00

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

**ARBITRATION PANEL**

Walter H. Clements, Esq. - Public Arbitrator, Presiding Chair  
Kendall B. Perry, M.A. - Public Arbitrator  
Gregory M. Gendron - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Walter H. Clements, Esq.  
Walter H. Clements, Esq.  
Public Arbitrator, Presiding Chair

02/10/04  
Signature Date

/s/ Kendall B. Perry, M.A.  
Kendall B. Perry, M.A.  
Public Arbitrator

02/10/04  
Signature Date

/s/ Gregory M. Gendron  
Gregory M. Gendron  
Non-Public Arbitrator

02/10/04  
Signature Date

02/10/04  
Date of Service (For NASD office use only)

NASD Dispute Resolution  
Arbitration No. 01-07887  
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Respondents, Merrill Lynch Pierce Fenner & Smith and Lee Russell, are jointly and severally liable for:

Forum Fees	= \$ 4,425.00
Total Fees	= \$ 4,425.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,425.00

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Public Arbitrator, Presiding Chair

Signature Date

  
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Public Arbitrator

2-10-04  
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2 / 14 / 04  
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Signature Date

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NASD Dispute Resolution  
Arbitration No. 01-C7887  
Award Page 4 of 4

Respondents, Merrill Lynch Pierce Fenner & Smith and Lea Russell, are jointly and severally liable for:

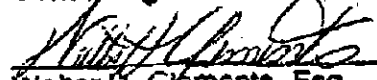
Forum Fees	= \$ 4,425.00
Total Fees	= \$ 4,425.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,425.00

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2-10-04  
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