

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant

Case Number: 03-00784

Michael A. Brim

Name of the Respondents

Hearing Site: Richmond, Virginia

Merrill Lynch, Pierce, Fenner, & Smith, Inc.  
David E. Jennings  
Martin W. Ross

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Nature of the Dispute: Customer vs. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimant, Michael A. Brim, hereinafter referred to as "Claimant", was represented by Mark J. Krudys, Esq., Mark J. Krudys, PLC, Richmond, Virginia.

Respondents, Merrill Lynch, Pierce, Fenner, & Smith, Inc. ("Merrill Lynch"), David E. Jennings ("Jennings"), and Martin W. Ross ("Ross"), hereinafter collectively referred to as "Respondents", were represented by Todd D. Brody, Esq., Morgan Lewis & Bockuis, LLP, New York, New York.

**CASE INFORMATION**

Statement of Claim filed on January 31, 2003.

Claimant signed the Uniform Submission Agreement on January 30, 2003.

Statement of Answer filed by Respondents on April 18, 2003.

A representative of Respondent Merrill Lynch executed an undated Uniform Submission Agreement.

Respondent Jennings and Ross did not file Uniform Submission Agreements with NASD Dispute Resolution.

Respondents' Motion to Preclude filed on July 2, 2004

Claimant's Response in Opposition to Respondents' Motion to Preclude filed on July 14, 2004.

Claimant's Request for Oral Argument on Respondents' Motion to Preclude filed on September 28, 2004.

Respondents' Response to Claimant's Request for Oral Argument on Respondents' Motion to Preclude filed on September 28, 2004.

### CASE SUMMARY

Claimant in his Statement of Claim asserted the following causes of action, among others: unsuitability, misrepresentation, fraud, breach of fiduciary duty, violation of Virginia and Federal securities statutes, negligence, breach of contract, violation of NASD rules and regulations, and vicarious liability. The causes of action relate to the purchase and sale of Davis New York Venture Fund Class C shares and various other securities.

Unless specifically admitted their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: failure to state a claim upon which relief may be granted, ratification, estoppel, assumption of risk, contributory negligence, failure to mitigate, failure to use due diligence, any losses were caused by intervening factors, and statute of limitations.

### RELIEF REQUESTED

Claimant in his Statement of Claim requested:

Compensatory Damages	\$250,000.00
Punitive Damages	\$350,000.00
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondents in their Statement of Answer requested that Claimant's claim be dismissed in its entirety, with prejudice, and that the Panel award Respondents costs and other further relief as it deems just and proper.

### OTHER ISSUES CONSIDERED AND DECIDED

Respondents Jennings and Ross did not file with NASD Dispute Resolution, properly executed submission to arbitrations but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and having answered the claim are bound by the determination of the Panel on all issues submitted.

By letter dated May 10, 2004, Claimant dismissed his claims against Respondent Ross.

By Order dated September 2, 2004, the Panel granted Respondents' Motion to Preclude. By Order dated October 12, 2004, the Panel granted Claimant's request for oral argument on Respondents' Motion to Preclude. By Order dated October 26, 2004, the Panel reaffirmed its earlier ruling granting Respondents' Motion to Preclude.

By letter dated November 11, 2004, Claimant withdrew his allegations concerning Respondents' recommendation of C-shares in connection with the purchase of Davis New York Venture Fund.

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

1. Respondent Merrill Lynch and Jennings are jointly and severally liable to and shall pay to Claimant compensatory damages of \$94,000.00;
2. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
3. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

### 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
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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 firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch was a party.

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 4,000.00</u>
Total Member Fees	= \$ 7,000.00

#### Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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 @ \$450.00	= \$ 450.00
Pre-hearing conference: March 10, 2004 1 session	

Three (3) Pre-hearing sessions with Panel @ \$1,200.00 = \$ 3,600.00  
Pre-hearing conferences:      October 16, 2003      1 session  
   June 23, 2004      1 session  
   October 26, 2004      1 session

Fourteen (14) Hearing sessions @ \$1,200.00 = \$16,800.00  
Hearing Dates:              June 15, 2004      2 sessions  
   June 16, 2004      2 sessions  
   June 17, 2004      2 sessions  
   June 18, 2004      1 session  
   November 9, 2004      2 sessions  
   November 10, 2004      2 sessions  
   November 11, 2004      3 sessions

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Total Forum Fees = \$20,850.00

1. The Panel has assessed \$10,425.00 of the forum fees to Claimant.
3. The Panel has assessed \$10,425.00 of the forum fees jointly and severally to Respondents Merrill Lynch and Jennings.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant requested copies of tapes = \$ 195.00
2. Respondents Merrill Lynch and Jennings requested copies of tapes = \$ 195.00

FEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 10,425.00
Administrative Costs	= \$ 195.00
Total Fees	= \$10,995.00
Less payments	= \$ 1,770.00
Balance Due NASD Dispute Resolution	= \$ 9,225.00
2. Respondent Merrill Lynch is assessed and shall pay the following fees:

Member Fees	= \$ 7,000.00
Total Fees	= \$ 7,000.00
Less payments	= \$ 5,750.00
Balance Due NASD Dispute Resolution	= \$ 1,250.00

3. Respondents Merrill Lynch and Jennings are jointly and severally assessed and shall pay the following fees:

Forum Fees	= \$10,425.00
<u>Administrative Costs</u>	<u>= \$ 195.00</u>
Total Fees	= \$10,620.00
<u>Less payments</u>	<u>= \$ 390.00</u>
Balance Due NASD Dispute Resolution	= \$10,230.00

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

ARBITRATION PANEL

Ellen S. Saltzman, Esq.	-	Public Arbitrator, Presiding Chairperson
J. Alden Bulter	-	Public Arbitrator, Panelist
Thomas Daniel Applewhite, Esq.	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures



Ellen S. Saltzman, Esq.  
Public Arbitrator, Presiding Chairperson

12-02-04

Signature Date

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J. Alden Bulter  
Public Arbitrator, Panelist

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Signature Date

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Thomas Daniel Applewhite, Esq.  
Non-Public Arbitrator, Panelist

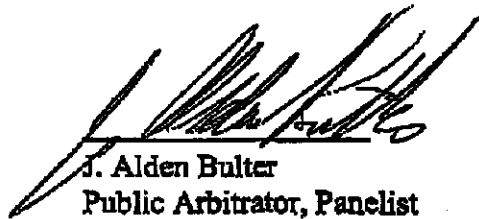
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Signature Date

December 3, 2004  
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Ellen S. Saltzman, Esq.  
Public Arbitrator, Presiding Chairperson

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

  
J. Alden Bulter  
Public Arbitrator, Panelist

12/2/04  
Signature Date

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Thomas Daniel Applewhite, Esq.  
Non-Public Arbitrator, Panelist

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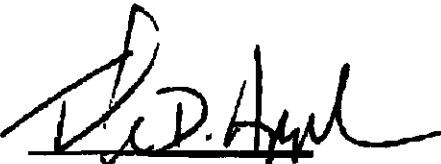
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J. Alden Bulter  
Public Arbitrator, Panelist

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Signature Date

  
Thomas Daniel Applewhite, Esq.  
Non-Public Arbitrator, Panelist

12-2-2004  
Signature Date:

December 3, 2004  
Date of Service (For NASD Dispute Resolution office use only)