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

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In the Matter of the Arbitration Between:

Names of the Claimants

Carl H. Will, in his individual capacity  
and in his capacity as custodian and  
Lisa Will, in her individual capacity

Case Number: 03-00956

Name of the Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Tampa, Florida

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

For Carl H. Will, in his individual capacity and in his capacity as custodian and Lisa Will, in her individual capacity, hereinafter collectively referred to as "Claimants": David McGee, Esq., Beggs & Lane, Pensacola, Florida.

For Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": Brian F. Amery, Esq., Bressler, Amery & Ross, P.C., New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: February 7, 2003.

Claimants signed the Uniform Submission Agreement: December 5, 2002.

Statement of Answer filed by Respondent on or about: May 12, 2003.

Respondent signed the Uniform Submission Agreement: March 19, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty; fraud; negligent misrepresentation; negligence; violation of Blue Sky laws; and, violations of Section 10(b) of the Exchange Act and Rule 10(b)(5) promulgated thereunder. The causes of action relate to Claimants' investments in shares of Internet Capital Group, Exodus and unspecified securities, including Merrill Lynch proprietary products.

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

### **RELIEF REQUESTED**

Claimants requested judgment against Respondent for compensatory damages in the amount of \$2.5 million, unspecified punitive damages, interest, costs, attorneys' fees, and such other damages the arbitration panel deemed appropriate.

Respondent requested that the arbitration panel enter an award dismissing Claimants' claims in their entirety and granting such other and further relief as the arbitration panel deemed just and proper. Further, Respondent reserved its right, and notified Claimants of its intent to seek, pursuant to Sections 57.105 and 517.211(6) of the Florida Statutes and in a court of competent jurisdiction, reimbursement of attorneys' fees and costs incurred in this matter.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The undersigned arbitrators (the "Panel") determined to assess to the parties the forum fee for the December 30, 2004 Pre-Hearing that was cancelled 10 minutes before commencement. The fees are included as if the Pre-Hearing had gone forward. Further, the Panel determined to split the \$1,200.00 forum fee for the December 30, 2004 Pre-Hearing Conference equally between the Claimants, jointly and severally, and Respondent.

The parties 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, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondent is found liable on the claim of professional negligence and shall pay to Claimants compensatory damages of \$350,000.00 plus compounded interest at the rate of 9% from February 1, 2000 until January 17, 2006 of \$236,985.00.

Respondent is liable and shall pay to Claimants their verified costs of \$71,654.30.

Respondent is liable and shall pay to Claimants the sum of \$500.00 representing reimbursement of the claim filing fee previously paid by Claimants to NASD Dispute Resolution.

Any and all claims for relief not specifically addressed herein, including Claimants' requests for attorneys' fees and punitive damages and Claimants' claims for relief pursuant to the Blue Sky laws, are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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 = \$ 500.00

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent is a member firm and a party.

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$5,000.00</u>
Total Member Fees	= \$8,550.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 22-June 25, 2004, adjournment requested by Respondent= \$1,200.00.

**Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

There were no three-day cancellation fees assessed during these proceedings.

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

There were no injunctive relief fees assessed during these proceedings.

**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:

Three (3) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$1,350.00

Pre-hearing conferences:	December 16, 2003	1 session
	December 22, 2003	1 session
	April 1, 2004	1 session

Four (4) Pre-hearing sessions with the Panel @ \$1,200.00/session = \$4,800.00

Pre-hearing conferences:	September 25, 2003	1 session
	June 3, 2004	1 session
	December 30, 2004	1 session
	August 2, 2005	1 session

Fifteen (15) Hearing sessions @ \$1,200.00/session = \$18,000.00

Hearing Dates:	June 6, 2005	2 sessions
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October 4, 2005	2 sessions
October 5, 2005	2 sessions
October 6, 2005	3 sessions
October 7, 2005	3 sessions
October 8, 2005	1 session
January 17, 2006	2 sessions

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Total Forum Fees	= \$24,150.00
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The Panel waived the forum fees for the June 6, 2005 hearing (\$2,400.00) and the August 2, 2005 pre-hearing conference (\$1,200.00).

The Panel has assessed \$10,275.00 of the forum fees to Claimants, jointly and severally.

The Panel has assessed \$10,275.00 of the forum fees to Respondent.

#### **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.

There were no administrative costs incurred during these proceedings.

#### **Fee Summary**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$ 10,275.00
Total Fees	= \$ 10,775.00
<u>Less payments</u>	= \$ 2,300.00
Balance Due NASD Dispute Resolution	= \$ 8,475.00

Respondent is solely liable for:

Member Fees	= \$ 8,550.00
Adjournment Fee	= \$ 1,200.00
<u>Forum Fees</u>	= \$ 10,275.00
Total Fees	= \$ 20,025.00
<u>Less payments</u>	= \$ 10,350.00
Balance Due NASD Dispute Resolution	= \$ 9,675.00

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

#### **ARBITRATION PANEL**

James H. Frank, Esq.	-	Public Arbitrator, Presiding Chairperson
Paul E. Merritt	-	Public Arbitrator
Ben E. Fisher	-	Non-Public Arbitrator

### Concurring Arbitrators' Signatures

           /S/

James H. Frank, Esq.

Public Arbitrator, Presiding Chairperson

January 21, 2006

Signature Date

/S/

Paul E. Merritt

Public Arbitrator

January 23, 2006

Signature Date

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Ben E. Fisher

### Non-Public Arbitrator

January 23, 2006

Signature Date

January 24, 2006

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

Arbitration No. 03-00936

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Concurring Arbitrators' Signatures



James H. Frank, Esq.

Public Arbitrator, Presiding Chairperson

JAN 21 2006

Signature Date

Paul E. Merritt

Public Arbitrator

Signature Date

Ben E. Fisher

Non-Public Arbitrator

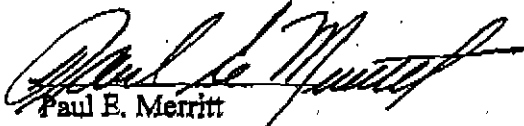
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Public Arbitrator, Presiding Chairperson

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Signature Date

  
Paul E. Merritt  
Public Arbitrator

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Signature Date

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Ben E. Fisher  
Non-Public Arbitrator

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Ben E. Fisher  
Non-Public Arbitrator

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