

---

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

---

In the Matter of the Arbitration Between:

Names of the Claimants

Elwood E. and Fern O. Rowe JTWROS

Case Number: 03-00986

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc. and  
Perry Switzer

Hearing Site: Tampa, Florida

---

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

**REPRESENTATION OF PARTIES**

For Elwood E. and Fern O. Rowe JTWROS, hereinafter collectively referred to as "Claimants":  
Virginia Zock Houser, Esq. and Gregory M. Kehoe, Esq., James, Hoyer, Newcomer &  
Smiljanich, P.A., Tampa, Florida.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill") and Perry Switzer ("Switzer"),  
hereinafter collectively referred to as "Respondents": Francis M. Curran, Esq., Akerman  
Senterfitt, Tampa, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: February 10, 2003.

Claimants signed the Uniform Submission Agreement: February 1, 2003.

Statement of Answer filed by Respondents on or about: April 14, 2003.

Respondent Switzer signed the Uniform Submission Agreement: March 24, 2003.

Respondent Merrill did not file an executed Uniform Submission Agreement.

**CASE SUMMARY**

Claimants asserted the following causes of action: violation of the Florida Securities and  
Investor Protection Act, §517.301 of the Florida Statutes; breach of fiduciary duty; fraudulent  
inducement; negligence; negligent supervision; and, intentional infliction of emotional distress.  
The causes of action relate to the purchase and sale of a Conseco, Inc. Note, an HRPT Properties  
Note, Duke Energy Corp. Senior Notes and shares of the following: Duke Weeks Realty Corp.;  
Kimco Realty Corp.; Putnam Small Cap Fund; Eaton Vance Tax Managed Growth Fund;  
Fidelity Advisor Equity Growth Fund; Putnam Growth Opportunities Fund; and, Alliance  
Premier Growth Fund in Claimants' account.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the  
Statement of Claim and asserted various defenses.

### **RELIEF REQUESTED**

Claimants requested total damages in the amount of \$100,000.00 which included the following: compensatory damages; damages to compensate Claimants for emotional distress and suffering; punitive damages; costs and attorneys' fees to be determined by a court of competent jurisdiction under the provisions of §517.211 of the Florida Statutes; pre- and post-judgment interest; and, any other relief deemed just and proper.

Respondents requested that all claims against them be dismissed and that they be awarded any other relief deemed just and proper.

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

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

During the evidentiary hearing, the Panel directed the parties to file post-hearing submissions on or before April 13, 2004.

The parties have agreed that the Award in this matter may be executed in counterpart copies.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

*Respondents are jointly and severally liable on the claims of negligence and negligent supervision and shall pay to Claimants compensatory damages in the amount of \$28,960.00, pre-judgment interest specifically excluded.*

Any and all claims for relief not specifically addressed herein, including Claimants' requests for punitive damages, attorneys' fees under §517.211 of the Florida Statutes, damages pursuant to the Florida Securities and Investor Protection Act, §517.301 of the Florida Statutes, and damages for emotional distress, are denied.

### **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	= \$ 225.00
--------------------------	-------------

### **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 event giving rise to the dispute. In this matter, the member firm Merrill is a party.

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,700.00

### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No requests for adjournments were filed in this matter.

### **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.

No injunctive relief fees were incurred in this matter.

### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A 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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: March 9, 2004 1 session	
One (1) Pre-hearing session with the Panel @ \$750.00	= \$ 750.00
Pre-hearing conference: September 30, 2003 1 session	
Five (5) Hearing sessions @ \$750.00	= \$ 3,750.00
Hearing Dates: March 16, 2004 2 sessions	
March 17, 2004 2 sessions	
March 18, 2004 1 session	
Total Forum Fees	= \$ 4,950.00

The Panel has assessed \$2,475.00 of the forum fees jointly and severally to Claimants.  
The Panel has assessed \$2,475.00 of the forum fees jointly and severally to Respondents.

### **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 are not limited to: additional copies of arbitrator awards; copies of audio transcripts; retrieval of documents from archives; interpreters; and, security.

No administrative costs were incurred in this matter.

**Fee Summary**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 225.00
Forum Fees	= \$ 2,475.00
Total Fees	= \$ 2,700.00
<u>Less payments</u>	<u>= \$ 975.00</u>
Balance Due NASD Dispute Resolution	= \$ 1,725.00

Respondent Merrill is solely liable for:

Member Fees	= \$ 3,550.00
Total Fees	= \$ 3,550.00
<u>Less payments</u>	<u>= \$ 3,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents are jointly and severally liable for:

Forum Fees	= \$ 2,475.00
Total Fees	= \$ 2,475.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 2,475.00

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

**ARBITRATION PANEL**

Jacquelyn M. Shannon, Esq.	-	Public Arbitrator, Presiding Chairperson
James Barry Wright	-	Public Arbitrator
Augusto V. Perrotta	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/

04/28/04

---

Jacquelyn M. Shannon, Esq.  
Public Arbitrator, Presiding Chairperson

---

Signature Date

/s/

04/26/04

---

James Barry Wright  
Public Arbitrator

---

Signature Date

/s/

04/30/04

---

Augusto V. Perrotta  
Non-Public Arbitrator

---

Signature Date

04/30/04

---

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

### Converting Arbitrators' Signatures

**Jacquelyn M. Shannon, Esq.**  
**Public Artistic, Presiding Chairperson**

**Signature Date**

### Public Arbitrator

**Signature Date**

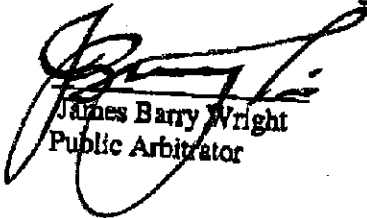
### Non-Public Arbitrators

**Signature Date**

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

Concurring Arbitrators' Signatures

Jacquelyn M. Shannon, Esq.  
Public Arbitrator, Presiding Chairperson

  
James Barry Wright  
Public Arbitrator

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

4/26/04  
Signature Date

Augusto V. Perrotta  
Non-Public Arbitrator

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

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

Concurring Arbitrators' Signatures

Jacquelyn M. Shannon, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

James Barry Wright  
Public Arbitrator

Signature Date

Augusto V. Perrotta  
Augusto V. Perrotta  
Non-Public Arbitrator

4-30-04  
Signature Date

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