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

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In the Matter of the Arbitration Between:

Names of the Claimants

Jorge Karpati and Ana Maria Davies

Case Number: 03-01274

Name of the Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc. a/k/a  
Merrill Lynch Montevideo, S. A.

Hearing Site: Atlanta, Georgia

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Nature of the Dispute: Customer v. Member Firm.

**REPRESENTATION OF PARTIES**

For Jorge Karpati ("Karpati") and Ana Maria Davies ("Davies"), hereinafter collectively referred to as "Claimants": Kevin M. Kinne, Esq., Cain Hibbard Myers & Cook, P.C., Pittsfield, Massachusetts and Daniel R. Solin, Esq., Law Office of Daniel R. Solin, New York, New York.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. a/k/a Merrill Lynch Montevideo, S. A. ("MLPFS"), hereinafter referred to as "Respondent": Maria D. Melendez, Esq., Sidley Austin Brown & Wood, L.L.P., New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: February 21, 2003.

Claimants signed the Uniform Submission Agreement: February 14, 2003.

Statement of Answer filed by Respondent on or about: June 6, 2003.

Amended Answer filed by Respondent on or about: June 9, 2003.

Respondent signed the Uniform Submission Agreement: April 14, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: unsuitable and inappropriate investments; misrepresentation; breach of fiduciary duty; violation of NASD Rule 2210(d)(1)(B); fraud; failure to supervise; violation of federal securities laws, including but not limited to Section 10 and 20 of the Securities and Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder and Section 15 of the Securities Act of 1933; violation of Sections 25401, 2550, 25501, 25504 and Sections 1, 2, 18, and 27 of Article III of the NASD Rules of Fair Practice; and violation of NYSE rule 405. The causes of action relate to the purchase of various unspecified technology and internet stocks in Claimants' account.

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 compensatory damages of up to \$325,960.32, plus interest at the legal rate from October 1999; punitive damages; reasonable attorneys' fees; costs; and, expenses.

Respondent requested dismissal of the Statement of Claim in its entirety, with prejudice; costs and disbursements; and, any and all other relief the Panel deemed just and proper.

**OTHER ISSUES CONSIDERED AND DECIDED**

During the evidentiary hearing, Claimants made an oral motion to amend the Statement of Claim to delete allegations that Respondent's restricted documents were given to Claimants by Respondent. The Panel granted said motion.

During the evidentiary hearing, Claimants made an oral motion to increase the compensatory damage amount requested from \$139,476.77 to an amount up to \$325,960.32. The Panel granted said motion.

At the conclusion of Claimants' case, Respondent made a motion to dismiss and/or for summary judgment as to all claims. The Panel denied the motion, with the exception that the Panel granted the motion to dismiss count 4 (misrepresentation and violation of NASD Rule 2210(d)(1)(B)) and count 7 (violation of federal securities laws, including but not limited to Section 10 and 20 of the Securities and Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder, Section 15 of the Securities Act of 1933, Sections 25401, 2550, 25501, 25504 and Sections 1, 2, 18, and 27 of Article III of NASD Rules of Fair Practice and NYSE rule 405) of the claim.

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 and 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:

Respondent is liable on the claims of unsuitable and inappropriate investments and failure to supervise. As such, Respondent is liable and shall pay to Claimants compensatory damages of \$250,836.00 plus pre-judgment interest at the rate of 6% per annum of \$15,957.22, accruing from February 21, 2003 through March 15, 2004. Post-judgment interest shall accrue in accordance with Rule 10330(h) of the NASD Code of Arbitration Procedure (the "Code").

Respondent is liable and shall pay to Claimants punitive damages of \$250,000.00.

Authority to award punitive damages

Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52(1995) – under New York law and the Federal Arbitration Act, arbitrators are permitted to award punitive damages.

Basis for Award of punitive damages

Count 1 – Unsuitable and inappropriate investments

Recommendations and/or failure to advise of risks by sales assistant in Respondent's branch office handling account consisting of elderly Claimants' retirement funds. Invested in non-diversified, high-risk portfolio of technology and telecommunication stocks, leveraged by margin and inconsistent with Claimants' stated conservative investment objectives.

Count 6 – Failure to supervise

No review by Respondent's branch office management of sales assistant's handling of Claimants' account, even though the account suffered continued steep losses and branch internal reports repeatedly flagged purchases inconsistent with Claimants' stated investment objectives.

Respondent is liable and shall pay to Claimants their expert witness fees of \$9,535.00.

Any and all claims for relief not specifically addressed herein, 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 = \$ 300.00

**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. Accordingly, Respondent MLPFS is a member firm and a party.

Member surcharge = \$1,700.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$2,750.00

Total Member Fees = \$5,200.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No adjournment fees were incurred 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:

Three (3) Pre-hearing sessions with the Panel @ \$1,125.00 per session = \$ 3,375.00

Pre-hearing conferences:      October 20, 2003      1 session  
   January 9, 2004      1 session  
   February 17, 2004      1 session

Twelve (12) Hearing sessions @ \$1,125.00 per session = \$13,500.00

Hearing Dates:      January 19, 2004      2 sessions  
                                 January 20, 2004      2 sessions  
                                 January 21, 2004      2 sessions  
                                 January 22, 2004      2 sessions  
                                 February 28, 2004      2 sessions  
                                 February 29, 2004      2 sessions

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Total Forum Fees = \$16,875.00

The Panel has assessed the total forum fees of \$16,875.00 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.

No administrative costs were incurred in this matter.

#### **Fee Summary**

Claimants are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$	300.00
<u>Total Fees</u>	= \$	300.00
<u>Less payments</u>	= \$	300.00
<u>Balance Due NASD Dispute Resolution</u>	= \$	0.00

Respondent is solely liable for:

<u>Member Fees</u>	= \$	5,200.00
<u>Forum Fees</u>	=	\$16,875.00
<u>Total Fees</u>	=	\$22,075.00

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Less payments = \$ 4,450.00

Balance Due NASD Dispute Resolution = \$17,625.00

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

ARBITRATION PANEL

Burton L. Ansell, Esq. - Public Arbitrator, Presiding Chairperson

Irving Wolinsky, DDS - Public Arbitrator

John F. Kavanewsky - Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ 03/17/04  
Burton L. Ansell, Esq. Signature Date  
Public Arbitrator, Presiding Chairperson

/s/ 03/17/04  
Irving Wolinsky, DDS Signature Date  
Public Arbitrator

/s/ 03/17/04  
John F. Kavanewsky Signature Date  
Non-Public Arbitrator

03/18/04  
Date of Service (For NASD Dispute Resolution office use only)

**NASD Dispute Resolution**  
**Arbitration No. 03-01274**  
**Award Page 5 of 5**

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**ARBITRATION PANEL**

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<b>Irving Wolinsky, DDS</b>	-	<b>Public Arbitrator</b>
<b>John F. Kavanewsky</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**

Burton L. Ansell  
Burton L. Ansell, Esq.  
Public Arbitrator, Presiding Chairperson

03/17/04  
Signature Date

**Irving Wolinsky, DDS**  
**Public Arbitrator**

**Signature Date**

**John F. Kavanewsky**  
Non-Public Arbitrator

**Signature Date**

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

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<i>Irving Wolinsky, DDS</i>	-	<i>Public Arbitrator</i>
<i>John F. Kavenewsky</i>	-	<i>Non-Public Arbitrator</i>

**RECEIVED**

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**FL ARBITRATION**

**Concurring Arbitrators' Signatures**

Burton L. Ansell, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

*Irving Wolinsky, DDS*  
Public Arbitrator

3-17-04  
Signature Date

John F. Kavanewsky  
Non-Public Arbitrator

Signature Date

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NASD Dispute Resolution  
Arbitration No. 03-01274  
Award Page 3 of 3

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Irving Wolinsky, DDS	-	Public Arbitrator
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**Concurring Arbitrators' Signatures**

Burton L. Ansell, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

Irving Wolinsky, DDS  
Public Arbitrator

Signature Date

John F. Kavanewsky  
Non-Public Arbitrator

March 17, 2009  
Signature Date

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