

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

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In the Matter of the Arbitration Between:

Janet Newman, the Newman Family Trust, the Newman Testamentary Trust, and Culver Shoe Corporation, Claimants v. Merrill Lynch Pierce Fenner & Smith Inc. and Susan Wingard, Respondents

Case Number: 03-01954

Hearing Site: Los Angeles, California

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Nature of the Dispute: Customers v. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimants:

Gregory J. Sherwin, Esq.  
Fields, Fehn & Sherwin  
Los Angeles, California

Howard R. Gaines, Esq.  
Law Offices of Howard R. Gaines  
Phoenix, Arizona

For Respondents:

Thomas L. Taylor, III, Esq.  
Leemore L. Libesman, Esq.  
Morgan, Lewis & Bockius LLP  
Los Angeles, California

**CASE INFORMATION**

Statement of Claim filed: March 11, 2003

Claimants' Joint Uniform Submission Agreement filed: March 11, 2003

Joint Statement of Answer filed by Respondents: June 5, 2003

Respondent Merrill Lynch Pierce Fenner & Smith Inc.'s Uniform Submission Agreement signed:  
May 5, 2003

Respondent Susan Wingard's Uniform Submission Agreement signed: June 2, 2003

### **CASE SUMMARY**

Claimants alleged breach of fiduciary duty, unsuitability, and misrepresentation, involving unspecified securities.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim.

### **RELIEF REQUESTED**

Claimants requested \$700,000.00 in compensatory damages, 5% rate of return on Claimants' investment from the beginning of the unsuitable behavior until the payment of any award rendered, and costs, including attorney's fees.

Respondents requested dismissal of the Claimants' Statement of Claim in its entirety. Respondent Susan Wingard requested expungement of her CRD record to delete all references to this arbitration proceeding.

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

On April 1, 2003, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On July 7, 2003, Respondents' counsel signed a Waiver Agreement on their behalf expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On August 2, 2004, Claimants dismissed their claims against Respondent Susan Wingard.

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

- 1) Claimants' claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 375.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch Pierce Fenner & Smith Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 4,000.00</u>
<b>Total Member Fees</b>	<b>= \$ 7,000.00</b>

#### **Adjournment Fees**

The following adjournment fees are assessed:

March 29 – April 1, 2004 hearing adjournment requested by Respondents	= \$ 1,200.00
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The Panel assessed \$1,200.00 of the adjournment fee jointly and severally to Respondents.

**Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

1 Pre-hearing conference session with a single arbitrator @ \$ 450.00/session	= \$ 450.00
Pre-hearing conference: July 20, 2004 1 session	
1 Pre-hearing conference session with the Panel @ \$1,200.00/session	= \$ 1,200.00
Pre-hearing conference: October 6, 2003 1 session	
7 Hearing sessions @ \$1,200.00/session	= \$ 8,400.00
Hearings: August 24, 2004 2 sessions	
August 25, 2004 2 sessions	
August 26, 2004 2 sessions	
August 27, 2004 1 session	

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<b>Total Forum Fees</b>	<b>= \$10,050.00</b>
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1. The Panel assessed \$ 5,025.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$ 5,025.00 of the forum fees to Respondent Merrill Lynch Pierce Fenner & Smith Inc.

**Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 5,025.00
Total Fees	= \$ 5,400.00
Less payments	= \$( 1,575.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,825.00</b>

2. Respondent Merrill Lynch Pierce Fenner & Smith Inc. is charged with the following fees and costs:

Member Fees	= \$ 7,000.00
Forum Fees	= \$ 5,025.00
Total Fees	= \$12,025.00
Less payments	= \$( 7,000.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 5,025.00</b>

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3. Respondents are charged jointly and severally with the following fees and costs:


Adjournment Fee	= \$ 1,200.00
<u>Less payments</u>	<u>= \$( 0.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 1,200.00</b>

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

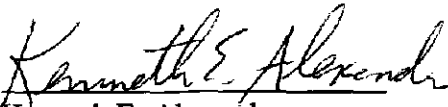
**ARBITRATION PANEL**

Joseph Winter, Esq.	-	Public Arbitrator, Presiding Chair
Kenneth E. Alexander	-	Public Arbitrator
John B. Wells	-	Non-Public Arbitrator


**Concurring Arbitrators' Signatures**

  
Joseph Winter, Esq.  
Chair, Public Arbitrator

Aug. 27, 2004  
Signature Date

  
Kenneth E. Alexander  
Public Arbitrator

Aug. 27, 2004  
Signature Date

  
John B. Wells  
Non-Public Arbitrator

Aug 27, 2004  
Signature Date

8/30/04  
Date of Service