

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

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In the Matter of the Arbitration Between:

Donald W. Sessamen and Alice C. Sessamen, Claimants v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Mark R. Easterday, Respondents

Case Number: 03-04055

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimants:

Mitchell S. Ostwald, Esq.  
Law Offices of Mitchell S. Ostwald  
Sacramento, California

For Respondents:

Paul J. Schumacher, Esq.  
Bingham McCutchen LLP  
Los Angeles, California

**CASE INFORMATION**

Statement of Claim filed: June 3, 2003

Claimant's Arbitration Brief filed: July 20, 2004

Claimants' Uniform Submission Agreement signed: May 29, 2003

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Mark R. Easterday: August 14, 2003

Respondents' Arbitration Brief filed: July 20, 2004

Respondent Merrill Lynch's Uniform Submission Agreement signed: July 16, 2003

Respondent Mark R. Easterday's Uniform Submission Agreement signed: August 6, 2003

**CASE SUMMARY**

Claimants alleged that the above-referenced dispute involves investments in NextLink stock and also alleged the following claims: 1) Breach of Fiduciary Duty; 2) Fraud (including California

Civil Code Sections 1709, 1710 and 1711; 3) Constructive Fraud (California Civil Code Section 1573); 4) Failure to Supervise; 5) Elder Abuse; 6) Unfair or Deceptive Practices Against Senior Citizens; and 7) Violation of Federal and State Securities Laws; NASD Rules of Fair Practice and NYSE Rules.

Respondents denied Claimants' allegations of wrongdoing and denied any liability to Claimants. Respondents also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested:

1. Compensatory damages in an amount according to proof, but not less than \$2,473,000.00;
2. Disgorgement and restitution of all earnings, profits, compensation and benefits received by the Respondents as a result of their unlawful acts and practices in an amount according to proof;
3. Lost opportunity cost of the gain from at least \$3,608,000.00 had it been suitably invested;
4. Attorney's fees and costs;
5. Pre- and post judgment interest at the legal rate;
6. Punitive damages in an amount according to proof; and
7. Such other and further relief as the Panel deems just and proper.

Respondents requested dismissal of Claimants' claims, and that the Panel recommend an expungement of all references to this action from the NASD Central Registration Depository records of Respondents.

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

On June 27, 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. Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

During the hearing, the Panel considered the positions of the parties relative to Respondents' Motion to Strike Exhibit A to the Statement of Claim and Motion in Limine to exclude certain documents. The Panel denied the Motions.

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) All claims by Claimants, including the claims for punitive damages, are dismissed.
- 2) The Panel found that during the hearing which lasted four and one-half days and involved ten sessions, it did not hear any evidence whatsoever that supported the Claimants' allegations that Mr. Easterday violated a fiduciary duty to the Claimants, made any unsuitable recommendations, committed fraud or elder abuse, engaged in any unfair or deceptive practices or violated any securities laws or SRO rules. On the contrary, it was the Panel's opinion that Mr. Easterday conducted himself in a professional and exemplary manner in his dealings with the Claimants and that his conduct was beyond reproach. Indeed, but for one Panel member who was opposed in principle to assessing forum fees against Claimants in general, the Panel would have assessed the entire forum fees against Claimants because Claimants' case was completely lacking in merit. Accordingly, the Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Mark R. Easterday's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Mark R. Easterday must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 3) Each party shall bear its own costs, including attorney's fees.
- 4) All other relief not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$500.00
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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, Merrill Lynch is a party and the following fees are assessed:

Member Surcharge	= \$2,800.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$5,000.00
Total Member Fees	= \$8,550.00

#### **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:

(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$2,400.00

Pre-hearing conferences:	October 24, 2003	1 session
	February 12, 2004	1 session

(10) Hearing sessions @ \$1,200.00/session = \$12,000.00

Hearing:	July 27, 2004	2 sessions
	July 28, 2004	2 sessions
	July 29, 2004	2 sessions
	July 30, 2004	3 sessions
	July 31, 2004	1 session

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Total Forum Fees	= \$14,400.00
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The Panel assessed \$7,200.00 in forum fees jointly and severally to Claimants.

The Panel assessed \$7,200.00 in forum fees jointly and severally to Respondents.

#### **Fee Summary**

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

Initial Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$ 7,200.00
Total Fees	= \$ 7,700.00
<u>Less Payments</u>	= \$(1,700.00)
Balance Due NASD-DR	= \$ 6,000.00

2. Respondent Merrill Lynch is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Less Payments</u>	= \$(8,550.00)
Balance Due NASD-DR	= \$ 0.00

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

Forum Fees	= \$ 7,200.00
Less Payments	= \$( 0.00)
Balance Due NASD-DR	= \$ 7,200.00

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

**ARBITRATION PANEL**

Dean J. Dietrich, Esq.	Public Arbitrator, Presiding Chair
David J. Anderson	Public Arbitrator
Thomas A. Thornhill, Jr.	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Dean J. Dietrich, Esq.  
Chair, Public Arbitrator

8/5/04  
Signature Date

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David J. Anderson  
Public Arbitrator

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

\_\_\_\_\_  
Thomas A. Thornhill, Jr.  
Non-Public Arbitrator

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

8/10/04  
Date of Service

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

Forum Fees	= \$ 7,200.00
Less Payments	= \$( 0.00)
Balance Due NASD-DR	= \$ 7,200.00

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

**ARBITRATION PANEL**

Dean J. Dietrich, Esq.	-	Public Arbitrator, Presiding Chair
David J. Anderson	-	Public Arbitrator
Thomas A. Thornhill, Jr.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Dean J. Dietrich, Esq.  
Chair, Public Arbitrator

Signature Date

  
David J. Anderson  
Public Arbitrator

August 6, 2004  
Signature Date

Thomas A. Thornhill, Jr.  
Non-Public Arbitrator

Signature Date

8/10/04  
Date of Service

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

Forum Fees	= \$ 7,200.00
Less Payments	= \$( 0.00)
Balance Due NASD-DR	= \$ 7,200.00

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

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Dean J. Dietrich, Esq.	-	Public Arbitrator, Presiding Chair
David J. Anderson	-	Public Arbitrator
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David J. Anderson  
Public Arbitrator

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Thomas A. Thornhill, Jr.  
Non-Public Arbitrator

  
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Date of Service