

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

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In the Matter of the Arbitration Between:

Name of the Claimant  
Derral D. Henderson

Case Number: 03-04357

Name of the Respondents  
Merrill Lynch Pierce Fenner & Smith, Inc.  
And Barry N. Arnwine

Hearing Site: Albuquerque, New Mexico

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**NATURE OF DISPUTE**

Customer vs. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Kathleen Toolan, Esq. and Wm. Jemison Mims, Jr., Esq. of the law firm Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A. located in Pensacola, Florida represented Claimant, Derral D. Henderson, hereinafter referred to as "Claimant."

Thomas A. Farnen, Esq. of the law firm Sutherland Asbill & Brennan, LLP, located in Atlanta, Georgia, represented the Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Barry N. Arnwine ("Arnwine"), hereinafter collectively referred to as "Respondents."

**CASE INFORMATION**

Statement of Claim filed on or about June 12, 2003. Claimant, Darryl D. Henderson, signed the Uniform Submission Agreement on January 17, 2003.

Statement of Answer jointly filed by Respondents, Merrill Lynch Pierce Fenner & Smith, Inc. and Barry N. Arnwine, on or about September 2, 2003. Respondent, Merrill Lynch, signed the Uniform Submission Agreement on July 21, 2003. Respondent, Barry N. Arnwine, signed the Uniform Submission Agreement on or about August 19, 2003.

On September 2, 2003, Respondents also filed a Motion to Strike and Motion to Dismiss, or, in the Alternative, a Motion to Compel a More Definite Statement. Claimant filed a Response on October 2, 2003, and Respondents filed a Reply on January 29, 2004.

Claimant filed an Amended Statement of Claim on March 12, 2003. Respondents filed a Response on March 31, 2004.

Respondents then filed a Second Motion to Strike and Motion to Dismiss on March 22, 2004. Claimant's Response was filed on April 13, 2004.

Claimant filed a Second Amended Statement of Claim on April 30, 2004. Respondents filed a Response on May 14, 2004.

### CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty, fraud, misrepresentations and violations of state and federal securities laws. The causes of action relate to stocks and options in AOL Time Warner. Claimant asserted that these were unsuitable to his investment needs and objectives.

Unless specifically admitted in its Answer, Respondents Merrill Lynch and Arnwine denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The Statement of Claim fails to state a cause of action upon which relief may be granted.
2. The Statement of Claim is barred, in whole or in part, by the equitable doctrines of laches, unclean hands, or estoppel.
3. All activity in the accounts was suitable for and consistent with Claimant's stated investment objectives.
4. Losses, if any, were sustained as a result of Claimant's own comparative negligence and/or contributory negligence.
5. Claimant, by his actions and inactions, waived the right to pursue any claim.
6. Claimant authorized, directed and ratified all of the transactions in his accounts.
7. Claimant is barred from recovery because he knowingly assumed the risks of his investments.
8. The Statement of Claim is barred, in whole or in part, based upon Claimant's failure to mitigate damages.
9. At all times mentioned in the Statement of Claim, Merrill Lynch maintained an adequate and reasonable system of supervision and control over its employees, and Merrill Lynch at all times acted in good faith.
10. Claimant failed to use the requisite due diligence in monitoring, trading, managing and handling Claimant's own accounts.
11. To the extent that Claimant seeks to assert claims for alleged violations of NASD and NYSE rule, no such private right of action exists.
12. Claimant's claims, if any, are barred, in whole or in part, by the statute of limitations.
13. Merrill Lynch is not subject to controlling person liability, and the "good faith" defense applies to negate such a claim.

**RELIEF REQUESTED**

Claimant requested:

Compensatory Damages	\$119,781.93
Punitive Damages	unspecified
Interest	unspecified
Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	unspecified

Respondents, Merrill Lynch and Arnwine requested that Claimant's Statement of Claim be dismissed in its entirety and order all costs of this arbitration be borne by the Claimant.

**OTHER ISSUES CONSIDERED AND DECIDED**

An Order dated February 27, 2004 regarding Respondents' Motion to Strike and Motion to Dismiss, or in the Alternative, Motion to Compel a More Definite Statement, contained the following ruling:

1. Respondents' Motion to Strike is granted with respect to all matters involving the Dinallo Affidavit and the Merrill Lynch settlement with the New York Attorney General, except for material that is directly pertinent to specific allegations of wrongdoing to Claimant by Respondents.
2. Respondents' Motion for a More Definite Statement is granted. Claimant is also allowed to file an Amended Statement of Claim and shall not allege violations of law in the abstract as in Count V of the Statement of Claim.
3. The Motion to Dismiss is reserved for decision after Claimant has filed his Amended Statement of Claim.

In an Order dated April 15, 2004, the Chair made the following ruling on Respondents' Second Motion to Strike and Motion to Dismiss:

1. The Motion to Dismiss is denied.
2. The Motion to Strike is interpreted and treated preliminary as a request for a more definite statement. Claimant is ordered to file a Second Amended Statement of Claim with respect to Counts II and III of the Amended Statement of Claim.

Lastly, at the conclusion of Claimant's case, Respondents Merrill Lynch and Arnwine orally moved for a directed verdict. Based on testimony and evidence presented, the Panel granted the Motion for directed verdict on all issues in favor of the Respondents.

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Any and all claims asserted by Claimant, Derral D. Henderson, are denied.
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Barry N. Arnwine'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 Barry N. Arnwine must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. Parties shall bear their own costs, including attorneys' fees, except as specified herein.
4. Any and all relief not specifically addressed herein, including punitive damages, is 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
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#### **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, Merrill Lynch Pierce Fenner & Smith, Inc. is a party and is assessed the following fees:

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

### **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 a single arbitrator @ \$450.00	= \$1,350.00
Pre-hearing conferences: February 27, 2004 1 session	
April 15, 2004 1 session	
April 16, 2004 1 session	
One (1) Pre-hearing session with Panel @ \$1,125.00	= \$1,125.00
Pre-hearing conference: February 3, 2004 1 session	
Two (2) Hearing sessions @ \$1,125.00	= \$2,250.00
Hearing Dates: June 29, 2004 2 sessions	
Total Forum Fees	= \$4,725.00

The Panel has assessed forum fees in the amount of \$4,725.00 solely to Claimant, Derral D. Henderson.

### **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.

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., requested one (1) copy of the audio transcript for these proceedings. = \$ 15.00

### **Fee Summary**

1. Claimant, Derral D. Henderson, is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$4,725.00
Total Fees	= \$5,025.00
Less payments	= \$2,550.00
Balance Due NASD Dispute Resolution	= \$2,475.00

2. Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$5,200.00
Administrative Costs	= \$ 15.00
Total Fees	= \$5,215.00
Less payments	= \$5,215.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

**ARBITRATION PANEL**

Barry H. Barnett, Esq.	-	Public Arbitrator, Presiding Chairperson
Thomas Smidt, II, Esq.	-	Public Arbitrator
William J. Kenna, Jr.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Barry H. Barnett, Esq.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
7/13/04  
Signature Date

\_\_\_\_\_  
Thomas Smidt, II, Esq.  
Public Arbitrator

\_\_\_\_\_  
7/13/04  
Signature Date

\_\_\_\_\_  
William J. Kenna, Jr.  
Non-Public Arbitrator

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


\_\_\_\_\_  
7/14/04  
Date of Service (For NASD Dispute Resolution office use only)

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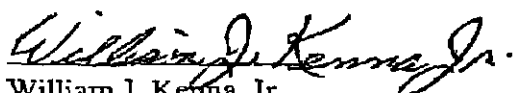
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