

**STIPULATED AWARD  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Names of Claimants

James B. Neathery and Marilyn A. Neathery

and

Case Number: 03-04760  
Hearing Site: Houston, Texas

Names of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
and David W. Nethery

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**NATURE OF DISPUTE**

Customers v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

James B. Neathery and Marilyn A. Neathery ("**Claimants**") were represented by Brian Turner, Esq., Heard, Robins, Cloud, Lubel & Greenwood, Austin, Texas.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("**Merrill Lynch**") and David W. Nethery ("**Nethery**"), hereinafter collectively referred to as "Respondents," were represented by Linda Broocks, Esq., Ogden, Gibson, White, Broocks and Longoria, LLP, Houston, Texas.

**CASE INFORMATION**

The Statement of Claim was filed on or about June 30, 2003. The Uniform Submission Agreement of Claimants, James B. Neathery and Marilyn A. Neathery, was signed on or about June 24, 2003.

The Joint Statement of Answer was filed by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nethery, on or about September 16, 2003. The Uniform Submission Agreements of Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nethery, were signed on or about August 7, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of contract, negligence, failure to supervise, breach of fiduciary duty, misrepresentations, omissions and suitability. The causes of action related to the purchase of various stocks including Cisco Systems, Inc.

and Internet Capital Group.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nethery, denied the allegations made in the Statement of Claim and asserted defenses including the following: waiver; estoppel, failure to state a claim on which relief can be granted; good faith and commercial reasonableness; assumption of the risk; compliance with all applicable exchange and SRO rules; and failure to mitigate damages.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of:

Actual/Compensatory Damages	\$87,513.00
Punitive/Exemplary Damages	Unspecified
Treble Damages	Unspecified
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. Respondent Nethery requested expungement of all reference to this matter from his CRD.

### **OTHER ISSUES CONSIDERED & DECIDED**

Claimants dismissed with prejudice all claims concerning Merrill Lynch's research, and all claims against David Nethery, and agreed that Nethery's NASD CRD records should be expunged of all references to their claims and to this proceeding. Claimants settled all remaining claims against Merrill Lynch and Claimants and Respondent Merrill Lynch executed a Release.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

After considering the parties' submissions and representations, but without making any findings of fact or conclusions of law, the undersigned arbitrators order as follows:

- 1.) Claimants' claims against Respondents, Merrill Lynch, Pierce, Fenner &

Smith, Inc. and David W. Nethery, are dismissed with prejudice;

- 2.) The panel recommends the expungement, of all references to the above captioned arbitration from Respondent, David W. Nethery's, registration record maintained by NASD Central Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent, David W. Nethery, must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
- 3.) No sanctions shall be assessed against any party;
- 4.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 5.) Any and all relief not specifically addressed herein, including attorneys' fees and costs is denied and all claims are dismissed with prejudice.

### **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 events giving rise to the dispute. In this matter, the member firm is Merrill Lynch, Pierce, Fenner & Smith, Inc.

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

#### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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 Panel x \$750.00	= \$ 750.00
Pre-hearing conference: February 2, 2004 1 session	
Total Forum Fees	= \$ 750.00

The Arbitration Panel has assessed \$375.00 of the forum fees jointly and severally to James B. Neathery and Marilyn A. Neathery.

The Arbitration Panel has assessed \$375.00 of the forum fees jointly and severally to Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Neathery,

Pursuant to Rule 10332(g) of NASD Code of Arbitration Procedures: *Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first hearing session, including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 based on hearing sessions held and scheduled within eight business days after the Association receives notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such forum fees and costs shall be borne. As NASD Dispute Resolution received notice of the settlement within eight business days of the first scheduled hearing, \$375 of the Claimant's remaining hearing session deposit is retained.*

#### Fee Summary

Claimants, James B. Neathery and Marilyn A. Neathery, are jointly and severally liable for:

Initial Filing Fee	= \$ 225.00
Forum Fees	= \$ 375.00
Retention of Hearing Session Deposit	= \$ 375.00
Total Fees	= \$ 975.00
Less payments	= \$ 975.00
Balance Due NASD Dispute Resolution	= \$ .00

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

Member Fees	= \$ 3,350.00
Total Fees	= \$ 3,350.00
Less payments	= \$ 3,350.00
Balance Due NASD Dispute Resolution	= \$ .00

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nethery, are jointly and severally liable for:

Forum Fees	= \$	375.00
Total Fees	= \$	375.00
Less payments	= \$	.00
Balance Due NASD Dispute Resolution	= \$	375.00

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

**ARBITRATION PANEL**

Walton L. Huff - Public Arbitrator, Presiding Chair  
Arno C. Schwethelm - Public Arbitrator  
Dale A. Hearn - Non-Public Arbitrator

Concurring Arbitrators:

Walton L. Huff  
Walton L. Huff  
Public Arbitrator, Presiding Chair

December 22, 2004  
Signature Date

Arno C. Schwethelm  
Arno C. Schwethelm  
Public Arbitrator

December 28, 2004  
Signature Date

Dale A. Hearn  
Dale A. Hearn  
Non-Public Arbitrator

December 21, 2004  
Signature Date

December 28, 2004  
Date of Service (For NASD office use only)

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nethery, are jointly and severally liable for:

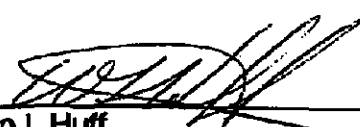
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Concurring Arbitrators:

  
Walton L. Huff  
Public Arbitrator, Presiding Chair

12/22/04  
Signature Date

Arno C. Schwethelm  
Public Arbitrator

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

Dale A. Hearn  
Non-Public Arbitrator

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

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Date of Service (For NASD office use only)

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Total Fees	= \$ 375.00
Less payments	= \$ .00
Balance Due NASD Dispute Resolution	= \$ 375.00

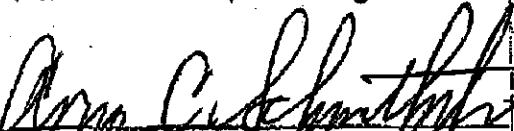
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Concurring Arbitrators:

Walton L. Huff  
Public Arbitrator, Presiding Chair



Arno C. Schwethelm  
Public Arbitrator

Dale A. Hearn  
Non-Public Arbitrator

Signature Date

12-28-2004  
Signature Date

Signature Date

Date of Service (For NASD office use only)

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and David W. Nathery, are jointly and severally liable for:

Forum Fees	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ .00
Balance Due NASD Dispute Resolution	= \$ 375.00

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Concurring Arbitrators:

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Public Arbitrator

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Signature Date

  
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Dale A. Hearn  
Non-Public Arbitrator

12-21-07  
\_\_\_\_\_  
Signature Date

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Date of Service (For NASD office use only)