

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

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In the Matter of the Arbitration Between:

Name of the Claimant

Case Number: 03-05452

Eric D. Hough

Name of the Respondent

Hearing Site: Charlotte, North Carolina.

Merrill Lynch Pierce Fenner & Smith, Inc.

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

Claimant, Eric D. Hough, hereinafter referred to as "Claimant", was represented by Wm. Jemison Mims, Jr., Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, Pensacola, Florida.

Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., hereinafter referred to as "Respondent", was represented by Julie L. Wilson, Esq., Maynard, Cooper & Gales, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on July 14, 2003.

Claimant signed the Uniform Submission Agreement on June 22, 2003.

Statement of Answer filed by Respondent on September 16, 2003.

Respondent filed an executed undated Uniform Submission Agreement.

Respondent's Motion to Strike and Motion to Dismiss filed on September 16, 2003.

Claimant's Response to Respondent's Motion to Dismiss and Motion to Strike filed on September 29, 2003.

Respondent's Memorandum in Further Support of its Motion to Dismiss and to Strike filed on November 4, 2003.

Respondent's Motion for Evidentiary Final Hearing filed on October 29, 2003.

Claimant's Response to Respondent's Motion for Evidentiary Hearing file on November 14, 2003.

Respondent's Reply Brief in Support of Motion for Evidentiary Final Hearing filed on November 18, 2003.

**CASE SUMMARY**

Claimant alleged that Respondent committed actual fraud, breach of fiduciary duty, negligent misrepresentation, negligent omission, and violation of "blue sky" laws concerning his

investment. Claimant's claim arises out of a solicited transaction in which a Merrill Lynch broker in March of 2000 sold him shares in the Merrill Lynch Focus Twenty Fund which was in the process of being constituted and had no portfolio of stocks in it. Claimant indicated that he wanted a "growth" fund. Claimant filed an affidavit in support of his claim asserting that he purchased the shares in direct reliance upon the express research reports, ratings, and representations of Henry Blodgett. At the hearing, Claimant denied knowledge of Mr. Blodgett or that he had ever read any of the reports which he affied served as the basis for the transaction.

#### RELIEF REQUESTED

Claimant in his Statement of Claim requested:

Compensatory Damages	\$3,605.29
Punitive Damages	amount unspecified
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondent in its Statement of Answer requested Claimant's claims be denied and that the costs of the proceeding be assessed against the Claimant.

#### OTHER ISSUES CONSIDERED AND DECIDED

By Order dated January 5, 2004, Arbitrator Saunders denied Respondent's Motion to Dismiss and Motion to Strike and granted Respondent's Motion for Evidentiary Hearing.

#### AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, Arbitrator Saunders has decided in full and final resolution of the issues submitted for determination as follows:

1. This case is a "misleading research reports" case. No issue of suitability was raised. Claimant failed to establish entitlement to relief based upon any theory of being misled and admitted at the hearing that he did not rely on the particularized research of Henry Blodgett in agreeing to purchase a "growth" mutual fund before it had made investments in any stocks. Claimant purchased the Focus Twenty Fund after hearing that the person who would run the fund had successfully made money in the past. No breach of fiduciary duty was established. Claimant failed to establish that any actions of the Respondent proximately caused him loss. Upon receipt of reports listing the stocks in the portfolio, he was in a position to exercise due diligence and exit it if so chose. He purchased the fund at a time when the markets were moving up and brought suit when the volatility caused him losses as it did to millions of other investors. Claimant is not entitled to recovery under any theory;

2. All claims against Respondent are denied in their entirety;
3. The parties shall bear their respective costs, including attorney's fees, except as Fees are specifically addressed below; and
4. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

#### 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 = \$ 50.00

##### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Respondent is a party.

Member surcharge = \$200.00

##### Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$125.00 = \$125.00  
Pre-hearing conference: February 18, 2004 1 session

Two (2) Hearing sessions @ \$125.00 = \$250.00  
Hearing Dates: April 12, 2004 2 sessions

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Total Forum Fees = \$375.00

1. The Panel has assessed \$187.50 of the forum fees to Claimant.
2. The Panel has assessed \$187.50 of the forum fees to Respondent.

#### FEES SUMMARY

1. Claimant is assessed the following fees:

Initial Filing Fee = \$ 50.00

Forum Fees = \$187.50

Total Fees = \$237.50

<u>Less payments</u>	= \$300.00
<u>Refund Owed Claimant</u>	= \$ 62.50

2. Respondent is assessed the following fees:

<u>Member Fees</u>	= \$200.00
<u>Forum Fees</u>	= \$187.50
<u>Total Fees</u>	= \$387.50
<u>Less payments</u>	= \$200.00
<u>Balance Due NASD Dispute Resolution</u>	= \$187.50

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

ARBITRATION PANEL

Chase Boone Saunders

- Public Arbitrator, Sole Arbitrator

Arbitrator's Signature



Chase Boone Saunders  
Public Arbitrator, Sole Arbitrator



Signature Date

May 21, 2004  
Date of Service (For NASD Dispute Resolution office use only)

**NASD DISPUTE RESOLUTION AWARD**

**NASD DISPUTE RESOLUTION**

CASE: 03-05453

John Polonchak, IRA, Claimant v. Morgan Stanley DW, Inc. f/k/a Dean Witter Reynolds, Inc., Respondent.

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**ATTORNEYS:**

Claimant, John Polonchak, IRA, ("Claimant"), appeared pro se, San Jose, CA.

Respondent, Morgan Stanley DW, Inc. f/k/a Dean Witter Reynolds, Inc., ("Respondent"), appeared through its in-house counsel, Judith M. Rosenberg, Esq., San Francisco, CA.

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**NATURE OF DISPUTE:** Customer v. Member

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**DATE FILED:** July 24, 2003

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**CASE SUMMARY:** Claimant alleged that Respondent breached its fiduciary duty, and misrepresented and omitted material facts about fees incurred upon purchase of certain bond funds. Claimant maintained that due to Respondent's action, his account suffered financial losses.

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<b>Claim Data</b>	<b>Award Data</b>
Claim: Unspecified	Award: \$5,600.00
Interest: Unspecified	Interest: At the rate of ten percent (10%) per annum from 1/10/02 to the date of the award
Punitive: \$25,000.00	Punitive: \$.00
Filing Fees: \$425.00	Filing Fees: \$425.00
Other: Unspecified	Other: \$.00

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**AWARD:** The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondent is liable for and shall pay to the Claimant \$5,600.00. 2) Respondent is liable for and shall pay to the Claimant interest at the rate of ten percent (10%) per annum from 1/10/02 to the date of the award. 3) All requests for punitive damages are denied. 4) All other relief requests are denied. 5) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 6) Respondent is liable for and shall pay to the Claimant \$425.00 as reimbursement of the filing fee.

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**OTHER FEES:** Pursuant to Rule 10333 of the Code, Respondent has paid to NASD Dispute Resolution the \$425.00 Member Surcharge invoiced previously.

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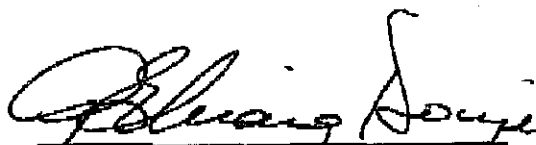
**OTHER ISSUE: ARBITRATOR'S REPORT:** This award is based on the fact that oral representations were made by Respondent's predecessor in interest to Claimant at the time he purchased the securities in question to the effect that the deferred contingent sales charge would be waived after the funds had been held for five(5) years. Respondent has not refuted the making of such oral representations, but has only cited the prospectuses. The representations in question were false, Claimant had a right to rely on them and was therefore damaged when he discovered their falsity. Damages are in the amount of the deferred sales charge and interest at the statutory rate of ten (10) percent runs from January 10, 2002, that date that Respondent asserted the charge after Claimant attempted to sell the funds after holding the funds for a period in excess of five (5) years.

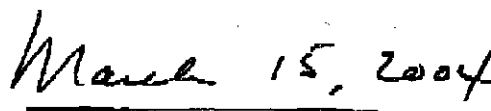
**ARBITRATOR**

G.E. Craig Doupe, Esq. - Sole Public Arbitrator

**AFFIRMATION**

I, G.E. Craig Doupe, Esq., do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.

  
G.E. Craig Doupe, Esq.

  
Signature Date

March 19, 2004

Date of Service (For NASD-DR office use only)