

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Claimants

Dennis W. Winsor and Alejandra L. Winsor,  
Individually, and on behalf of their National  
Placement 401(k) Profit Sharing Plan & Trust

v.

04-00388  
Minneapolis, Minnesota

Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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Nature of Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

Dennis W. Winsor and Alejandra L. Winsor, Individually, and on behalf of their National Placement 401(k) Profit Sharing Plan & Trust ("**Claimants**") were represented by Vernon J. Vander Weide, Esq., of Head Seifert & Vander Weide, Minneapolis, Minnesota.

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("**Respondent**") was represented by James K. Langdon, II, Esq., of Dorsey & Whitney, LLP, Minneapolis, Minnesota.

**CASE INFORMATION**

The Statement of Claim was filed on or about January 13, 2004. The Submission Agreement of Claimants was signed on or about February 9, 2004.

The Statement of Answer was filed by Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., on or about May 10, 2004. The Submission Agreement of Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., was signed on or about March 29, 2004.

**CASE SUMMARY**

Claimants asserted causes of action including the following: violation of the Minnesota Securities Act, violation of the Minnesota Consumer Fraud Act, breach of fiduciary duty, negligence, suitability and failure to supervise. The causes of action related to Claimants' allegation that Respondent mismanaged their accounts by selecting various inappropriate stocks and trading on margin. Claimants also alleged that Respondent failed to convert their accounts from a margin trading strategy to a conservative investment strategy despite their implicit instructions to do so. Claimants asserted that as a result their accounts suffered losses.

Respondent denied the allegations set forth in the Statement of Claim and asserted defenses including the following: the Statement of Claim failed to state a claim upon which relief can be granted; all activity in the account was suitable for and consistent with Claimants' stated investment objectives; losses, if any, were sustained as a result of Claimants' own comparative negligence and/or contributory negligence; Claimants authorized, directed, and ratified all of the transactions in their accounts; Claimants are barred from recovery because they knowingly assumed the risks of their investments; and Claimants failed to use the requisite due diligence in monitoring, trading, managing and handling their investments.

### **RELIEF REQUESTED**

Claimants requested an award of compensatory damages between \$120,000 and \$150,000, plus interest, attorneys' fees, costs, and such other relief the panel deemed just and equitable.

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

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

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 originals remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

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

1. Claimants' claims, each and all, are hereby denied and dismissed with prejudice in their entirety;
2. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, are denied with prejudice; and
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys' fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 300.00

#### **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 = \$ 1,700.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 2,750.00

#### **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 \$ 1,125.00 = \$ 1,125.00

Pre-hearing conference: 08/23/2004 1 session

Four (4) Hearing sessions with Panel x \$ 1,125 = \$ 4,450.00

Hearing Dates: 02/15/2005 2 sessions  
02/16/2005 2 sessions

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Total Forum Fees = \$ 5,625.00

The Arbitration Panel has assessed \$ 2,812.50 of the forum fees to Dennis W. Winsor and Alejandra L. Winsor, Individually, and on behalf of their National Placement 401(k) Profit Sharing Plan & Trust.

The Arbitration Panel has assessed \$ 2,812.50 of the forum fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

**FEE SUMMARY**

Claimants, Dennis W. Winsor and Alejandra L. Winsor, Individually, and on behalf of their National Placement 401(k) Profit Sharing Plan & Trust, are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$ 2,812.50</u>
Total Fees	= \$ 3,112.50
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Balance Due NASD Dispute Resolution	= \$ 1,687.50

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

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	<u>= \$ 2,812.50</u>
Total Fees	= \$ 8,012.50
<u>Less payments</u>	<u>= \$ 5,200.00</u>
Balance Due NASD Dispute Resolution	= \$ 2,812.50

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

**ARBITRATION PANEL**

Douglas G. Plank - Public Arbitrator, Presiding Chair  
David R. Bergerson, Esq. - Public Arbitrator  
John W. MacKimm, II- Non-Public Arbitrator

Concurring Arbitrators:

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Douglas G. Plank  
Public Arbitrator, Presiding Chair

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Signature Date

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David R. Bergerson, Esq.  
Public Arbitrator

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Signature Date

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John W. MacKimm, II  
Non-Public Arbitrator

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Signature Date

2/25/05  
Date of Service (NASD use only)

**ARBITRATION PANEL**

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David R. Bergerson, Esq. - Public Arbitrator  
John W. MacKimm, II - Non-Public Arbitrator

Concurring Arbitrators:

*Douglas G. Plank*  
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Public Arbitrator, Presiding Chair

2/24/05  
Signature Date

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David R. Bergerson, Esq.  
Public Arbitrator

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Signature Date

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John W. MacKimm, II  
Non-Public Arbitrator

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David R. Bergerson, Esq. - Public Arbitrator  
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Concurring Arbitrators:

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Douglas G. Plank  
Public Arbitrator, Presiding Chair

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Signature Date

  
David R. Bergerson, Esq.  
Public Arbitrator

2/25/05  
Signature Date

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John W. MacKimm, II  
Non-Public Arbitrator

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Signature Date

2/25/05  
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