

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

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In the Matter of the Arbitration Between

Name of Claimant

Jean Greenhill

and

04-01584  
Nashville, Tennessee

Name of Respondent

Merrill Lynch Pierce Fenner & Smith Incorporated

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

Jean Greenhill ("**Claimant**") was represented by Jeffrey B. Musslewhite, Esq., Woska & Hayes, LLP, Kingwood, Texas.

Merrill Lynch Pierce Fenner & Smith Incorporated ("**Respondent**") was represented by Bradley B. Rounsaville, Esq., Maynard Cooper & Gale, P.C., Montgomery, Alabama.

**CASE INFORMATION**

The Statement of Claim was filed on or about March 9, 2004. Submission Agreement of Claimant Jean Greenhill was signed on February 27, 2004.

Statement of Answer was filed by Respondent Merrill Lynch Pierce Fenner & Smith Incorporated on or about May 25, 2004. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith Incorporated was signed on June 2, 2004.

**CASE SUMMARY**

Claimant asserted the following causes of action: controlling person liability pursuant to section 20(A) of the Exchange Act; breach of fiduciary duty; breach of contract; violation of know your customer rule; unsuitability; failure to supervise; violations of the securities laws; violations of securities regulatory rules; violation of the Alabama Securities Act; and various common law claims. Specifically, Claimant alleged that:

This is a case of negligence, misrepresentation, and a challenge to Respondent's decision to place Ms. Greenhill in unsuitable investments, a decision which caused substantial, but avoidable, losses to Ms. Greenhill's account.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated

Claimant opened an account with Merrill Lynch's Florence, Alabama office in April 1998. In connection with opening the account, Claimant discussed her investment objectives and risk tolerance with Tom Pebworth, her financial advisor. Claimant identified her investment objective as growth, and stated that she was willing to accept a moderate level of risk in seeking to achieve that objective. Shortly after she opened the account, she deposited approximately \$87,000.

On April 22, 1998, Pebworth recommended a portfolio of highly rated mutual funds that would provide diversity in seeking Claimant's long-term growth needs. The three funds recommended included a growth fund, a value fund, and a capital fund (a mixture of fixed income (securities and equities)). Claimant accepted these recommendations, and the final decision to purchase the funds in question. A total of approximately \$87,000 was invested in these funds. In connection with the purchases of these funds, Claimant received prospectuses that explained the types of investments that the funds would make and the risk factors associated with those investments.

Over the next few years, various exchanges were made in these funds, some based upon the recommendation of Mr. Pebworth and others made upon the independent decision of Claimant. Each recommendation made by Mr. Pebworth was in line with Claimant's investment objective and risk tolerance.

In early 2000, Claimant sold her value fund on an unsolicited basis and purchased stock in two individual equities, Home Depot and WalMart. Pebworth subsequently left Merrill Lynch, and all trades in Claimant's account thereafter were initiated solely upon the direction of Claimant.

At the time she filed her complaint on February 27, 2004, Claimant still held her account with Merrill Lynch. As of February 28, 2004, Claimant's account was valued at approximately \$84,000, down roughly \$14,000 from when she opened the account (approximately 14%). At no time prior to filing the Statement of Claim did Claimant ever complain to anyone at Merrill Lynch about the performance of her account. The reason for this is simple. Claimant selected or authorized each transaction made in her account, and each investment was suitable in light of Claimant's investment objectives.

### **RELIEF REQUESTED**

Claimant requested that the Respondent be ordered to reimburse him for:

- A. All direct losses in the accounts (approximately \$44,000);
- B. All charges to the accounts;
- C. The lost earnings that the accounts would have earned if they had been properly invested;
- D. Pre-judgment and post-judgment interest at the maximum statutory rate on all losses sustained from the date of the transactions until the date of the award by the Arbitration Panel pursuant to Alabama law;
- E. All costs of these proceedings, including forum fees, hearing session fees and costs in bringing this action to protect Claimant's rights and best interests;
- F. Reasonable attorney's fees in bringing this action under Alabama statutory law and common law as well as under the NASD and NYSE Rules of Fair Practice. Claimant also requests costs and expenses including expert witness fees, in an amount to be determined at the arbitration hearing;
- G. Punitive damages to be assessed by the Arbitrator to ensure the investing public that, in the future, Respondent and their financial consultants will conduct their affairs to the highest integrity required of financial advisors;
- H. All damages allowable under the Alabama Securities Act; and
- I. That Claimant be granted all other and further relief to which he may be entitled.

Respondent requested that the relief requested in the Statement of Claim be denied in all respects and that the costs of this proceeding be assessed against the Claimant.

### **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 original(s) remain on file with the NASD Dispute Resolution (the "NASD").

### **AWARD**

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

1. Respondent Merrill Lynch Pierce Fenner & Smith Incorporated is liable for and shall pay to Claimant Jean Greenhill the sum of \$15,000.00 (**Fifteen Thousand Dollars and No Cents**).

2. That 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.
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, not specifically awarded or otherwise provided for above.

### **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 = \$175.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is Merrill Lynch Pierce Fenner & Smith Incorporated.

|                         |    |                 |
|-------------------------|----|-----------------|
| Member surcharge        | \$ | 875.00          |
| Pre-hearing process fee | \$ | 750.00          |
| Hearing process fee     | \$ | 1,000.00        |
| Total Member Fees       | \$ | <u>2,625.00</u> |

#### **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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

|                                     |            |        |    |                 |
|-------------------------------------|------------|--------|----|-----------------|
| 1 Pre-hearing session(s) with Panel | x          | 600.00 | \$ | 600.00          |
| October 27, 2004                    | 1 session  |        |    |                 |
| 3 Hearing sessions                  | x          | 600.00 | \$ | 1,800.00        |
| July 27, 2005                       | 2 sessions |        |    |                 |
| July 28, 2005                       | 1 session  |        |    |                 |
| Total Forum Fees                    |            |        | \$ | <u>2,400.00</u> |

The Arbitration Panel has assessed \$2,400.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith Incorporated.

**Fee Summary**

Claimant, Jean Greenhill, is liable for:

|   |      |          |
|---|------|----------|
| Initial Filing Fee                                | = \$ | 175.00   |
| Total Fees  | = \$ | 175.00   |
| <u>Less payments</u>                              | = \$ | -625.00  |
| Balance to be refunded by NASD Dispute Resolution | = \$ | - 450.00 |

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

|                                     |      |           |
|-------------------------------------|------|-----------|
| Member Fees                         | = \$ | 2,625.00  |
| <u>Forum Fees</u>                   | = \$ | 2,400.00  |
| Total Fees                          | = \$ | 5,025.00  |
| <u>Less payments</u>                | = \$ | -2,775.00 |
| Balance Due NASD Dispute Resolution | = \$ | 2,250.00  |

All balances are due to NASD Dispute Resolution

**ARBITRATION PANEL**

David N. Burn, Esq. - Public Arbitrator, Presiding Chair  
William P. Ortale, Esq. - Public Arbitrator  
Sandra J. Bakalus - Non-Public Arbitrator

Concurring Arbitrators:

/s/ David N. Burn  
David N. Burn, Esq.  
Public Arbitrator, Presiding Chair

August 25, 2005  
Signature Date

/s/ William P. Ortale  
William P. Ortale, Esq.  
Public Arbitrator

August 26, 2005  
Signature Date

/s/ Sandra J. Bakalus  
Sandra J. Bakalus  
Non-Public Arbitrator

August 25, 2005  
Signature Date

NASD Dispute Resolution

Arbitration No. 04-01584

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8/29/05

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Date of Service (For NASD office use only)

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NASD Dispute Resolution  
 Arbitration No. 04-01584  
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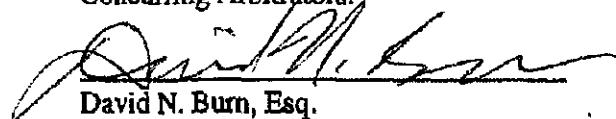
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 Public Arbitrator, Presiding Chair

8/25/05  
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Signature Date

Sandra J. Bakalus  
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Public Arbitrator, Presiding Chair

William P. Ortale  
William P. Ortale, Esq.  
Public Arbitrator

Signature Date

8-26-05  
Signature Date

Sandra J. Bakalus  
Non-Public Arbitrator

Signature Date

*Anderson*  
301:527-4848  
NASD

NASD Dispute Resolution  
Arbitration No. 04-01584  
Award Page 3 of 6

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Signature Date

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Non-Public Arbitrator

Signature Date  
*8/25/05*