

**NASD DISPUTE RESOLUTION AWARD**  
**NASD DISPUTE RESOLUTION**

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CASE: 04-02210

Douglas Below, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Respondent

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**ATTORNEYS:**

For Claimant, Douglas Below, ("Claimant"), appeared Wm. Jemison Mims, Jr. Esq., of the firm Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A., Pensacola, FL.

For Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent"), appeared Charles A. Gail, Esq., of the firm Jenkins & Gilchrist, Dallas, TX.

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

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**DATE FILED:** March 31, 2004.

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**CASE SUMMARY:** Claimant alleged that Respondent breached its fiduciary duty to generate analyst reports that accurately reflect its true opinions, disclose all inherent conflicts of interest, and provide accurate financial advice. Claimant further alleged that Respondent intentionally and/or recklessly misrepresented and/or omitted material facts that were necessary to make informed investment decisions in the Claimant's portfolio. Additionally, Claimant alleged that Respondent participated in and/or aided in the publication of untrue statements of material fact or omission of material facts to the Claimant. Claimant also alleged that Respondent was in breach of its contract to engage in fair dealing with its clients. Claimant maintained that as a result of Respondent's actions, his account suffered financial losses.

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**ARBITRATOR SUMMARY:** (See Exhibit A)

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**Claim Data**

Claim: \$25,000.00

Punitive: Unspecified

Interest: Unspecified

Attorney Fees: Unspecified

Filing Fees: Unspecified

Other: Unspecified

**Award Data**

Award: \$.00

Punitive: \$.00

Interest: \$.00

Attorney Fees: \$.00

Filing Fees: \$212.50

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) The claims of Claimant are dismissed in their entirety. 2) All requests for attorney fees are denied. 3) All requests for punitive damages are denied. 4) All requests for interest are denied. 5) All other relief requests are denied. 6) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously. 7) Respondent is liable and shall pay Claimant \$212.50 as reimbursement of the filing fee.

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**OTHER FEES:** Pursuant to Rule 10333 of the Code, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

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**ARBITRATOR**

Carol Stoner - Sole Public Arbitrator

**AFFIRMATION**

I, Carol M. Stoner, 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.

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Carol M. Stoner, Esq.

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

October 13, 2004

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

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ARBITRATOR

Carol Stoner - Sole Public Arbitrator

AFFIRMATION

I, Carol M. Stoner, 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.

  
Carol M. Stoner, Esq.

  
Signature Date

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

# Exhibit A

## ORDER NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Douglas Below

Hearing Site: On Papers

Name of Respondent

Merrill Lynch Pierce Fennar & Smith

Nature of Dispute: Customer vs. Member

### REPRESENTATION OF PARTIES

Claimant, Douglas Below, hereinafter referred to as "Claimant", was represented by Wm. Jernison Mims, Jr., Esq., Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A., Pensacola Florida; Hooper & Weiss, LLC ; and Feggs and Lane.

Respondent, Merrill Lynch Pierce Fennar & Smith, Inc., hereinafter referred to as "Respondent", was represented by Charles A. Gall, Esq., Joel K. Sharp, Esq., & J. Michael Ellis, Esq. of Jenkins & Gilchrist, PC of Dallas, Texas.

### CASE INFORMATION

Statement of Claim filed on March 29, 2004.

Claimant signed the Uniform Submission Agreement on May 27, 2003.

Respondent signed the Uniform Submission Agreement on May 18, 2004.

Statement of Answer and Exhibits were filed by Respondent on June 08, 2004.

Respondent's Motion to Strike and Motion to Dismiss was filed on June 08, 2004.

Claimant's Response to Respondent's Motion to Dismiss and Motion to Strike was filed on June 24, 2004.

Respondent's Brief in Further Support of its Motion to Dismiss and to Strike was filed on September 15, 2004.

Respondent's Request for Production of Documents and Information was filed on June 08, 2004.

Claimant's Motion to Strike Respondent's Request for Production was filed June 08, 2004.

Respondent's Response to Claimant's Motion to Strike Discovery and Respondent's Motion to Compel Production of Documents and Information was filed on July 08, 2004. Claimant's Response to Respondent's Motion to Compel Production was filed on August 31, 2004.

Respondent's Motion for Evidentiary Final Hearing was filed on June 08, 2004.

Claimant's Response to Respondent's Motion for Evidentiary Hearing was filed on June 24, 2004.

Respondent's Reply Brief in Support of Motion for Evidentiary Final Hearing was filed on September 15, 2004.

Claimant's Pre-Hearing Brief was filed on September 14, 2004.

Respondent's Hearing Submission was filed on September 15, 2004.

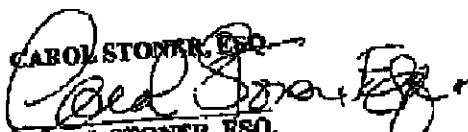
#### ORDER

After reading and considering the abovementioned pleadings, Arbitrator Stoner has decided the issues submitted for determination as follows:


#### IT IS ORDERED:

1. That Respondent's Motion to Strike is denied.
2. That Respondent's Motion to Dismiss is granted.
3. That Claimant's Motion to Strike Respondent's Request for Production of Documents and Information is denied, as Motion to Dismiss has been granted.
4. That Respondent's Motion to Compel Production of Documents and Information is denied, as Motion to Dismiss has been granted.
5. That Respondent's Motion for Evidentiary Final Hearing is denied, as Motion to Dismiss has been granted.

ARBITRATION PANEL

  
CAROL STONER, ESQ.  
Public Arbitrator, Sole Arbitrator

Public Arbitrator - Sole Arbitrator

  
Signature Date

Date of Service (For NASD Dispute Resolution office use only)