

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Kathleen Holmes

and

04-03904
Phoenix, Arizona

Name of Respondent

Merrill Lynch Pierce Fenner & Smith

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

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

Merrill Lynch Pierce Fenner & Smith ("**Respondent**") was represented by Kenneth C. Mennemeier, Esq. and Steven Lau, Esq., Mennemeier Glassman & Stroud LLP, Sacramento, California.

CASE INFORMATION

The Statement of Claim was filed on or about June 1, 2004. Submission Agreement of Claimant Kathleen Holmes was signed on May 3, 2004.

Statement of Answer was filed by Respondent Merrill Lynch Pierce Fenner & Smith on or about August 10, 2004. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith was signed on June 25, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: control person liability pursuant to Sec. 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 state and federal securities laws; intentional and negligent misrepresentation; failure to hedge; and failure to diversify. The allegations relate to the enrollment and investments through the Merrill Lynch Consults program.

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

This is another case arising from an investor's impatience and angst over the prolonged Bear Market. Claimant told Merrill Lynch financial advisor Robert Hollinger that she wanted to invest for growth. Claimant also indicated that she wanted to invest for her retirement over a time horizon of fifteen to twenty years. Hollinger enrolled Claimant in the Merrill Lynch Consults® program and recommended a suitable investment manager. By 1999, Claimant was invested in a portfolio of high-quality, large cap stocks.

The Bear Market, however, was about to begin. As the Bear Market continued, Claimant's investments declined in value. The declines troubled Claimant. As happened with many investors, she lost confidence in the market. In January 2003, she closed her account and transferred all of her assets away from Merrill Lynch.

Disappointed with the performance of her investments, Claimant now complains that Hollinger erred in choosing the professional money manager that he recommended to her. It is true that Claimant's investments declined in value during the approximately 46-month period that she had her assets invested with Merrill Lynch. However, the primary flaw in Claimant's claim is the fact that suitability is judged with reference to the investment objectives that a Claimant states at the time of the investment, not based on hindsight. This is especially so when a purported long-term growth-oriented investor loses her patience in her portfolio less than four years after making her investments.

The decline in the value of Claimant's investments resulted from adverse market conditions. In fact, adverse market conditions prevailed during much of the period in which Claimant had her assets invested with Merrill Lynch. The decline in the value of her investments has absolutely no bearing on the issue of whether Hollinger's recommendations were suitable. Claimant told Hollinger that she wanted growth-oriented investments. Hollinger recommended an investment manager that built a portfolio of high-quality, large cap companies. These recommendations were consistent with Claimant's stated investment objectives.

RELIEF REQUESTED

Claimant requested that the Arbitration Panel order Respondent to reimburse her for damages in excess of \$48,000.00, including but not limited to:

1. All direct losses in the accounts;
2. All charges to the accounts;
3. The lost earnings that the accounts would have earned if they had been properly invested;

4. Prejudgment 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 Arbitrator pursuant to Arizona law;
5. All costs of these proceedings, including forum fee, hearing session fees and costs in bringing this action to protect Claimant's rights and best interests;
6. Reasonable attorney fees in bringing this action under Arizona 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;
7. 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;
8. That Claimant be granted all other and further relief to which she may be entitled.

Respondent requested that the Arbitration Panel (1) dismiss this matter in its entirety and (2) assess all costs and forum fees to 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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted in this matter shall be and hereby are denied in their entirety.
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.

Member surcharge	\$	875.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	1,000.00
Total Member Fees	\$	2,625.00

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 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 18, 2004	1 session			
4 Hearing sessions	x	600.00	\$	2,400.00
May 3, 2005	2 sessions			
May 4, 2005	2 sessions			
Total Forum Fees			\$	3,000.00

The Arbitration Panel has assessed \$1,500.00 of the forum fees to Kathleen Holmes.

The Arbitration Panel has assessed \$1,500.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith.

Fee Summary

Claimant, Kathleen Holmes, shall be and hereby is liable for:

Initial Filing Fee	= \$	175.00
<u>Forum Fees</u>	= \$	1,500.00
Total Fees	= \$	1,675.00
<u>Less payments</u>	= \$	-625.00
Balance Due NASD Dispute Resolution	= \$	1,050.00

Respondent, Merrill Lynch Pierce Fenner & Smith, shall be and hereby is liable for:

Member Fees	= \$	2,625.00
<u>Forum Fees</u>	= \$	1,500.00
Total Fees	= \$	4,125.00
<u>Less payments</u>	= \$	-2,625.00
Balance Due NASD Dispute Resolution	= \$	1,500.00

All balances are due to NASD Dispute Resolution

ARBITRATION PANEL

Howard W. Shannon - Public Arbitrator, Presiding Chair
Alfred Lindeman - Public Arbitrator
Edward F. Altman, Jr. - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Howard W. Shannon
Howard W. Shannon
Public Arbitrator, Presiding Chair

May 26, 2005
Signature Date

/s/ Alfred Lindeman
Alfred Lindeman
Public Arbitrator

June 1, 2005
Signature Date

/s/ Edward F. Altman, Jr.
Edward F. Altman, Jr.
Non-Public Arbitrator

May 27, 2005
Signature Date

Date of Service (For NASD office use only)

NASD Dispute Resolution
Arbitration No. 04-03904
Award Page 5 of 5

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Alfred Linderman - Public Arbitrator

Edward F. Altman, Jr. - Non-Public Arbitrator

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Public Arbitrator, Presiding Chair


Signature Date

Alfred Linderman
Public Arbitrator

Signature Date

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NASD Dispute Resolution
 Arbitration No. 04-03904
 Award Page 3 of 3

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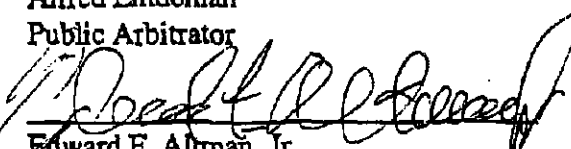
Concurring Arbitrators:

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 Public Arbitrator, Presiding Chair

 Signature Date

 Alfred Lindeman
 Public Arbitrator

 Signature Date


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 Non-Public Arbitrator

5-27-2005
 Signature Date

 Date of Service (For NASD office use only)