

**STIPULATED AWARD  
NASD Dispute Resolution**

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**In the Matter of the Arbitration Between:**

**Names of Claimants**

**Gordon McKinley, Jr. and  
Willie L. McKinley, As Co-Trustees of the  
Willie L. McKinley Revocable Trust**

**vs.**

**Case Number: 04-04621  
Hearing Site: Houston, Texas**

**Names of Respondents**

**Prudential Equity Group, LLC,  
Merrill Lynch Pierce Fenner & Smith, Inc.,  
Robert Scott Jones and Cindy Lynn Zuber**

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**NATURE OF DISPUTE**

**Customers v. Member Firms and Associated Persons**

**REPRESENTATION OF PARTIES**

Gordon McKinley, Jr. and Willie L. McKinley, As Co-Trustees of the Willie L. McKinley Revocable Trust ("Claimants") were represented by Laura Page Mitchell, Esq. and Eric Marin, Esq., Mitchell, Colmenero & Lipshy, L.L.P., Austin, Texas.

Prudential Equity Group, LLC f/k/a Prudential Securities, Inc. ("Prudential") was represented by Retta Miller, Esq. and Mark Steiner, Esq., Jackson Walker, LLP, Dallas, Texas.

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Robert Scott Jones ("Jones") and Cindy Lynn Zuber ("Zuber"), were represented by Linda Broocks, Esq. and Eric J. Cassidy, Esq., Ogden, Gibson, White, Broocks & Longoria, L.L.P., Houston, Texas.

**CASE INFORMATION**

The Statement of Claim was filed by Claimants on or about June 29, 2004. Claimant filed their Uniform Submission Agreement on or about June 23, 2004.

A Statement of Answer was filed by Respondent, Prudential Equity Group, LLC, on or about September 15, 2004. Respondent, Prudential Equity Group, LLC, filed its Uniform Submission Agreement on or about September 7, 2004.

A Statement of Answer was filed jointly by Respondents, Merrill Lynch, Jones and Zuber, on or about September 21, 2004. Respondent, Merrill Lynch, filed its Uniform Submission Agreement

on or about November 22, 2004. Respondent, Robert Scott Jones, filed his Uniform Submission Agreement on or about November 5, 2004. Respondent, Cindy Lynn Zuber, filed her Uniform Submission Agreement on or about November 4, 2004.

### **CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty; negligence, negligence per se, gross negligence; negligent hiring, supervision, training or retention; negligent misrepresentation; and conspiracy. The causes of action related to recommendation and purchase of various unspecified securities. Claimants alleged that Respondents provided them with inappropriate risky investment advice, largely involving margin trading related to Internet securities.

Respondents, Merrill Lynch, Jones and Zuber, denied the allegations made in the Statement of Claim and asserted the following defenses: statute of limitations; waiver, estoppel, laches and ratification; failure to state a claim on which relief can be granted; good faith and commercial reasonableness; assumption of the risk; contributory negligence, compliance with all applicable exchange and SRO rules; failure to mitigate damages; that the Claimants' losses were the result of adverse market condition and thus that the Claimant could not show loss causation; that any alleged violation of exchange or SRO rules does not provide a private right of action; that Merrill Lynch maintained an adequate and reasonable system of supervision and control over its employees; and that Merrill Lynch was not subject to control person or *respondeat superior* liability.

Respondent Prudential denied the allegations made in the Statement of Claim and asserted the following defenses: ratification, authorization and approval; estoppel; contributory negligence; failure to state a claim upon which relief may be granted; assumption of risk and equitable estoppel; Prudential had no contractual or common law duty to Claimants; Prudential's conduct was not the proximate cause of Claimants' damages; and waiver.

### **RELIEF REQUESTED**

Claimants requested an Award in the amount of:

Actual/Compensatory Damages	\$1,600,000.00
Punitive/Exemplary Damages	Unspecified
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

### **OTHER ISSUES CONSIDERED AND DECIDED**

Claimants began this proceeding on February 28, 2003, when they filed an original petition against all Respondents in the District Court of Travis County, Texas, 345<sup>th</sup> Judicial District, Cause No. GN300655. On April 21, 2004, the District Court stayed Claimants' claims and

compelled them to arbitration. Claimants then filed with the NASD their petition that they had filed in district court, along with a Uniform Submission Agreement on or about July 2, 2004.

The expungement request in this case does not fall under the new Rule 2130 due to the civil lawsuit that was filed prior to April 12, 2004.

Claimants dismissed all claims concerning Prudential and Merrill Lynch, as well as all claims against Robert Scott Jones and Cindy Lynn Zuber, and agreed that their NASD CRD records should be expunged of all references of this proceeding. Claimants and all Respondents have executed a Settlement Agreement and Release.

### **AWARD**

Pursuant to the parties' settlement agreement, and after considering the parties' submissions and representations, but without making any finding of fact or conclusions of law, the Arbitration Panel orders as follows:

1. Claimants' claims against Respondents, Prudential Equity Group, LLC, Merrill, Lynch, Pierce, Fenner & Smith, Inc., Robert Scott Jones and Cindy Lynn Zuber, are dismissed with prejudice;
2. The Panel recommends the expungement of all reference to Claimants' complaints and to this arbitration from Respondents, Robert Scott Jones' and Cindy Lynn Zuber's, registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, these Respondents, Robert Scott Jones and Cindy Lynn Zuber, must obtain confirmation for a court of competent jurisdiction before the CRD will execute the expungement directive;
3. All forum fees and other NASD fees shall be assessed equally between Claimants and Merrill Lynch, Pierce, Fenner & Smith, Inc. and Prudential Equity Group, LLC; and
4. Any and all relief not specifically addressed herein is denied with prejudice.

### **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	\$ 500.00
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#### **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 persons at the time of the events giving rise to the

dispute. Prudential Equity Group, LLC and Merrill Lynch, Pierce, Fenner & Smith, Inc. are member firms.

Member surcharge	\$ 2,800.00
Pre-hearing process fee	\$ 750.00
Hearing process fee	\$ 5,000.00

#### **Adjournment Fees**

Adjournments granted during these proceedings:

September 27-29, 2005, adjournment requested by Claimant (fee waived by the Panel)	\$ 1,200.00
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#### **Forum Fees and Assessments**

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

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	\$ 2,400.00
Pre-hearing conferences: December 3, 2004 1 session	
October 31, 2005 1 session	

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Total Forum Fees	\$ 2,400.00
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1. The Panel has assessed one-third of all forum fees in the amount of \$800.00 jointly and severally to Claimants.
2. The Panel has assessed one-third of all form fees in the amount of \$800.00 to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.
3. The Panel has assessed one-third of all form fees in the amount of \$800.00 to Respondent Prudential Equity Group, LLC.

#### **Fee Summary**

Claimants, Gordon McKinley, Jr. and Willie L. McKinley, As Co-Trustees of the Willie L. McKinley Revocable Trust, are jointly and severally liable for:

Initial Filing Fee	\$ 500.00
Forum Fees	\$ 800.00
Total Fees	\$ 1,300.00
Less payments	\$ 1,700.00
Refund Due	\$ 400.00

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

Member Fees	\$ 8,550.00
Forum Fees	\$ 800.00
Total Fees	\$ 9,350.00
Less Payments	\$ 9,350.00

Balance Due NASD Dispute Resolution \$ 50.00

Respondent, Prudential Equity Group, LLC, is liable for:

Member Fees	\$ 8,550.00
<u>Forum Fees</u>	<u>\$ 800.00</u>
Total Fees	\$ 9,350.00
<u>Less Payments</u>	<u>\$ 9,150.00</u>
Balance Due NASD Dispute Resolution	\$ 200.00

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

**ARBITRATION PANEL**

Frank M. Romano - Public Arbitrator, Presiding Chairperson  
Martha Failing, Esq. - Public Arbitrator  
Nick Sacaris - Non-Public Arbitrator

**Concurring Arbitrators:**

/s/ Frank M. Romano  
Frank M. Romano  
Public Arbitrator, Presiding Chairperson

May 9, 2006  
Signature Date

/s/ Martha Failing, Esq.  
Martha Failing, Esq.  
Public Arbitrator

May 10, 2006  
Signature Date

/s/ Nick Sacaris  
Nick Sacaris  
Non-Public Arbitrator

May 12, 2006  
Signature Date

May 10, 2006  
Date of Service (For NASD Dispute Resolution use only)

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Frank M. Romano  
Public Arbitrator, Presiding Chairperson

5/9/06  
Signature Date

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Martha Failing, Esq.  
Public Arbitrator

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

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Nick Sacaris  
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Public Arbitrator, Presiding Chairperson

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Signature Date

\_\_\_\_\_  
*Martha Failing*  
Martha Failing, Esq.  
Public Arbitrator

\_\_\_\_\_  
MAY 10 2006  
Signature Date

\_\_\_\_\_  
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Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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Signature Date

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Martha Failing, Esq.  
Public Arbitrator

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Signature Date

  
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Nick Sacaris  
Non-Public Arbitrator

5-12-06  
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Signature Date

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)