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**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimants

Richard W. Reese and Kathryn J. Reese

Case Number: 04-04826

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
And John C. Hemphill

Hearing Site: Albuquerque, New Mexico

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Nature of the Dispute: Customer vs. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Claimants, Richard W. Reese and Kathryn J. Reese, hereinafter collectively referred to as "Claimants": Sam Bregman, Esq. of The Bregman Law Firm, P.C. located in Albuquerque, New Mexico.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and John C. Hemphill ("Hemphill"), hereinafter collectively referred to as "Respondents": Joseph L. Hood, Esq., of the law firm Scott Hulse Marshall Feuille Finger & Thurmond, P.C. located in El Paso, Texas.

**CASE INFORMATION**

Statement of Claim filed on or about July 7, 2004. Amended Statement of Claim filed on August 3, 2005. Claimants jointly signed the Uniform Submission Agreement on July 1, 2004.

Statement of Answer filed by Respondents Merrill Lynch and Hemphill on October 22, 2004. Respondent Merrill Lynch signed the Uniform Submission Agreement on October 6, 2004. Respondent Hemphill signed the Uniform Submission Agreement on October 21, 2004.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of contract, negligence, failure to supervise, breach of fiduciary duty and unsuitability. The causes of action relate to various securities, including, but not limited to, Internet Capital Group, Broadcom Corp. and Global Crossing, Ltd. Claimants asserted that these securities were unsuitable to their investment goals and objectives.

Unless specifically admitted in its Answer, Respondents Merrill Lynch and Hemphill denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Respondents deny that any of the securities Claimants purchased were unsuitable for person in the same or similar situation as Claimants, and deny that any losses sustained by Claimants were due to any act, omission or misconduct on the part of either Hemphill or anyone else associated with Merrill Lynch. Respondents specifically deny that the Claimants were not informed that Merrill Lynch acted as a market maker in any of the securities that were bought and sold for the Reese's accounts.
2. Mr. Reese retained control over the Claimants' accounts. Neither Hemphill nor Merrill Lynch owed him a general fiduciary duty to provide the Reese's with investment advice. Rather, Respondents' duty was limited to following instructions given to them with respect to individual transactions. Respondents complied with that duty.
3. Respondents dealt with the Claimants in good faith, and violated no Rule or Regulation of the Association, any other self-regulatory organization, or the Securities and Exchange Commission in their dealings with the Claimants.
4. The contracts between the Claimants and Merrill Lynch were written agreements, the terms of which are the best evidence of their contents and the parties' respective obligations. Merrill Lynch denies that it breach any term of the agreements it entered into with the Claimants. Hemphill, individually, was not a party to those agreements.
5. Respondents deny that they were negligent in their handling of the Claimants' accounts. Respondent further allege that there is no cause of action under New Mexico law for "negligence" in cases such as this involving economic loss.
6. The New Mexico Unfair Trade Practices Act does not apply to transactions in securities and does not authorize an award of treble damages in this case.
7. The Claimants received confirmations and account statements reflecting each transaction effected for their accounts. They failed to object to any transaction and thereby ratified all transactions effected for their accounts.

#### **RELIEF REQUESTED**

Claimants requested \$748,679.00 in compensatory damages, \$2,246,037.00 in punitive damages, forum fees and legal fees pursuant to the New Mexico Unfair Practices Act.

Respondents Merrill Lynch and Hemphill requested that the Statement of Claim be dismissed in its entirety, for costs, attorney's fees and for expungement of the CRD record of Respondent Hemphill.

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

Claimants' Motion to Amend Statement of Claim, which added a claim for failure to supervise, was brought to the Panel at the hearing. The Panel granted Claimants' Amended Statement of Claim.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

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

1. Respondent, Merrill Lynch, Pierce, Fenner & Smith, is solely liable for and shall pay to Claimants, Richard W. Reese and Kathryn J. Reese, the sum of \$160,000.00 as compensatory damages.
2. Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees.
3. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **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 = \$ 500.00

#### **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. Accordingly, Merrill Lynch is a party and is assessed the following fees:

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

#### **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 lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$1,200.00 = \$ 1,200.00  
Pre-hearing conference: January 20, 2005 1 session

Five (5) Hearing sessions @ \$1,200.00 = \$ 6,000.00  
Hearing Dates: August 15, 2005 2 sessions  
August 16, 2005 2 sessions  
August 17, 2005 1 session

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Total Forum Fees = \$ 7,200.00

1. The Panel assessed 100% of the total forum fees in the amount of \$7,200.00 solely to Merrill Lynch, Pierce, Fenner & Smith, Inc.

**FEF SUMMARY**

1. Claimants, Richard W. Reese and Kathryn Reese, are jointly liable for:

Initial Filing Fee	= \$ 500.00
<u>Less payments</u>	<u>= \$ 1,700.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

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

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$ 7,200.00</u>
Total Fees	= \$15,750.00
<u>Less payments</u>	<u>= \$ 8,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 7,200.00

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

**ARBITRATION PANEL**

Lawrence M. Berkowitz	-	Public Arbitrator, Presiding Chairperson
Patrick J. Halter	-	Public Arbitrator
Kenneth R. Johnston	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/ Lawrence M. Berkowitz  
Lawrence M. Berkowitz  
Public Arbitrator, Presiding Chairperson

8/26/05  
Signature Date

/s/ Patrick J. Halter  
Patrick J. Halter  
Public Arbitrator

8/26/05  
Signature Date

/s/ Kenneth R. Johnston  
Kenneth R. Johnston  
Non-Public Arbitrator

8/31/05  
Signature Date

8/26/05  
Date of Service (For NASD Dispute Resolution office use only)

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Less payments	= \$ 1,700.00
Refund Due from NASD Dispute Resolution	= \$ 1,200.00
  
2. Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$ 8,650.00
Enum Fees	= \$ 7,200.00
Total Fees	= \$15,750.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 7,200.00

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Kenneth R. Johnston	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Lawrence M. Berkowitz  
Public Arbitrator, Presiding Chairperson

August 26, 2005  
Signature Date

\_\_\_\_\_  
Patrick J. Halter  
Public Arbitrator

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

\_\_\_\_\_  
Kenneth R. Johnston  
Non-Public Arbitrator

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NASD Dispute Resolution  
Arbitration No. 04-04826  
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Public Arbitrator, Presiding Chairperson

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Signature Date

  
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Public Arbitrator

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Lawrence M. Berkowitz  
Public Arbitrator, Presiding Chairperson

8/26/05  
Signature Date

/s/ Patrick J. Halter  
Patrick J. Halter  
Public Arbitrator

8/26/05  
Signature Date

Kenneth R. Johnston  
Kenneth R. Johnston  
Non-Public Arbitrator

8/31/05  
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8/26/05  
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