

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant  
April E. Miller

Case Number: 04-05812

Name of the Respondents  
Merrill Lynch, Pierce, Fenner & Smith, Inc. and  
Stanley A Weron

Hearing Site: Dallas, Texas

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**NATURE OF THE DISPUTE**

Customer v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Claimant April E. Miller, hereinafter referred to as "Claimant": Jeff M. Travis, Esq., of Travis & Thompson, located in Dallas, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Stanley A. Weron ("Weron"), hereinafter collectively referred to as "Respondents": Will S. Montgomery, Esq., Jonathan D. Neerman, Esq. and Joel R. Sharp, Esq. of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

**CASE INFORMATION**

Statement of Claim filed: August 17, 2004.

Claimant signed the Uniform Submission Agreement: August 13, 2004.

Statement of Answer filed by Respondents on: October 11, 2004.

Respondent Merrill Lynch signed the Uniform Submission Agreement: August 27, 2004.

Respondent Weron signed the Uniform Submission Agreement: October 15, 2004.

Respondents' Pre-Hearing Brief filed on: April 22, 2005.

Respondents' Motion for More Definite Statement of Claim filed on: June 14, 2005.

Claimant's Response to Respondents' Motion for More Definite Statement of Claim filed on: June 30, 2005.

Claimant's Amended Statement of Claim filed on: July 11, 2005.

Respondents' Amended Answer filed on: November 2, 2005.

### CASE SUMMARY

Claimant asserted the following causes of action: violations of Section 10(b) of the Securities Exchange Act and Rule 10(b)5; violations of the Anti-Fraud provisions of the Texas Securities Act; violations of the Texas Deceptive Trade Practices ("DTPA"); violations of the NASD and NYSE rules, regulations and policies, including violations of NASD Rule 2310, NYSE Rule 405, NASD Rule 2110 and NYSE Rule 401, NASD Rule 2510 and NYSE Rule 408, NASD Rule 2430 and NASD Rule 2120; failure to supervise Weron by Merrill Lynch; vicarious liability; breach of contract; fraud; breach of fiduciary duty; negligence; and negligent misrepresentation. These causes of action resulted from Respondents' allegedly engaging in the unauthorized and unsuitable sale of equities from Claimant's managed accounts to purchase three separate bond funds.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following affirmative defenses:

1. Claimant made a profit in the four mutual funds at issue;
2. Respondents were not the proximate cause of Claimant's alleged losses;
3. Claimant's claims are barred by applicable statutes of limitations;
4. Claimant was contributorily negligent;
5. Any right of recovery is limited by the doctrine of comparative responsibility;
6. Claimant's claims are barred by the equitable doctrine of laches;
7. Claimant assumed the risk of the market;
8. Claimant's losses, if any, were market losses that were not caused by Respondents and for which Respondents should not be held liable;
9. Claimant failed to timely notify Respondents, either orally or in writing, of complaints arising out of her accounts and, therefore, waived and is estopped from asserting these claims;
10. Claimant failed to mitigate her alleged damages and, in addition, affirmatively incurred damages for which she is solely responsible;
11. Respondents conducted themselves in a professional manner, did not breach any duties owed Claimant, and acted in good faith and without knowledge of any wrongdoing or improper activity in her accounts;
12. Respondents did not act with any intent to defraud Claimant or with any willful disregard for her;
13. Respondents did not misrepresent or omit material facts;
14. Any and all duties owed to Claimant were fully and faithfully performed;
15. Merrill Lynch had in place adequate supervisory procedures that it reasonably implemented and followed;
16. Claimant is not entitled to attorneys' fees as a matter of law;
17. Respondents deny that they engaged in any conduct in violation of the applicable state securities laws or any other principles of common law;
18. Respondents deny that they engaged in any conduct in violation of the federal securities laws or any of the rules promulgated thereunder;

19. Respondents deny that under the facts of this case they owed any fiduciary duty to Claimant;
20. Respondents deny all claims for damages (including punitive damages), interest, attorneys' fees costs and expenses; and,
21. Merrill Lynch denies liability under theories of *respondeat superior* or vicarious liability and denies that it was negligent or breached any contractual obligations with respect to Claimant.

### **RELIEF REQUESTED**

Claimant April E. Miller requested:

Compensatory Damages	Not less than \$400,000.00 for all lost principle, lost interest and/or income, excessive commissions and fees and other pot-of-pocket losses
Punitive Damages	In an amount to be determined at hearing, but not less than three times the amount of actual damages
Interest	Pre- and post-judgment on all sums at the maximum rate allowed by law
Attorneys' Fees	All reasonable fees and costs incurred in bringing this arbitration and enforcing the Award
Other Monetary/Non-Monetary Relief if any:	Mental anguish damages and three times the amount of mental anguish damages for conduct committed intentionally.

Respondents Merrill Lynch and Weron requested that the Panel issue an Award (a) dismissing the Amended Statement of Claim in all respects; (b) assessing the costs and forum and other fees of this proceeding against the Claimant; and, (c) granting Respondents such other and further relief as is deemed just and proper. Respondent Weron also requested that the Panel order that all references to this matter be expunged from his permanent registration record maintained by the Central Registration Depository.

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

On July 27, 2005, the Panel granted Respondents' Motion for More Definite Statement of Claim.

### **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. The Claims asserted by the Claimant, April E. Miller, are dismissed and

- denied in their entirety;
2. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
  3. Any and all relief not specifically addressed herein, including punitive or exemplary 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 = \$ 300.00

#### **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, Pierce, Fenner & Smith, Inc. is a party and the following member fees are assessed:

Member surcharge = \$ 1,700.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$ 2,750.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

May 24-27, 2005 jointly requested adjournment = \$ 1,125.00  
(Waived by NASD)

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A 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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00 = \$ 450.00  
Pre-hearing conference: April 21, 2005 1 session

One (1) Pre-hearing session with Panel @ \$1,125.00 = \$ 1,125.00  
Pre-hearing conference: December 14, 2004 1 session

Six (6) Hearing sessions @ \$1,125.00 = \$ 6,750.00  
Hearing Dates: December 6, 2005 2 sessions  
December 7, 2006 2 sessions  
February 27, 2006 2 sessions

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Total Forum Fees = \$ 8,325.00

The Panel has assessed \$2,775.00 of the forum fees to Claimant April E. Miller, \$2,775.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., and the remaining \$2,775.00 to Respondent Stanley A. Weron.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Claimant April E. Miller requested copies of audio transcripts = \$ 120.00  
Respondent Merrill Lynch requested audio transcripts = \$ 120.00

**FEE SUMMARY**

Claimant April E. Miller is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 2,775.00
<u>Administrative Costs</u>	= \$ 120.00
Total Fees	= \$ 3,195.00
<u>Less payments</u>	= \$ 2,107.50
Balance Due NASD Dispute Resolution	= \$ 1,087.50

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

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 2,775.00
<u>Administrative Costs</u>	= \$ 120.00
Total Fees	= \$ 8,095.00
<u>Less payments</u>	= \$ 5,945.00
Balance Due NASD Dispute Resolution	= \$ 2,150.00

Respondent Stanley A. Weron is solely liable for:

Forum Fees	= \$ 2,775.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 2,775.00

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

NASD Dispute Resolution.

Arbitration No. 04-05812

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**ARBITRATION PANEL**

Donna Ross Philip, Esq. - Public Arbitrator, Presiding Chairperson

Richard Roach - Public Arbitrator

Robert G. Clark - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Donna Ross Philip, Esq.

Public Arbitrator, Presiding Chairperson

3-13-06

Signature Date

Richard Roach

Public Arbitrator

Signature Date

Robert G. Clark

Non-Public Arbitrator

Signature Date

3/13/06 

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

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Donna Ross Philip, Esq. - Public Arbitrator, Presiding Chairperson  
Richard Roach - Public Arbitrator  
Robert G. Clark - Non-Public Arbitrator

Concurring Arbitrators' Signatures

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Donna Ross Philip, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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Richard Roach  
Public Arbitrator

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

  
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Robert G. Clark  
Non-Public Arbitrator

3/11/06  
\_\_\_\_\_  
Signature Date

3/13/06   
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Date of Service (For NASD Dispute Resolution office use only)