

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

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In the Matter of the Arbitration Between:

1992 Samuel Harris Family Trust and The Charlotte Harris Trust (Claimants) vs. Merrill Lynch, Pierce, Fenner and Smith, Inc. and Morgan Stanley DW, Inc. (Respondents)

Case Number: 05-04195

Hearing Site: Cincinnati, Ohio

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Nature of the Dispute: Customers vs. Members

**REPRESENTATION OF PARTIES**

Claimants 1992 Samuel Harris Family Trust ("Family Trust") and The Charlotte Harris Trust ("C.H. Trust") hereinafter collectively referred to as "Claimants": Thomas A. Hargett, Esq., Maddox Hargett & Caruso, P.C., Fishers, IN.

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc. ("Merrill Lynch"): Anne N. DePrez, Esq., Karoline E. Jackson, Esq., and Marc E. Darnell, Esq., Barnes & Thornburg LLP, Indianapolis, IN.

Respondent Morgan Stanley DW, Inc. ("Morgan Stanley"): Gary M. Saretsky, Esq. and Eric A. Michaels, Esq., Hertz, Schram & Saretsky, P.C., Bloomfield Hills, MI.

**CASE INFORMATION**

Statement of Claim filed on or about: August 8, 2005.

Family Trust signed the Uniform Submission Agreement: July 7, 2005.

C.H. Trust signed the Uniform Submission Agreement: July 7, 2005.

Statement of Answer filed by Respondent Merrill Lynch on or about: November 3, 2005.

Merrill Lynch signed the Uniform Submission Agreement: August 31, 2005.

Statement of Answer filed by Respondent Morgan Stanley on or about: November 4, 2005.

Morgan Stanley signed the Uniform Submission Agreement: August 25, 2005.

**CASE SUMMARY**

Claimants asserted the following causes of action: suitability, negligence, misrepresentations and omissions, control person liability, violations of the Indiana Securities Act, violations of NASD Conduct Rules, breach of contract, breach of fiduciary duty, constructive fraud, respondeat superior, negligent supervision, and common law fraud.

Unless specifically admitted in its Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in its Answer, Respondent Morgan Stanley denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$1,464,314.00, pre-judgment interest and post-judgment interest at a rate of 8% per annum, punitive damages, disgorgement of all profits, fees, and commissions earned due to Respondents' misconduct, costs, filing fees, expert witness fees, attorneys' fees, and expenses.

Respondent Merrill Lynch requested dismissal of the Statement of Claim in its entirety.

Respondent Morgan Stanley requested dismissal of the Statement of Claim in its entirety.

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

Respondent Merrill Lynch and Respondent Morgan Stanley submitted to the Panel Motions to Dismiss. On May 23, 2006 the Panel heard oral arguments on Respondents' respective Motions to Dismiss. After due deliberation and review of the entire record, the Panel, by Order dated June, 2006, granted Merrill Lynch and Morgan Stanley's respective Motions to Dismiss.

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

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the May 23, 2006 pre-hearing conference, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are dismissed in their entirety with prejudice.
2. 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
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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 firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, Pierce, Fenner and Smith, Inc and Morgan Stanley DW, Inc. are parties.

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 or each decision rendered on a discovery-related motion on the papers. 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:

Two (2) Pre-hearing sessions with Panel @ \$1,200.00/session	= \$	2,400.00
Pre-hearing conferences: January 9, 2006      1 session		
May 23, 2006      1 session		
<b>Total Forum Fees</b>	<b>= \$</b>	<b>2,400.00</b>

1. The forum fees for the January 9, 2006 conference are as follows:
  - a. The Panel assessed \$600.00 of the forum fees to Claimants, jointly and severally.
  - b. The Panel assessed \$300.00 of the forum fees to Respondent Merrill Lynch.
  - c. The Panel assessed \$300.00 of the forum fees to Respondent Morgan Stanley.

### **Fee Summary**

1. Claimants are jointly and severally is solely liable for:

Initial Filing Fee	= \$	500.00
Forum Fees	= \$	600.00
<u>Total Fees</u>	<u>= \$</u>	<u>1,100.00</u>
<u>Less payments</u>	<u>= \$</u>	<u>1,100.00</u>
Balance Due NASD Dispute Resolution	= \$	0.00
2. Claimant Family Trust is solely liable for:

Forum Fees	= \$	300.00
<u>Total Fees</u>	<u>= \$</u>	<u>300.00</u>
<u>Less payments</u>	<u>= \$</u>	<u>300.00</u>
Balance Due NASD Dispute Resolution	= \$	0.00
3. Claimant C.H. Trust is solely liable for:

Forum Fees	= \$	300.00
<u>Total Fees</u>	<u>= \$</u>	<u>300.00</u>
<u>Less payments</u>	<u>= \$</u>	<u>300.00</u>

Balance Due NASD Dispute Resolution = \$ 0.00

4. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
Forum Fees	= \$ 600.00
Total Fees	= \$ 9,150.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 600.00

5. Respondent Morgan Stanley is solely liable for:

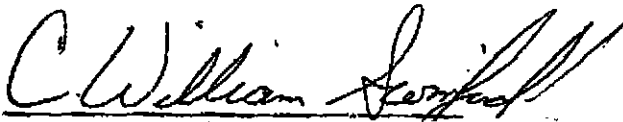
Member Fees	= \$ 8,550.00
Forum Fees	= \$ 600.00
Total Fees	= \$ 9,150.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 600.00

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

**ARBITRATION PANEL**

Bill Swinford, Jr., Esq.	-	Public Arbitrator, Presiding Chairperson
Charles D. Underwood, Jr., Esq.	-	Public Arbitrator
Daniel T. Johns	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Bill Swinford, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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Charles D. Underwood, Jr., Esq.  
Public Arbitrator

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



Daniel T. Johns  
Non-Public Arbitrator

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

June 16, 2006

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Date of Service (For NASD Dispute Resolution use only)