

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimant

Melody Malouf

and

Case Number: 06-00250  
Hearing Site: Houston, Texas

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

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**NATURE OF DISPUTE**

Customer v. Member Firm

**REPRESENTATION OF PARTIES**

Melody Malouf ("**Claimant**") was represented by Leonard Meyer, Esq. and Nelson Ebaugh, Esq., Zimmerman, Axelrad, Meyer, Stern & Wise, Houston, Texas.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent**") was represented by Jack Ballard, Esq., and Ann Ryan Robertson, Esq., The Ballard Law Firm, Houston, Texas.

**CASE INFORMATION**

The Statement of Claim was filed on or about January 18, 2006. The Submission Agreement of Claimant, Melody Malouf, was signed on or about December 22, 2005. Claimant's Response to the Motion to Dismiss was filed on or about April 10, 2006. On or about June 2, 2006, Claimant filed a Second Motion to Strike, and in the alternative, Second Sur-Reply. On or about June 9, 2006, Claimant filed her Second Sur-Reply to Respondent's Reply in Support its Motion to Dismiss.

The Statement of Answer was filed by Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., on or about March 31, 2006. The Submission Agreement of Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., was signed on or about February 16, 2006. Respondent's Motion to Dismiss was filed on or about March 31, 2006. On or about May 10, 2006, Respondent filed its Response to Claimant's Reply to the Motion to Dismiss. On or about May 25, 2006, Respondent filed its Reply to Claimant's Motion to Strike and for Leave to File Sur-Reply to the Motion to Dismiss. On or about June 16, 2006, Respondent filed its Response to Claimant's Second Sur-Reply.

### **CASE SUMMARY**

Claimant asserted the following causes of action: failure to supervise, breach of fiduciary duty, negligence, misrepresentation, suitability, violation of the Texas Deceptive Trade Practices Act and violation of the Texas Securities Act. The causes of action related to recommendation and purchase of various unspecified securities. Claimant alleged that Respondent placed her in unsuitable investments that were not in accordance with her risk tolerance or investment objectives.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: the Statement of Claim failed to state a claim upon which relief can be granted; all of Claimant's claims are barred by the applicable statutes of limitation; Claimant is estopped by her conduct from complaining about the transactions in her accounts; Claimant knew the risks associated with her accounts and willingly assumed those risks at the time each and every transaction took place; Claimant failed to timely complain about any of the transaction in the accounts, and never accused Respondent or its representatives of any misrepresentation, omission, or inappropriate conduct until well after she sustained investment losses; Claimant, by her conduct, waived any claims she might have had against Respondent; Claimant ratified, approved, accepted, acquiesced and confirmed the acts complained of in the Statement of Claim; Claimant assumed the risks of the investments; Claimant's claim are barred by laches; and Claimant failed to mitigate her damages.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of:

Actual/Compensatory Damages	\$350,000.00
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondent requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

On August 10, 2006, the parties presented oral arguments during a conference call regarding Respondent's Motion to Dismiss. After deliberation, the Panel granted Respondent's Motion to Dismiss.

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 NASD Dispute Resolution ("NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the prehearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Claimant's claims, each and all, are hereby dismissed with prejudice;
- 2.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 3.) Any relief not specifically enumerated, including attorneys' fees, is hereby 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 = \$ 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. In this matter, the member firm is Merrill Lynch Pierce Fenner & Smith, Inc.

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

#### **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 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 x \$1,125.00	= \$ 2,250.00
Pre-hearing conferences: June 5, 2006      1 session	
August 10, 2006      1 session	

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Total Forum Fees	= \$ 2,250.00
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The Arbitration Panel has assessed \$1,125.00 of the forum fees to Melody Malouf.

The Arbitration Panel has assessed \$1,125.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

#### **Fee Summary**

Claimant, Melody Malouf, is liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 1,125.00
Total Fees	= \$ 1,425.00
Less payments	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 1,125.00
Total Fees	= \$ 6,325.00
Less payments	= \$ 5,200.00
Balance Due NASD Dispute Resolution	= \$ 1,125.00

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

**ARBITRATION PANEL**

James A. Parker - Public Arbitrator, Presiding Chair  
Malcolm Whittaker - Public Arbitrator  
Teresa Jensen White, CFP - Non-Public Arbitrator

Concurring Arbitrators:

/s/ James A. Parker  
James A. Parker  
Public Arbitrator, Presiding Chair

August 10, 2006  
Signature Date

/s/ Malcolm Whittaker  
Malcolm Whittaker  
Public Arbitrator

August 10, 2006  
Signature Date

/s/ Teresa Jensen White, CFP  
Teresa Jensen White, CFP  
Non-Public Arbitrator

August 10, 2006  
Signature Date

August 11, 2006  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

James A. Parker - Public Arbitrator, Presiding Chair  
Malcolm Whittaker - Public Arbitrator  
Teresa Jensen White, CFP - Non-Public Arbitrator

Concurring Arbitrators:

James A. Parker  
James A. Parker  
Public Arbitrator, Presiding Chair

8/10/06  
Signature Date

Malcolm Whittaker  
Malcolm Whittaker  
Public Arbitrator

Signature Date

Teresa Jensen White, CFP  
Teresa Jensen White, CFP  
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)

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Malcolm Whittaker - Public Arbitrator  
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**Concurring Arbitrators:**

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James A. Parker  
Public Arbitrator, Presiding Chair

  
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Malcolm Whittaker  
Public Arbitrator

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

August 10, 2006  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Teresa Jensen White, CFP  
Non-Public Arbitrator

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

\_\_\_\_\_  
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Malcolm Whittaker - Public Arbitrator  
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Concurring Arbitrators:

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James A. Parker  
Public Arbitrator, Presiding Chair

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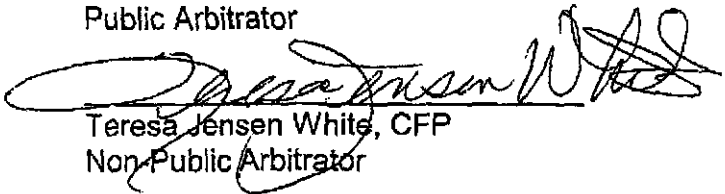
Signature Date

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Malcolm Whittaker  
Public Arbitrator


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Signature Date



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Teresa Jensen White, CFP  
Non-Public Arbitrator



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Signature Date

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Date of Service (For NASD office use only)