

NASD REGULATION, INC. AWARD

NASD REGULATION, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Henry J. Harfosh

96-01016

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
James D'Amico

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REPRESENTATION

For Claimant Henry Harfosh ("Claimant") appeared Sidney L. Manes, Esq., of the law firm Green & Seifter in Syracuse, New York.

For Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") and James D'Amico, ("D'Amico") (collectively the "Respondents") appeared Marianne Bretton Granatoor, Esq., in-house-counsel located in New York, New York.

CASE INFORMATION

Statement of Claim was filed March 7 1996.

Claimant's Submission Agreement was signed on February 26, 1996.

Joint Statement of Answer was filed by Respondents on June 13, 1996.

Respondent Merrill Lynch's Submission Agreement was signed on February 5, 1997.

Respondent James D'Amico's Submission Agreement was signed on October 23, 1996.

HEARING INFORMATION

Pre-Hearing Conferences:	October 18, 1996	-	One Session
	April 3, 1997	-	One Session
Hearing dates/sessions:	April 9, 1997	-	Two Sessions
	April 10, 1997	-	Two Sessions

The hearings were conducted at the Marriott Hotel located in Albany, New York.

### CASE SUMMARY

Claimant alleged that, in January of 1993, he purchased shares of Boeing Company ("Boeing") from Merrill Lynch and from A.G. Edwards & Sons, in volumes of 3000 and 4000 shares, respectively, at approximately \$46.00 a share. Claimant further alleged that, on March 1, 1995, D'Amico predicted a drop in Boeing stock and advised him to sell all of his shares in Boeing. Claimant contended that, based solely upon D'Amico's representations concerning Merrill Lynch's position on Boeing, he liquidated all of his shares of Boeing, including the shares in A.G. Edwards account and purchased 1,400 shares of St. Paul Companies and 2,200 shares of Boatmans Bank. Claimant further contended that as a result of these transactions respondents earned a commission of \$2,164.51.

Claimant alleged that Boeing stock, rather than decreasing, increased in value to the current price of approximately \$83.00 per share. Claimant asserted that, on March 13, 1995, he requested that D'Amico restore his position to what it had been on March 1, 1995, with respect to the Boeing stock. Claimant further asserted that D'Amico became angry, refused to honor his request, and advised him that he would no longer handle his account. Claimant maintained that, as a result, he proceeded to transfer his entire account to A.G. Edwards & Sons.

Respondents maintained that claimant's account was serviced in a lawful, competent, and professional fashion, in accordance with claimant's directions, and all trading was properly authorized in advance. Respondents further maintained that, in January of 1989, claimant opened an account at Merrill Lynch's Syracuse, New York office and, in 1991, D'Amico began to handle the account. Respondents also maintained that trades entered by D'Amico were accompanied by frequent phone calls from claimant who routinely questioned prices and the merits of Merrill Lynch's analysts recommendations. Respondents contended that, in March of 1995, due to fluctuations in the price of Boeing's stock, D'Amico suggested that claimant consider selling the Boeing stock and investing the proceeds in banking and insurance stocks. Respondents further contended that D'Amico never indicated that Merrill Lynch's research opinion for this stock had changed.

Respondent further contended that claimant earned a profit of over \$10.00 per share by selling the Boeing stocks, that both of the stocks purchased with the proceeds from claimant's sale of Boeing have increased in value, that claimant has profited from Mr. D'Amico's suggestions, and it was unrealistic to expect a financial consultant to know exactly how a stock will change in value. Respondents maintained that claimant failed to state a claim upon which relief may be granted, that claimant was barred from maintaining this proceeding on the grounds of laches; that all losses allegedly suffered by claimant were proximately caused by claimant's own negligence, that claimant expressly ordered, approved, authorized, participated in and ratified the acts complained of and, therefore, claimant was accordingly estopped from recovery herein.

### RELIEF REQUESTED

Claimant requested an award against each of the respondents in the total amount of \$410,250.00 representing actual damages \$260,250.00, damages for emotional distress in the

amount of \$75,000, and punitive damages in the amount of \$15,000, plus interest and the cost and expenses incurred in this proceeding, including attorney's fees.

Respondents requested that the Statement of Claim be dismissed in its entirety, that the costs and expenses of the arbitration proceeding be assessed against the claimant and that respondents be awarded such other and further relief as the panel deems is just and proper

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

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 originals remain on file with the NASD.

#### **AWARD**

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

1. All claims against respondents Merrill Lynch and D'Amico be and hereby are dismissed in their entirety.
2. Respondent D'Amico's request for expungement of his Form U-4 is hereby denied.
3. Claimant's request for attorney fees is hereby denied.
4. Claimant's request for punitive damages are denied.
5. Each party shall bear their respective costs.
6. All other requests for relief are denied.

#### **FORUM FEES**

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$200.00 non-refundable filing fee previously paid by claimant and have assessed the following forum fees:

2 Pre-Hearing Session x \$300.00	= \$ 600.00
4 Hearing Sessions x \$750.00	= \$3,000.00
Total fees outstanding	= \$3,600.00

1. Claimant, be and is hereby liable and shall pay to NASD Regulation Inc. the sum of \$1,800.00, representing one-half of the total amount of forum fees assessed. Claimant previously deposited \$750.00 with NASD Regulation, Inc and, therefore, claimant shall pay to NASD Regulation, Inc. the sum of \$1,050.00.

2. Respondents, Merrill Lynch and D'Amico be and hereby are jointly and severally liable for and shall pay to NASD Regulation, Inc. the sum of \$1,800.00, representing one-half of the forum fees assessed.

Fees are payable to NASD Regulation, Inc.

**ARBITRATORS' SIGNATURES**

I, Lorraine I. Remo, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



Lorraine I. Remo, Esq.  
Public Chairperson

I, Prescott C. Sook, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law & Rules, that I am the individual described herein, and who executed this instrument which is my award.

Prescott C. Sook, Esq.  
Public arbitrator

I, Edward LaVarnway, do hereby affirm, pursuant to article 7507 of the Civil Practice Law & rules, that I am the individual described herein, and who executed this instrument which is my award.

Edward LaVarnway  
Industry Arbitrator

Date of Decision: June 23, 1997

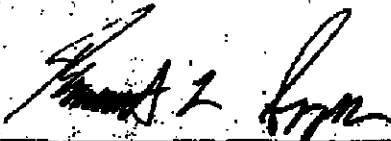
**ARBITRATORS' SIGNATURES**

I, Lorraine I. Reno, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

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Lorraine I. Reno, Esq.  
Public Chairperson

I, Prescott C. Sook, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law & Rules, that I am the individual described herein, and who executed this instrument which is my award.



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Prescott C. Sook, Esq.  
Public arbitrator

I, Edward LaVarnway, do hereby affirm, pursuant to article 7507 of the Civil Practice Law & rules, that I am the individual described herein, and who executed this instrument which is my award.

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Edward LaVarnway  
Industry Arbitrator

Date of Decision: June 23, 1997

**ARBITRATORS' SIGNATURES**

I, Lorraine I. Remo, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

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Lorraine I. Remo, Esq.  
Public Chairperson

I, Prescott C. Sook, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law & Rules, that I am the individual described herein, and who executed this instrument which is my award.

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Prescott C. Sook, Esq.  
Public arbitrator

I, Edward LaVainway, do hereby affirm, pursuant to article 7507 of the Civil Practice Law & rules, that I am the individual described herein, and who executed this instrument which is my award.

  
Edward LaVainway  
Industry Arbitrator

Date of Decision: June 23, 1997