

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimants

Case Number: 03-02107

Ted and Shirley Berry; Daniel and Betty Gower;  
Amber J. Sievers; Natalie Gower;  
Keith and Beverly Kirk; Jerry and Mary McLain Littlejohn;  
Garry and Brenda Warner; Royce Garrett;  
Larry and Rheta Waldrop; Gene and Virginia Montgomery;  
Brian and Jane Evans; Edward and Pamela Rich; and  
Wayne and Karen Montgomery

Name of the Respondent

Hearing Site: Indianapolis, Indiana

Merrill Lynch Pierce Fenner & Smith, Inc.

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**NATURE OF DISPUTE**

Customers vs. Member Firm

**REPRESENTATION OF PARTIES**

David L. McGee, Esq. and Peter Mougey, Esq. of the law firm Beggs & Lane, located in Pensacola, Florida represented Claimants Ted and Shirley Berry ("Berry"); Daniel and Betty Gower ("Gower"); Amber J. Sievers ("Sievers"); Natalie Gower ("N. Gower"); Keith and Beverly Kirk ("Kirk"); Jerry and Mary McLain Littlejohn ("Littlejohn"); Garry and Brenda Warner ("Warner"); Royce Garrett ("Garrett"); Larry and Rheta Waldrop ("Waldrop"); Gene and Virginia Montgomery ("Gene and Virginia Montgomery"); Brian and Jane Evans ("Evans"); Edward and Pamela Rich ("Rich"); and Wayne and Karen Montgomery ("Wayne and Karen Montgomery"), hereinafter collectively referred to as "Claimants."

James L. Petersen, Esq. and Philip Whistler, Esq. of the law firm Ice Miller, located in Indianapolis, Indiana, along with their co-counsel, Peter S. Fruin, Esq. of the law firm Maynard, Cooper & Gale, P.C. located in Birmingham, Alabama represented the Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Respondents."

**CASE INFORMATION**

The Statement of Claim was filed on or about March 21, 2003. Claimants Ted and Shirley Berry jointly signed a Uniform Submission Agreement on January 22, 2003; Amber J. Sievers signed a Uniform Submission Agreement on January 22, 2003; Royce Garrett signed a Uniform Submission Agreement on February 10, 2003; Gene and Virginia Montgomery jointly signed a Uniform Submission Agreement on January 22, 2003; Brian and Jane Evans jointly signed a Uniform Submission Agreement on January 22, 2003; Pamela Rich signed a Uniform Submission Agreement on January 23, 2003; Daniel and Betty Gower jointly signed a Uniform Submission Agreement on December 8, 2003; Wayne and Karen Montgomery jointly signed a Uniform Submission Agreement on December 9, 2003; and Claimants Gary and Brenda Warner, Jerry and Mary McLain Littlejohn, Edward Rich, Larry and Rheta Waldrop, and Keith

and Beverly Kirk all submitted an undated Uniform Submission Agreement.

The Statement of Answer was filed by Respondent Merrill Lynch on or about July 30, 2003. Respondent Merrill Lynch signed the Uniform Submission Agreement on May 15, 2003.

Respondent Merrill Lynch filed a Motion to Sever Claims on November 26, 2003 and a Reply Brief on December 31, 2003. Claimants filed a Response to said Motion on March 9, 2004.

Claimants filed a Motion to Amend Statement of Claim and Amended Statement of Claim on January 26, 2004 to name additional Claimants, Stacey Shew ("Shew"), Tura Pauline Leckey ("Leckey"), and as beneficiary for Christopher Buchanan, Justin A. Buchanan, Kendra N. Leckey and Caitlin M. Leckey. Respondent Merrill Lynch filed its Response on February 24, 2004.

### CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty, suitability, failure to supervise, negligent misrepresentations, omission, and violation of Blue Sky Laws. The causes of action relate to various stocks and equity mutual funds, including certain Dreyfus funds, certain Alliance funds, Fidelity Advisor funds, Merrill Lynch bond fund, Marathon Oil, U.S. Steel, and technology stocks such as Oracle and EMC. Other investments included mutual funds such as the Alliance Premier Growth Fund; the Merrill Lynch Basic Value Fund; the Merrill Lynch Fundamental Growth Fund; the Alliance Growth & Income Fund; the AIM Basic Value Fund; the Merrill Lynch Small Cap Value Fund; the Pimco Small Cap Fund, and MFA products and other diversified mutual funds and fixed income funds.

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

1. Claimants' claims are barred by the equitable doctrines of waiver, laches and estoppel;
2. To the extent that any Claimant failed to mitigate his alleged losses, he or she is barred from recovering said losses from the Respondent;
3. To the extent that any of the damages complained of by Claimant were the proximate fault of any person or entity other than the Respondent, including Claimant himself, then Claimants' recovery, if any, should be reduced proportionately pursuant to the Illinois Comparative Fault Act;
4. Claimants ratified the trades in their accounts;
5. To the extent any Claimant bears any fault in relation to any of the claims that he has asserted, he is therefore barred from recovery;
6. Each Claimant was fully advised and aware of the nature of his investments and the risks involved, and knowingly assumed the risks; and
7. Some of the occurrences and conduct alleged by Claimants occurred outside the relevant statute of limitations, and such actions are barred.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$4,200,000.00; and unspecified amounts for punitive damages, interest, attorneys' fees and other costs.

Respondent Merrill Lynch requested dismissal of all claims in their entirety.

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

The Panel heard oral argument on Claimants' Motion to Amend Statement of Claim and Respondent's Motion to Sever on March 10, 2004. The Panel denied both Motions. This matter proceeded on claims asserted in the initial Statement of Claim, and parties Shew and Leckey were not added as Claimants to these proceedings.

During the hearing on June 28, 2004, Claimants presented to the Panel a Memorandum of Law on Lost Wages and Respondent's Brief on Purported Lost Wages Claim. The Panel reserved their decision on the issue of lost wages until close of hearing.

Also, on June 28, 2004, Respondent filed a Motion to Strike Claimants' Amended and Second Amended Witness and Exhibit List, and the Panel granted Respondent's Motion. The following individuals were stricken from the list of witnesses to appear at the hearing: Ralph Bilyew; Ken Woodworth; Jeffrey Tuttle; Charles M. David; James Pearson; Bethany Grimes; and Patrick Keen. Also, responsive documents to discovery Request No. 43 containing investment advice given by Merrill Lynch brokers, Shawn Sorrells and Jason Murdock, to other Merrill Lynch customers, were stricken from Claimants' Exhibit List.

On August 5, 2004 during the hearing, Claimants filed a Memorandum on the applicability of work product privilege to Shawn Sorrell's written statement, and requested that Respondent produce these statements. Respondent filed its opposition to Claimants' request. After Panel deliberation, the Panel denied Claimants' request.

On August 30, 2004 during the hearing, Claimants submitted a Damages Memorandum and Respondent filed a Brief on Measure of Damages, both relating to the McCann expert testimony given by Claimants on the theory of a "well-managed portfolio." The Panel reserved their decision on the issue of damages until close of hearing.

Lastly, during the proceedings on August 30, 2004, Respondent Merrill Lynch made an oral motion to dismiss all claims. After hearing arguments by both parties, the Panel denied Respondent's motion.

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 and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Ted and Shirley Berry, the sum of \$75,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
2. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Berry the sum of \$27,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Berry.
3. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Brian and Jane Evans, the sum of \$68,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
4. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Evans the sum of \$25,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Evans.
5. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimant Royce Garrett, the sum of \$24,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full. The Panel denied punitive damages to Claimant Garrett.
6. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Daniel and Betty Gower, the sum of \$22,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
7. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Gower the sum of \$8,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Gower.
8. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Keith and Beverly Kirk, the sum of \$80,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the

- date the award is paid in full.
9. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Kirk the sum of \$28,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Kirk.
  10. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Jerry Littlejohn and Mary McLain Littlejohn, the sum of \$25,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full. The Panel denied punitive damages to Claimants Littlejohn.
  11. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Gene and Virginia Montgomery, the sum of \$45,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
  12. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Gene and Virginia Montgomery the sum of \$25,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Gene and Virginia Montgomery.
  13. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Wayne and Karen Montgomery, the sum of \$60,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
  14. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Wayne and Karen Montgomery the sum of \$25,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Wayne and Karen Montgomery.
  15. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Edward and Pamela Rich, the sum of \$65,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
  16. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Rich, the sum of \$18,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Rich.

17. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Larry and Rheta Waldrop, the sum of \$20,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
18. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Waldrop, the sum of \$10,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Waldrop.
19. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Garry and Brenda Warner, the sum of \$77,000.00 as compensatory damages, plus interest at the rate of 4.5% per annum to accrue from date the award is served until the date the award is paid in full.
20. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Warner, the sum of \$25,000 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Warner.
21. Parties shall bear their own costs, including attorneys' fees, except as specified herein.
22. Any and all relief not specifically addressed herein, including any punitive damages beyond those specified herein, are 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	= \$ 600.00
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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 person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch Pierce Fenner & Smith, Inc. is a party and is assessed the following fees:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 5,000.00</u>
Total fees	= \$8,550.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed: None.

**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:

Three (3) Pre-hearing sessions with a single arbitrator @ \$450.00 = \$ 1,350.00  
Pre-hearing conferences: November 24, 2003 1 session  
May 21, 2004 1 session  
June 14, 2004 1 session

Two (2) Pre-hearing sessions with Panel @ \$1,200.00 = \$ 2,400.00  
Pre-hearing conferences: November 3, 2003 1 session  
March 10, 2004 1 session

Fifty-two (52) Hearing sessions @ \$1,200.00 = \$62,400.00  
Hearing Dates: June 28, 2004 2 sessions  
June 29, 2004 2 sessions  
June 30, 2004 2 sessions  
July 1, 2004 2 sessions  
July 2, 2004 2 sessions  
July 6, 2004 2 sessions  
July 7, 2004 2 sessions  
July 8, 2004 2 sessions  
July 9, 2004 2 sessions  
July 10, 2004 2 sessions  
August 5, 2004 2 sessions  
August 6, 2004 2 sessions  
August 7, 2004 2 sessions  
August 9, 2004 2 sessions  
August 10, 2004 3 sessions  
August 11, 2004 2 sessions  
August 12, 2004 2 sessions  
August 13, 2004 2 sessions  
August 14, 2004 1 session  
August 30, 2004 3 sessions  
August 31, 2004 2 sessions  
September 1, 2004 3 sessions  
September 2, 2004 3 sessions  
September 3, 2004 2 sessions  
September 6, 2004 1 session

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Total Forum Fees = \$66,150.00

The Panel assessed 100% of the total forum fees in the amount of \$66,150.00 solely to Respondent Merrill Lynch Pierce Fenner & Smith, Inc.

**FEES SUMMARY**

1. Claimants Gower; Sievers; Natalie Gower; Kirk; Littlejohn; Warner; Garrett; Waldrop; Gene and Virginia Montgomery; Evans; Rich; and Wayne and Karen Montgomery are solely liable for:

Initial Filing Fee	= \$ 600.00
<u>Less payments</u>	<u>= \$ 2,400.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,800.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$66,150.00</u>
Total Fees	= \$74,700.00
<u>Less payments</u>	<u>= \$ 8,550.00</u>
Balance Due NASD Dispute Resolution	= \$66,150.00

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

**ARBITRATION PANEL**

Stanley G. Rives, PhD.	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Thomas A. Welch	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Stanley G. Rives, PhD.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
9/22/04  
Signature Date

\_\_\_\_\_  
Daniel P. Urban  
Public Arbitrator

\_\_\_\_\_  
9/22/04  
Signature Date

\_\_\_\_\_  
Thomas A. Welch  
Non-Public Arbitrator

\_\_\_\_\_  
9/22/04  
Signature Date

\_\_\_\_\_  
9/22/04  
Date of Service (For NASD Dispute Resolution office use only)



NASD Dispute Resolution

Arbitration No. 09-02107

Award Page 6

**SEE SUMMARY**

1. Claimants Gower; Sievers; Natalie Gower; Kirk; Littlejohn; Warner; Garrett; Waldrop; Gene and Virginia Montgomery; Evans; Rich; and Wayne and Karen Montgomery are solely liable for:

Initial Filing Fee	= \$ 600.00
Less payments	= \$ 2,400.00
Refund Due from NASD Dispute Resolution	= \$ 1,800.00

2. Respondent Merrill Lynch is solely liable for:


Member Fees	= \$ 8,550.00
Forum Fees	= \$66,150.00
Total Fees	= \$74,700.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$66,150.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10390(g) of the Code.

**ARBITRATION PANEL**

Stanley G. Fives, PhD.	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Thomas A. Welch	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
 Stanley G. Fives, PhD.  
 Public Arbitrator, Presiding Chairperson

9-22-04  
 Signature Date

\_\_\_\_\_  
 Daniel P. Urban  
 Public Arbitrator

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

\_\_\_\_\_  
 Thomas A. Welch  
 Non-Public Arbitrator

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

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

**SEE SUMMARY**

1. Claimants Gower; Sievers; Natalie Gower; Kirk; Littlejohn; Warner; Garrett; Waldrop; Gene and Virginia Montgomery; Evans; Rich; and Wayne and Karen Montgomery are solely liable for:

Initial Filing Fee	= \$ 600.00
Less payments	= \$ 2,400.00
Refund Due from NASD Dispute Resolution	= \$ 1,800.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
Forum Fees	= \$66,150.00
Total Fees	= \$74,700.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$66,150.00

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

**ARBITRATION PANEL**

Stanley G. Rives, PhD.	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Thomas A. Welch	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Stanley G. Rives, PhD.  
Public Arbitrator, Presiding Chairperson

Signature Date

  
Daniel P. Urban  
Public Arbitrator

  
Signature Date

Thomas A. Welch  
Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution  
 Arbitration No. 03-02107  
 Award Page 8

**EEE SUMMARY**

1. Claimants Gower; Sievers; Natalie Gower; Kirk; Littlejohn; Warner; Garrett; Waldrop; Gene and Virginia Montgomery; Evans; Rich; and Wayne and Karen Montgomery are solely liable for:

Initial Filing Fee	= \$ 600.00
Less payments	= \$ 2,400.00
Refund Due from NASD Dispute Resolution	= \$ 1,800.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
Forum Fees	= \$86,150.00
Total Fees	= \$74,700.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$66,150.00

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

**ARBITRATION PANEL**

Stanley G. Rives, PhD.	-	Public Arbitrator, Presiding Chairperson
Daniel P. Urban	-	Public Arbitrator
Thomas A. Welch	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
 Stanley G. Rives, PhD.  
 Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
 Daniel P. Urban  
 Public Arbitrator

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

*Thomas A. Welch*  
 \_\_\_\_\_  
 Thomas A. Welch  
 Non-Public Arbitrator

*Sept 22, 2004*  
 \_\_\_\_\_  
 Signature Date

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