

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

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In the Matter of the Arbitration Between:

Robert J. Smith Revocable Trust dated 9/15/94, Robert J. Smith and Diane E. Smith, Co-Trustees (Claimant) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Paul E. Brindle, and John D. Canale (Respondents)

Case Number: 03-01735

Hearing Site: Albany, New York

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Nature of the Dispute: Customer v. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimant Robert J. Smith Revocable Trust dated 9/15/94, Robert J. Smith and Diane E. Smith, Co-Trustees ("The Trust") hereinafter referred to as "Claimant": Roger G. McMorrow, Esq., McMorrow & Dillon, P.A., Naples, FL. Previously represented by: John J. Martin, Jr., Esq., Martin, Oliveira, Alessio & Lee, LLP, Pittsfield, MA.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Paul E. Brindle ("Brindle"), and John D. Canale ("Canale") hereinafter collectively referred to as "Respondents": Ethan Leonard, Esq., The Law Offices of Neal Brickman, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: March 5, 2003.

Claimant signed the Uniform Submission Agreement: March 3, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent Merrill Lynch on or about: July 28, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: July 24, 2003.

Respondent Brindle did not file a Statement of Answer or sign the Uniform Submission Agreement.

Respondent Canale did not file a Statement of Answer or sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: unauthorized trading; failure to supervise; unsuitable recommendations and trading; misrepresentation/non-disclosure; breach of contract; churning; manipulations; breach of contract; negligence; fraud; violation of the Massachusetts Securities Act; violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-

5 promulgated thereunder; and unfair and deceptive acts. The causes of action relate to common stock.

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

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$196,251.00; punitive damages in the amount of \$588,753.00; treble damages; costs; interest; attorneys' fees; and other case-related costs.

Respondent Merrill Lynch requested dismissal of the Statement of Claim in its entirety; costs, disbursements, and attorneys' fees; and such other and further relief as the NASD, or Panel, may deem just and proper.

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

By letter dated July 28, 2003, counsel for Respondents Brindle and Canale contested jurisdiction as they are not currently registered agents. However, upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrators (the "Panel") determined that Respondents Brindle and Canale have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondents present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondents Brindle and Canale did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and are bound by the determination of the Panel on all issues submitted.

By letter dated January 14, 2005, NASD Dispute Resolution was notified that the parties settled this matter and that Claimant withdrew, with prejudice its claims against Respondents Brindle and Canale and requested the entry of this Stipulated Award.

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**

The parties entered into an agreement to present to the Panel a Stipulated Award. Now, in lieu of a hearing and upon motion of all parties for an entry of an award, the written stipulation thereto, the Panel grants the motion and enters this award granting the following relief:

1. The claims of Claimant are dismissed in their entirety.
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Paul E. Brindle's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Paul E. Brindle must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent John D. Canale's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent John D. Canale must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
4. Any and all claims for costs, fees, punitive damages, treble damages, or attorneys' fees, or any other relief, except for that specifically provided for herein, by either party, are hereby dismissed with prejudice.

#### **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 = \$375.00

##### **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 persons at the time of the events giving rise to the dispute. In this matter, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member Surcharge = \$2,250.00

Pre-Hearing Process Fee = \$ 750.00

Hearing Process Fee = \$4,000.00

Total Member Fees = \$7,000.00

##### **Adjournment Fees**

The following adjournment fees are assessed:

June 8-11, 2004, adjournment requested by Claimant = \$1,200.00

**Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

January 18-20, 2005, settled by parties	= \$300.00
Claimant's share	= \$75.00
Respondent Merrill Lynch's share	= \$75.00
Respondent Brindle's share	= \$75.00
Respondent Canale's share	= \$75.00

**Forum Fees and Assessments**

The 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. Forum fees associated with these proceedings are:

One (1) Pre-hearing conference session with the Panel @ \$1,200.00/session	= \$1,200.00
Pre-hearing conference: December 5, 2003 1 session	
Total Forum Fees	= \$1,200.00

1. The Panel has assessed \$600.00 of the forum fees against Claimant.
2. The Panel has assessed \$600.00 of the forum fees against Respondent Merrill Lynch.

**Fee Summary**

1. Claimant is solely liable for:	
Initial Filing Fee	= \$ 375.00
Adjournment Fee	= \$1,200.00
Three Day Cancellation Fee	= \$ 75.00
Forum Fees	= \$1,200.00
Total Fees	= \$2,850.00
Less payments	= \$1,575.00
Balance Due NASD Dispute Resolution	= \$1,275.00

*Pursuant to Rule 10332(f) of the Code of Arbitration Procedure, NASD is retaining the total amount of the hearing session deposited by the Claimant because this office was notified by the parties that they settled this matter within eight business days of the first scheduled hearing session.*

2. Respondent Merrill Lynch is solely liable for:	
Member Fees	= \$7,000.00
Three Day Cancellation Fee	= \$ 75.00
Forum Fees	= \$ 600.00

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2. Respondent Merrill Lynch is solely liable for:	
Member Fees	= \$7,000.00
Three Day Cancellation Fee	= \$ 75.00
Forum Fees	= \$ 600.00

Total Fees	= \$7,675.00
<u>Less payments</u>	<u>= \$7,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 675.00

3. Respondent Brindle is solely liable for:

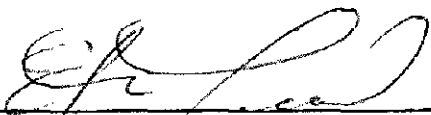
<u>Three Day Cancellation Fee</u>	<u>= \$ 75.00</u>
Total Fees	= \$ 75.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 75.00

4. Respondent Canale is solely liable for:

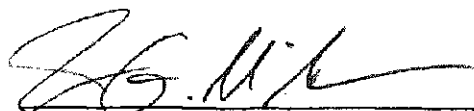
<u>Three Day Cancellation Fee</u>	<u>= \$ 75.00</u>
Total Fees	= \$ 75.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 75.00

All balances are due and payable to NASD Dispute Resolution

Dated: January 27, 2005



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\_\_\_\_\_  
David W. Morris

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

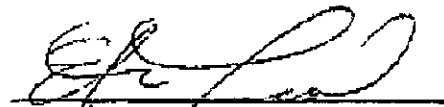
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Jacqueline W. Marshall

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Signature Date

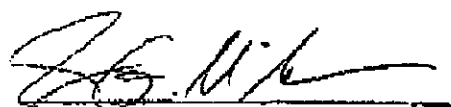
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Ramona Gallagher

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Signature Date

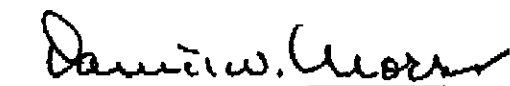
Dated: January ~~27~~ <sup>27</sup>, 2005



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David W. Morris

February 18, 2005  
Signature Date

Jacqueline W. Marshall

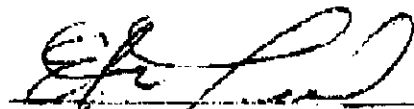
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Ramona Gallagher

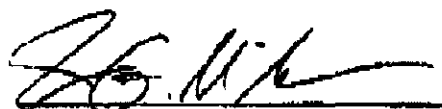
Signature Date



Dated: January 27, 2005



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David W. Morris

Signature Date



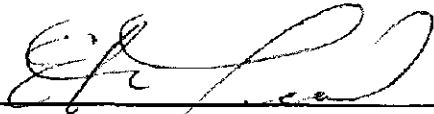
Jacqueline W. Marshall

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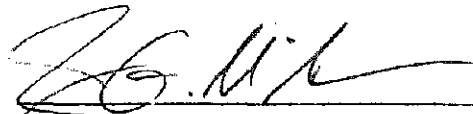
Ramona Gallagher

Signature Date

Dated: January 24, 2005



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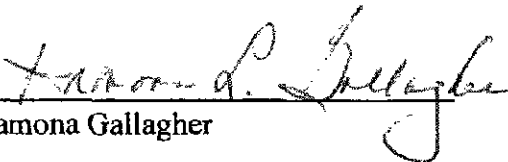
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Signature Date

\_\_\_\_\_  
Jacqueline W. Marshall

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



Ramona Gallagher


2-24-05  
\_\_\_\_\_  
Signature Date

ARBITRATION PANEL

David W. Morris, Esq.	-	Public Arbitrator, Presiding Chair
Ramona L. Gallagher	-	Public Arbitrator
Jacqueline W. Marshall	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, 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 is which is my award.



David W. Morris, Esq.  
Public Arbitrator, Presiding Chair

February 19, 2005  
Signature Date

\_\_\_\_\_  
Ramona L. Gallagher  
Public Arbitrator

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

\_\_\_\_\_  
Jacqueline W. Marshall  
Non-Public Arbitrator

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

March 1, 2005  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

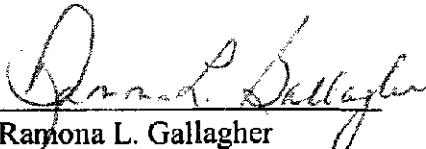
David W. Morris, Esq.	-	Public Arbitrator, Presiding Chair
Ramona L. Gallagher	-	Public Arbitrator
Jacqueline W. Marshall	-	Non-Public Arbitrator

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I, the undersigned arbitrator, 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 is which is my award.

\_\_\_\_\_  
David W. Morris, Esq.  
Public Arbitrator, Presiding Chair

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

  
\_\_\_\_\_  
Ramona L. Gallagher  
Public Arbitrator

2-24-05  
\_\_\_\_\_  
Signature Date

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Jacqueline W. Marshall  
Non-Public Arbitrator

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

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March 1, 2005  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

David W. Morris, Esq.	-	Public Arbitrator, Presiding Chair
Ramona L. Gallagher	-	Public Arbitrator
Jacqueline W. Marshall	-	Non-Public Arbitrator

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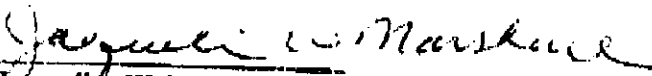
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David W. Morris, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

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