

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

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In the Matter of the Arbitration Between:

John J. Smith and Maria Schluter and John J. Smith IRA (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., George Edward Hagerty, Keith E. Hagerty, and Henry Blodget (Respondents)

Case Number: 03-04887

Hearing Site: New York, New York

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

**REPRESENTATION OF PARTIES**

Claimant John J. Smith ("Smith") and Maria Schluter ("Schluter") and John J. Smith IRA ("Smith IRA") hereinafter collectively referred to as "Claimants": Andrew J. Kohler, Esq., John T. McGuire & Associated, P.C., New York, NY.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), George Edward Hagerty ("G. Hagerty"), and Keith E. Hagerty ("K. Hagerty"): Dimitri Nemirovsky, Esq., Bingham McCutchen, LLP, New York, NY.

Respondent Henry Blodget ("Blodget"): Joseph D. Edmondson, Jr., Esq., Foley & Lardner, Washington, D.C.

**CASE INFORMATION**

Statement of Claim filed on or about: June 30, 2003.

Claimants signed the Uniform Submission Agreement: June 21, 2003.

Joint Statement of Answer filed by Respondents MLPFS, G. Hagerty, and K. Hagerty on or about: September 18, 2003.

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

Respondent G. Hagerty signed the Uniform Submission Agreement: September 9, 2003.

Respondent K. Hagerty signed the Uniform Submission Agreement: September 9, 2003.

Statement of Answer filed by Respondent Blodget on or about: October 6, 2003.

Respondent Blodget did not sign the Uniform Submission Agreement.

### **CASE SUMMARY**

Claimants asserted the following causes of action: negligence; breach of fiduciary duty; failure to supervise; fraud; securities fraud; and breach of contract. The causes of action relate to various common and preferred stocks, including, but not limited to Rhythms, Infinity Broadcasting, Computer Associates, JDS Uniphase, Digex, Shiva, U.S. Bioscience, Micron, Informix, Infoseek, Tosco, Ubid, Lucent, Street.com, Vitesse, Ziff Davis, Analog, and Starmedia.

Unless specifically admitted in their Answer, Respondents MLPFS, G. Hagerty, and K. Hagerty denied the allegations of wrongdoing set forth in the Statement of Claim and asserted various affirmative defenses.

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

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$1,800,000.00, plus 9% interest pursuant to NY CPLR §5004, from the date the losses were incurred to the date of the Arbitration hearing; punitive damages; attorneys' fees; costs; and any other damages the Panel may deem just and fair.

Respondents MLPFS, G. Hagerty, and K. Hagerty requested that the Panel dismiss the Statement of Claim in its entirety; that the Panel direct that the registration files of Respondents G. Hagerty and K. Hagerty be expunged of any reference to this claim; and grant such other, further, and different relief as the Panel may deem appropriate.

Respondent Blodget requested that the Statement of Claim be dismissed with prejudice, that he be awarded his attorneys' fees and costs, and that all references to the Statement of Claim be expunged from Blodget's CRD record.

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

Respondent Blodget did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On or about January 15, 2004, Claimants dismissed their claims against Respondent Blodget.

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 parties have agreed to settle this matter for a sum certain to be paid by Respondent MLPFS.
2. Claimants' claims are hereby dismissed in their entirety with prejudice.
3. All parties are to bear their own attorneys' fees.
4. The panel determined that expungement of reference to these proceedings and the settlement from the registration records of Respondents G. Hagerty and K. Hagerty maintained by the NASD Central Registration Depository ("CRD") would have no material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements. Accordingly,
  - a. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent G. Hagerty'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 G. Hagerty must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
  - b. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent K. Hagerty'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 K. Hagerty must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
5. All other relief requests not specifically addressed herein, including punitive damages, 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 = \$500.00

### **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	= \$2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$5,000.00
<u>Total Member Fees</u>	<u>= \$8,550.00</u>

### **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:

Two (2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$2,400.00

Pre-hearing conferences:	December 30, 2003	1 session
	April 2, 2004	1 session

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Total Forum Fees = \$2,400.00

1. The Panel has assessed \$1,200.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$1,200.00 of the forum fees jointly and severally against Respondents MLPFS, G. Hagerty, and K. Hagerty.

### **Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
<u>Forum Fees</u>	<u>= \$1,200.00</u>
Total Fees	= \$1,700.00
<u>Less payments</u>	<u>= \$1,800.00</u>
Refund Due to Claimants	= \$ 100.00

2. Respondent MLPFS is solely liable for:

<u>Member Fees</u>	<u>= \$8,550.00</u>
Total Fees	= \$8,550.00
<u>Less payments</u>	<u>= \$8,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents MLPFS, G. Hagerty, and K. Hagerty are jointly and severally liable for:

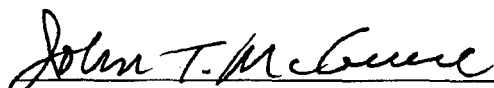
Forum Fees	= \$1,200.00
Total Fees	= \$1,200.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$1,200.00

All balances are due and payable to NASD Dispute Resolution

**PARTIES' SIGNATURES**

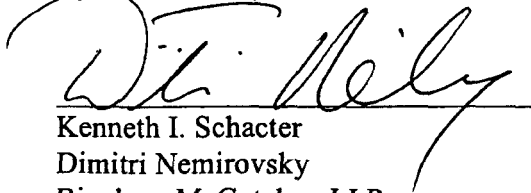
By and through their undersigned counsel, the parties stipulate to entry of this Stipulated Award.

John J. Smith and Maria Schluter,  
By their attorney,



John T. McGuire  
John T. McGuire & Associates, P.C.  
67 Wall Street, Suite 2001  
New York, NY 10005  
(212) 425-6562

Merrill Lynch, Pierce, Fenner & Smith  
Incorporated, G. Edward Hagerty and  
Keith Hagerty,  
By their attorneys,



Kenneth I. Schacter  
Dimitri Nemirovsky  
Bingham McCutchen LLP  
399 Park Avenue, 24th FL  
New York, NY 10022  
(212) 705-7281

Donald Ferguson, Esq.  
Kenneth J. Horowitz  
Michael Ross

Concurring Arbitrators' Signatures

ARBITRATION PANEL

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

Donald Ferguson  
Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair

July 3, 2004  
Signature Date

Kenneth J. Horowitz  
Kenneth J. Horowitz  
Public Arbitrator

Signature Date

Michael Ross  
Michael Ross  
Non-Public Arbitrator

Signature Date

July 6, 2004  
Date of Service (For NASD office use only)

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ARBITRATION PANEL

Donald Ferguson, Esq.	-	Public Arbitrator, Presiding Chair
Kenneth J. Horowitz	-	Public Arbitrator
Michael Ross	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair



Kenneth J. Horowitz  
Public Arbitrator

Signature Date

6/29/04

Signature Date

Michael Ross  
Non-Public Arbitrator

Signature Date

July 6, 2004  
Date of Service (For NASD office use only)



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Donald Ferguson, Esq.	-	Public Arbitrator, Presiding Chair
Kenneth J. Horowitz	-	Public Arbitrator
Michael Ross	-	Non-Public Arbitrator

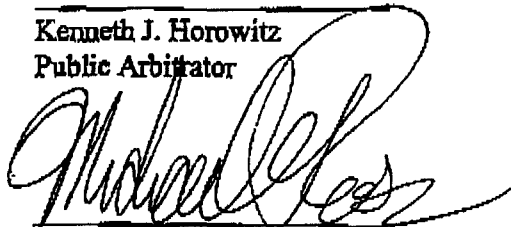
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Donald Ferguson, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

\_\_\_\_\_  
Kenneth J. Horowitz  
Public Arbitrator

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Signature Date

  
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Michael Ross  
Non-Public Arbitrator

6-29-04  
\_\_\_\_\_  
Signature Date

July 6, 2004

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Date of Service (For NASD office use only)