

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

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In the Matter of the Arbitration Between:

Kathleen Arcuri (Claimant) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Gary M. Grzybowski, Donald Minor, and Brad Smithy (Respondents)

Case Number: 03-06389

Hearing Site: New York, New York

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

**REPRESENTATION OF PARTIES**

Claimant Kathleen Arcuri ("Arcuri") hereinafter referred to as "Claimant" appeared *pro se*, Rockville Centre, NY.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Gary M. Grzybowski ("Grzybowski"), Donald Minor ("Minor"), and Bradley Smithy ("Smithy") hereinafter collectively referred to as "Respondents": George C. Freeman, III, Esq., Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., New Orleans, LA.

**CASE INFORMATION**

Statement of Claim filed on or about: September 2, 2003.

Claimant signed the Uniform Submission Agreement: September 24, 2003.

Joint Statement of Answer and Counterclaims filed by Respondents on or about: November 26, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: December 19, 2003.

Respondent Minor signed the Uniform Submission Agreement.

Respondent Smithy signed the Uniform Submission Agreement: December 17, 2003.

Respondent Grzybowski did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: misrepresentation; omission of fact; failure to supervise; and breach of fiduciary duty. The causes of action relate to shares of Montana Power Company.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In their Counterclaim, Respondents Smithy and Minor asserted the following cause of action: defamation.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$17,251.05; punitive damages in the amount of \$2,748.95; that the original transaction be reversed and the cash value and 200 shares of DOW be re-instated into the account, as well as the lost cash dividends associated with DOW and lost interest associated with the cash.

Respondents requested that the Statement of Claim be denied in all respects; that all fees and costs be assessed against the Claimant; and such other relief as is deemed just and proper. Further, Respondents Smithy, Minor and Grzybowski requested that all references to the allegations in this matter and proceeding be ordered expunged from their respective registration records maintained by the Central Registration Depository. In their Counterclaim, Respondents Minor and Smithy requested that an award be entered in their favor and against Claimant for any and all damages sustained by them, plus any other relief as is deemed just and proper, including expungement of their respective registration records maintained by the Central Registration Depository.

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

Respondent Grzybowski 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 May 21, 2004, Respondents Minor and Smithy made a motion to dismiss. Claimant did not submit a response to the motion. On or about July 8, 2004, the Panel unanimously granted the motion to dismiss Respondents Minor and Smithy and requested that all complaints be expunged from their CRD records.

On or about December 15, 2004, Claimant notified NASD Dispute Resolution that the parties settled this matter.

On or about December 30, 2004, Respondents notified NASD Dispute Resolution that the Counterclaims against Claimant were resolved.

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.

### **AWARD**

After considering the pleadings, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Donald Minor's and Brad Smithy'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, Respondents Donald Minor and Brad Smithy must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
2. Any and all relief not specifically addressed herein, including punitive damages, is 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	= \$125.00
Counterclaim filing fee	= \$250.00

#### **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. Accordingly, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$ 425.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

#### **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:

One (1) Pre-hearing session with Panel  
Pre-hearing conference:      March 23, 2004      1 session

*In accordance with Rule 10332(c) of the NASD Code of Arbitration Procedure, Claimant's portion of the assessment of the forum fee is based on \$450.00 and Respondents' portion of the forum fee is based on \$1,000.00*

1. The Panel has assessed \$225.00 of the forum fees against Claimant.
2. The Panel has assessed \$500.00 of the forum fees jointly and severally against Respondents.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 125.00
Forum Fees	= \$ 225.00
Total Fees	= \$ 350.00
Less payments	= \$ 575.00
Refund Due	= \$ 225.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$3,375.00
Total Fees	= \$3,375.00
Less payments	= \$3,375.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Minor and Smithy are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 250.00
Total Fees	= \$ 250.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 250.00

4. Respondents are jointly and severally liable for:

Forum Fees	= \$ 500.00
Total Fees	= \$ 500.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 500.00

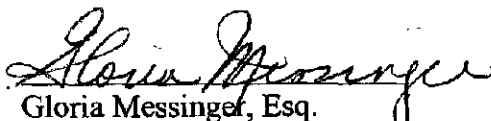
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

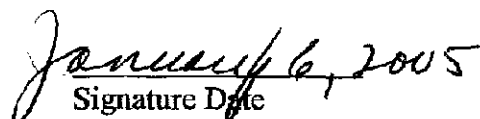
**ARBITRATION PANEL**

Gloria Messinger, Esq.	-	Public Arbitrator, Presiding Chairperson
Raymond S. Fleishman	-	Public Arbitrator
Michael F. Greco	-	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 which is my award.

  
Gloria Messinger, Esq.  
Public Arbitrator, Presiding Chairperson

  
Signature Date

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Raymond S. Fleishman  
Public Arbitrator

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

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Michael F. Greco  
Non-Public Arbitrator

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Signature Date

January 12, 2005  
Date of Service (For NASD Dispute Resolution use only)

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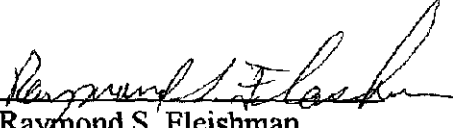
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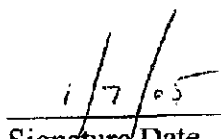
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