

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

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In the Matter of the Arbitration Between:

Nicholas and Jolan D'Alessio and Marc Schwartz (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith Inc. and Steven N. Jaenichen (Respondents).

Case Number: 04-00464

Hearing Site: New York, New York

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

**REPRESENTATION OF PARTIES**

Claimants Nicholas and Jolan D'Alessio ("D'Alessio") and Marc Schwartz ("Schwartz") (individually and in a representative capacity) hereinafter collectively referred to as "Claimants": James C. Shah, Esq., Shepherd, Finkelman, Miller & Shah, LLC, Media, PA.

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") and Steven N. Jaenichen ("Jaenichen") hereinafter collectively referred to as "Respondents": Alyson M. Weiss, Esq. and John A. Piskora, Esq., Loeb & Loeb LLP, New York, NY.

**CASE INFORMATION**

Amended Statement of Claim filed on or about: February 11, 2004.

Claimant D'Alessio signed the Uniform Submission Agreement: February 5, 2004.

Claimant Schwarz signed the Uniform Submission Agreement: February 4, 2004.

Motion to Dismiss and Statement of Answer filed on or about: April 8, 2004.

Respondent Merrill Lynch signed the Uniform Submission Agreement: April 9, 2004.

Respondent Steven N. Jaenichen signed the Uniform Submission Agreement: April 21, 2004.

**CASE SUMMARY**

Claimants asserted the following causes of action related to their investments: fraud, breach of fiduciary duty, breach of contract, failure to supervise, violations of the New York Consumer Protection Act, negligent infliction of emotional distress, unsuitability, and unjust enrichment. Claimants' claim involved unspecified common stock.

Respondents denied all allegations of wrongdoing set forth in the Amended Statement of Claim and asserted the following defenses: failure to state a legally viable claim; Claimants directed, approved, authorized, consented to, acquiesced in, and/or ratified all transactions in their accounts; lack of causation; lack of intent; failure to mitigate damages; contributory negligence; laches, waiver and estoppel; lack of reliance; statutes of limitation; unclean hands; and voluntary

assumption of the risk.

### **RELIEF REQUESTED**

Claimants requested: (1) compensatory damages in excess of \$200,000.00; (2) pre-judgment and post-judgment interest; (3) costs; (4) attorneys' fees; (5) damages for emotional pain, suffering, mental anguish and loss of enjoyment of life in excess of \$500,000.00; (6) punitive damages in excess of \$500,000.00; and (7) the return of fees and commissions.

Respondents requested dismissal of the Amended Statement of Claim in its entirety and assessment of all costs against Claimants. In addition, Respondents sought an Order directing the expungement this matter from the CRD record of Respondent Steven N. Jaenichen.

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

On January 22, 2004, the arbitration panel in Case No. 03-00887 granted Respondents' motion to sever, and this proceeding followed.

On or about December 8, 2004, NASD Dispute Resolution was notified that the parties settled this matter and dismissed their claims with prejudice against Respondents.

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**

On December 2, 2004, the parties entered into a preliminary agreement to present the Panel a Stipulated Award. Now, in lieu of a further hearing and upon the joint motion of the parties for entry of an Award, the Panel grants the motion and enters this award granting the following relief:

- (1) The Statement of Claim is dismissed in its entirety;
- (2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Steven N. Jaenichen'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 Steven N. Jaenichen must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
- (3) Each party shall bear its own costs, including attorney's fees, except as Fees are specifically addressed below; and

(4) Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

### **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 person 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
Total Member Fees	= \$8,550.00

#### **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: September 8, 2004 1 session	
Total Forum Fees	= \$1,200.00


1. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Claimant D'Alessio has been assessed \$300.00 of the forum fees.
2. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Claimant Schwartz has been assessed \$300.00 of the forum fees.
3. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Respondent Merrill Lynch has been assessed \$300.00 of the forum fees.
4. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Respondent Jaenichen has been assessed \$300.00 of the forum fees.

**Fee Summary**

1. Claimants are jointly and severally liable for:	
<u>Initial Filing Fee</u>	= \$ 500.00
<u>Total Fees</u>	= \$ 500.00
<u>Less payments</u>	= \$1,100.00
<u>Refund Due Claimants</u>	= \$ 600.00
2. Claimant D'Alessio is solely liable for:	
<u>Forum Fees</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 300.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00
3. Claimant Schwartz is solely liable for:	
<u>Forum Fees</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 300.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00
4. Respondent Merrill Lynch is solely liable for:	
<u>Member Fees</u>	= \$8,550.00
<u>Forum Fees</u>	= \$ 300.00
<u>Total Fees</u>	= \$8,850.00
<u>Less payments</u>	= \$8,550.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 300.00
3. Respondent Jaenichen is solely liable for:	
<u>Forum Fees</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 300.00

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

**Parties' Signatures**

  
\_\_\_\_\_  
James Shah, Esq.  
Shepherd, Finkelman, Miller & Shah, LLC  
Attorneys for Claimants

1-21-05  
Signature Date

\_\_\_\_\_  
Alyson M. Weiss, Esq.  
Loeb & Loeb LLP  
Attorneys for Respondents

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

NASD Dispute Resolution  
Arbitration No. 04-00464  
Award Page 5 of 6

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**Parties' Signatures**

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James Shah, Esq.  
Shepherd, Finkelman, Miller & Shah, LLC  
Attorneys for Claimants

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Signature Date


Alyson M. Weiss  
Alyson M. Weiss, Esq.  
Loeb & Loeb LLP  
Attorneys for Respondents

1/20/05  
Signature Date

**ARBITRATION PANEL**

Alexander Forti	-	Public Arbitrator, Presiding Chair
Howard Breindel, Esq.	-	Public Arbitrator
Robert F. Hartnett, CFP, CLU	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Alexander Forti  
Public Arbitrator, Presiding Chair

2/3/05  
Signature Date

\_\_\_\_\_  
Howard Breindel, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Robert F. Hartnett, CFP, CLU  
Non-Public Arbitrator

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

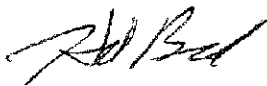
February 10, 2005  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

Alexander Forti	-	Public Arbitrator, Presiding Chair
Howard Breindel, Esq.	-	Public Arbitrator
Robert F. Hartnett, CFP, CLU	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Alexander Forti  
Public Arbitrator, Presiding Chair



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

1/28/05

\_\_\_\_\_  
Howard Breindel, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Robert F. Hartnett, CFP, CLU  
Non-Public Arbitrator

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Alexander Forti  
Public Arbitrator, Presiding Chair

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Signature Date


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Howard Breindel, Esq.  
Public Arbitrator

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Signature Date

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Robert F. Hartnett, CFP, CLU  
Non-Public Arbitrator

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01-31-05  
Signature Date

February 10, 2005  

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Date of Service (For NASD office use only)