

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

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In the Matter of the Arbitration Between:

Bruce L. Maltz, M.D., Bonnie L. Maltz, Bruce L. Maltz, M.D., A Professional Corporation, The  
Bruce L. Maltz, M.D. A.P.C. Profit Sharing Plan, Bruce L. Maltz IRA, and Bruce L. Maltz, M.D.  
Defined Benefit Plan, Claimants v. Keith Virnoche, Gerard Frigon, and Merrill Lynch Pierce  
Fenner & Smith, Inc., Respondents

Case Number: 04-00700

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimants:

Alan W. Sparer, Esq.  
Law Offices of Alan W. Sparer  
San Francisco, California

For Respondents:

Philip A. McLeod, Esq.  
Julie A. Kole, Esq.  
Keesal, Young & Logan  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: February 3, 2004

Claimants' Joint Uniform Submission Agreement signed: January 28, 2004

Joint Statement of Answer filed by Respondents: May 10, 2004

Respondent Keith Virnoche's Uniform Submission Agreement signed: March 25, 2004

Respondent Gerard Frigon's Uniform Submission Agreement signed: March 24, 2004

Respondent Merrill Lynch Pierce Fenner & Smith, Inc.'s Uniform Submission Agreement  
signed: March 1, 2004

### **CASE SUMMARY**

Claimants alleged violation of NASD Rules of Conduct, professional negligence, breach of fiduciary duties, negligent misrepresentation, negligent failure to supervise, respondeat superior, breach of contract, unfair business practices, and violation of the Consumer Legal Remedies Act. Claimants' allegations involved various unspecified securities.

Respondents denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested an amount in excess of \$1,500,000.00 in compensatory damages, disgorgement, restitution, pre-judgment interest and costs, including attorney's fees.

Respondents requested dismissal of Claimants' Statement of Claim in its entirety, expungement of this claim from the CRD records of Respondents Keith Virmoche and Gerard Frigon, and costs, including attorney's fees.

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

On March 18, 2004, Claimants and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waiver of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On the first day of hearing, February 9, 2005, the Panel heard oral argument regarding the Chairperson's prior rulings not to allow Claimants' Motion to Compel Further Responses to Second Set of Requests for Documents and Information, dated December 10, 2004, and Claimants' Motion to Compel Further Responses to Third Set of Requests for Production of Documents and Information, dated January 18, 2005. After due deliberation, the Panel decided that the Chairperson's prior rulings not to allow the above-referenced discovery motions were valid, that Claimants did not suffer prejudice from those prior rulings, and that the hearing should proceed.

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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is liable to and shall pay Claimants the sum of \$195,717.00 in compensatory damages.
- 2) Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is liable to and shall pay NASD the entire \$12,000.00 in forum fees that have accrued in this matter.
- 3) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Keith Virnoche's and Gerard Frigon's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondents Keith Virnoche and Gerard Frigon must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) The parties shall, except as noted above, bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 500.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch Pierce Fenner & Smith, Inc. is a party and the following fees are assessed:

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

#### **Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair or the parties and the Panel. The following fees are assessed:

(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 2,400.00
Pre-hearing conferences:	
July 27, 2004	1 session
November 18, 2004	1 session
 (8) Hearing sessions @ \$1,200.00/session	 = \$ 9,600.00
Hearings:	
February 9, 2005	2 sessions
February 10, 2005	2 sessions
February 11, 2005	2 sessions
February 14, 2005	2 sessions
 <b>Total Forum Fees</b>	 <b>= \$12,000.00</b>

1. The Panel assessed the entire \$12,000.00 in forum fees to Respondent Merrill Lynch Pierce Fenner & Smith, Inc.

**Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 500.00
<u>Less payments</u>	<u>= \$(1,700.00)</u>
<b>Refund Due Claimants</b>	<b>= \$(1,200.00)</b>

2. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$12,000.00</u>
Total Fees	= \$20,550.00
<u>Less payments</u>	<u>= \$ (8,550.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$12,000.00</b>

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

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**ARBITRATION PANEL**

Ferdinand Schoch	-	Public Arbitrator, Presiding Chair
Michelle Brant	-	Public Arbitrator
Carlos Richard Mangum	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Ferdinand Schoch  
Chair, Public Arbitrator

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

Michelle Brant  
Michelle Brant  
Public Arbitrator

2-24-05  
Signature Date

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Carlos Richard Mangum  
Non-Public Arbitrator

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Signature Date

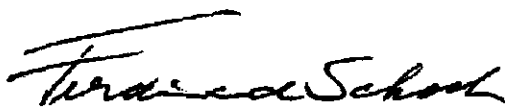
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Date of Service

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Signature Date

Michelle Brant  
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