

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

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In the Matter of the Arbitration Between:

Gary W. and Margaret J. Sischo, Margaret J. Sischo IRRA, Gary Sischo IRRA, Claimants v.  
Merrill Lynch, Pierce, Fenner & Smith Incorporated and Diane Marie Carter, Respondents

Case Number: 04-01961

Hearing Site: Portland, Oregon

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

**REPRESENTATION OF PARTIES**

For Claimant:

Robert S. Banks, Jr., Esq.  
Banks Law Office PC  
Portland, Oregon

For Respondents:

Thomas Sand, Esq.  
Ky Fullerton, Esq.  
Miller Nash LLP  
Portland, Oregon

**CASE INFORMATION**

Statement of Claim filed: March 19, 2004

Claimants' Joint Uniform Submission Agreement signed: January 16, 2004

Joint Statement of Answer filed by Respondents: May 26, 2004

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: April 20, 2004

Respondent Diane Marie Carter's Uniform Submission Agreement signed: May 10, 2004

**CASE SUMMARY**

Claimants alleged negligence, breach of fiduciary duty, violation of the Oregon Securities Laws ORS 59.115, 59.127 and ORS 59.135 involving the purchase of Cisco, EMC, Motorola, Home Depot, AIM Class B Equity Funds, and Oppenheimer Growth and Income fund.

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

### **RELIEF REQUESTED**

Claimants requested \$312,660.00 in compensatory damages, pre- and post-judgment interest and costs, including attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, and costs, including attorney's fees.

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

On December 22, 2004, NASD Dispute Resolution received Claimants' notice of dismissal with prejudice of Respondent Diane Marie Carter.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a hand written, signed Award may be entered.

### **FINDINGS**

The Panel found a failure in the supervision by Respondent's management of the Registered Representative, especially in light of the Fall of the 1998, NASD Regulatory & Compliance Alert Regarding Suitability Issues and the "suitability" standards of law existent during the relevant period. The Panel found this failure resulted in negligence and damage to Claimants.

### **AWARD**

After considering the pleadings, testimony, and evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is liable to and shall pay Claimants the sum of \$150,000.00 in compensatory damages.
- 2) Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is liable to and shall pay Claimants interest on the sum of \$150,000.00 at rate thereof 9% per annum from the date of service of the award until paid.
- 3) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Diane Marie Carter'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, Respondent Diane Marie Carter must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) Claimants' request for Attorney's fees and costs are denied.
- 5) The parties shall bear their respective costs, including attorney's fees.
- 6) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the *NASD Code of Arbitration Procedure* ("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	= \$ 300.00
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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 Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
<b>Total Member Fees</b>	<b>= \$ 5,200.00</b>

#### **Adjournment Fees**

The following adjournment fees are assessed:

December 20-22, 2004, adjournment requested by Respondents	= \$ 1,125.00
February 22-24, 2005, adjournment requested by Respondents	= \$ 1,500.00

The Panel assessed \$2,625.00 of adjournment fees to Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.

#### **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:

One (1) Pre-hearing conference session with a single arbitrator @ \$450.00/session	= \$ 450.00
Pre-hearing conference: November 15, 2004	1 session
Two (2) Pre-hearing conference sessions with the Panel @ \$1,125.00/session	= \$ 2,250.00
Pre-hearing conferences: August 2, 2004	1 session
December 13, 2004	1 session

Six (6) Hearing sessions @ \$1,125.00/session		= \$ 6,750.00
Hearings:	September 19, 2005	2 sessions
	September 20, 2005	2 sessions
	September 21, 2005	2 sessions

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<b>Total Forum Fees</b>	<b>= \$ 9,450.00</b>
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1. The Panel assessed \$4,725.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$4,725.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.

**Fee Summary**

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

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 4,725.00
Total Fees	= \$ 5,025.00
Less payments	= \$(1,425.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,600.00</b>

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

Member Fees	= \$ 5,200.00
Adjournment Fees	= \$ 2,625.00
Forum Fees	= \$ 4,725.00
Total Fees	= \$12,550.00
Less payments	= \$(7,825.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 4,725.00</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.

**ARBITRATION PANEL**

Douglas Martin Crow	-	Public Arbitrator, Presiding Chair
Joseph L. Mangan	-	Public Arbitrator
Larry H. Mylnechuk	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

*Douglas M. Crow*

Douglas Martin Crow  
Chair, Public Arbitrator

October 13, 2005  
Signature Date

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Joseph L. Mangan  
Public Arbitrator

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Signature Date

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Larry H. Mylnechuk  
Non-Public Arbitrator

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Signature Date

10/14/05  
Date of Service

**ARBITRATION PANEL**

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Joseph L. Mangan	-	Public Arbitrator
Larry H. Mylnechuk	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Douglas Martin Crow  
Chair, Public Arbitrator

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Signature Date

  
Joseph L. Mangan  
Public Arbitrator

10-12-05  
Signature Date

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Larry H. Mylnechuk  
Non-Public Arbitrator

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Signature Date

10/14/05  
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<b>Joseph L. Mangan</b>	-	<b>Public Arbitrator</b>
<b>Larry H. Mylniechuk</b>	-	<b>Non-Public Arbitrator</b>

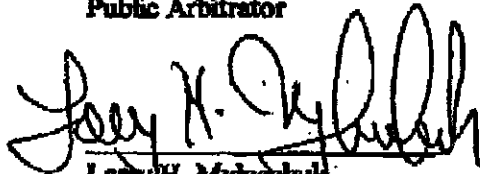
**Concurring Arbitrators' Signatures**

Douglas Martin Crow  
Chair, Public Arbitrator

Signature Date

Joseph L. Mangan  
Public Arbitrator

Signature Date

  
Larry H. Mylniechuk  
Non-Public Arbitrator

10-14-05  
Signature Date

10/14/05  
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