

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

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In the Matter of the Arbitration Between:

G. Carrol Incencio, Claimant v. Banc of America Investment Services, Inc. and James E. McCabe, Respondents

Case Number: 04-02185

Hearing Site: Los Angeles, California

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

**REPRESENTATION OF PARTIES**

For Claimant:

Steven M. Green, Esq.  
The Law Firm of Steven M. Green  
San Diego, California

For Respondents:

Joseph E. Floren, Esq.  
Morgan, Lewis & Bockius, LLP  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: March 28, 2004

Claimant's Uniform Submission Agreement signed: June 3, 2003

Joint Statement of Answer filed by Respondents: August 25, 2004

Respondent James E. McCabe's Uniform Submission Agreement signed: July 28, 2004

**CASE SUMMARY**

Claimant alleged breach of fiduciary duty, breach of contract and covenant of good faith and fair dealing, unsuitability, fraud, misrepresentation and omission of facts, negligence, conversion, violation of federal and state securities laws, and failure to supervise. Claimant's allegations involved transactions in unspecified mutual funds and securities described as "high risk investments."

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

### **RELIEF REQUESTED**

Claimant requested \$100,000.00 in compensatory damages, unspecified punitive damages, interest, and costs, including attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, expungement of all reference to the above captioned arbitration from Respondent James E. McCabe's registration records maintained by the NASD Central Registration Depository, and costs, including attorney's fees.

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

Respondent Banc of America Investment Services, Inc. did not file with the NASD Dispute Resolution a properly executed 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 August 30, 2004, Claimant and Claimant's 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.

On August 2, 2004, Respondents' counsel signed a Waiver Agreement on Respondents' behalf expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

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 and the parties' request for this Stipulated Award, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) The parties have entered into a confidential settlement agreement.
- 2) Claimant's claims are dismissed with prejudice.
- 3) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent James E. McCabe's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent James E. McCabe must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) The parties shall 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 = \$ 225.00

**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 Banc of America Investment Services, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$1,100.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$1,700.00
<b>Total Member Fees</b>	<b>= \$3,550.00</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:

One (1) Pre-hearing conference session with the Panel @ \$750.00/session	= \$ 750.00
<u>Pre-hearing conference:      March 31, 2005      1 session</u>	
<b>Total Forum Fees</b>	<b>= \$ 750.00</b>

In accordance with the parties' stipulation, the Panel assessed \$750.00 of the forum fees jointly and severally to Respondents Banc of America Investment Services, Inc. and James E. McCabe.

**Fee Summary**

1. Claimant G. Carrol Incencio is charged with the following fees and costs:

Initial Filing Fee	= \$ 225.00
<u>Less payments</u>	<u>= \$(1,575.00)</u>
<b>Refund Due from NASD Dispute Resolution</b>	<b>= \$(1,350.00)</b>
  
2. Respondent Banc of America Investment Services, Inc. is charged with the following fees and costs:

Member Fees	= \$ 3,550.00
<u>Less payments</u>	<u>= \$(3,550.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>
  
3. Respondents Banc of America Investment Services, Inc. and James E. McCabe are charged jointly and severally with the following fees and costs:

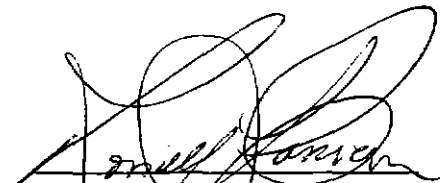
Forum Fees	= \$ 750.00
<u>Less payment by James E. McCabe</u>	<u>= \$ (375.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 375.00</b>

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**

<b><i>Ronald L. Cameron</i></b>	-	<b><i>Public Arbitrator, Presiding Chair</i></b>
<b><i>Thomas L. Flattery, Esq.</i></b>	-	<b><i>Public Arbitrator</i></b>
<b><i>Thomas J. Doherty</i></b>	-	<b><i>Non-Public Arbitrator</i></b>

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Ronald L. Cameron  
Chair, Public Arbitrator

11/15/05  
Signature Date

\_\_\_\_\_  
Thomas L. Flattery, Esq.  
Public Arbitrator

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

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Thomas J. Doherty  
Non-Public Arbitrator

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

November 22, 2005  
Date of Service

**ARBITRATION PANEL**

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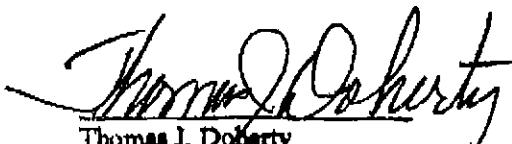
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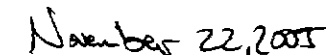
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