

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

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In the Matter of the Arbitration Between:

Guy R. Cathcart and Patricia Cathcart Claimants v. Stephen M. Zanolli and Merrill Lynch, Pierce, Fenner & Smith Incorporated, Respondents

Case Number: 04-02776

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimants:

Gary R. Gleason, Esq.  
Farbstein & Blackman  
San Mateo, California

Michael Fox, Esq.  
Fox, Shjeflo, Wohl, & Hartley,  
LLP  
San Mateo, California

For Respondents:

Ben Suter, Esq.  
Garrett Wynne, Esq.  
Keesal, Young & Logan  
San Francisco, California

**CASE INFORMATION**

Statement of Claim dated: April 21, 2004

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

Joint Statement of Answer filed by Respondents: July 23, 2004

Respondent Stephen M. Zanolli's Uniform Submission Agreement signed: August 2, 2004

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: June 9, 2004

### **CASE SUMMARY**

Claimants alleged unsuitability, negligence, negligent supervision, conflict of interest, and breach of fiduciary duty relating to the management of their accounts. Claimants' allegations involved stocks including, but not limited to, Incyte Pharmaceuticals Inc., and accounts traded on margin.

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

### **RELIEF REQUESTED**

Claimants requested unspecified compensatory damages, and costs, including attorney's fees.

Respondents requested dismissal of Claimant's Statement of Claim in its entirety, expungement of this matter from Respondent Stephen M. Zanolli's CRD records, and costs.

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

On September 4, 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 December 28, 2005, NASD received the parties' stipulated dismissal of Respondent Stephen M. Zanolli from this matter.

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) Claimants' claims are denied in their entirety.
- 2) Respondents' request for expungement of this matter from Respondent Stephen M. Zanolli's CRD records is denied.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure, 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	= \$ 250.00
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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	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,200.00
<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

### **Adjournment Fees**

The following adjournment fees are assessed:

Adjournment of the May 9-13, 2005 hearings  
jointly requested by the parties = \$ 1,000.00

Adjournment of the December 5-9, 2005 hearings  
jointly requested by the parties = \$ 1,500.00

1. The Panel assessed \$1,250.00 of the adjournment fees jointly and severally to Claimants.
2. The Panel assessed \$1,250.00 of the adjournment fees to Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.

### **Forum Fees and Assessments**

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion decided on the papers. 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:

(2) Pre-hearing conference sessions with the Panel @ \$1,000.00/session = \$ 2,000.00

Pre-hearing conference:	November 11, 2004	1 session
	March 16, 2006	1 session

(17) Hearing sessions @ \$1,000.00/session = \$17,000.00

Hearings:	November 6, 2006	2 sessions
	November 7, 2006	2 sessions
	November 8, 2006	2 sessions
	November 9, 2006	2 sessions
	November 10, 2006	2 sessions
	December 11, 2006	2 sessions
	December 12, 2006	3 sessions
	December 13, 2006	2 sessions

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**Total Forum Fees = \$19,000.00**

1. The Panel assessed \$9,500.00 of the forum fees jointly and severally to Claimants.
2. The Panel assessed \$9,500.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.

### **Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and sundry other requests.

Claimants requested copies of audio transcripts @ \$15/tape = \$ 225.00

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated  
requested copies of audio transcripts @ \$15/tape = \$ 225.00

### **Fee Summary**

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

Initial Filing Fee	= \$ 250.00
Adjournment Fees	= \$ 1,250.00
Forum Fees	= \$ 9,500.00
<u>Administrative Costs</u>	<u>= \$ 225.00</u>
Total Fees	= \$11,225.00
<u>Less payments</u>	<u>= \$(2,725.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 8,500.00</b>

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

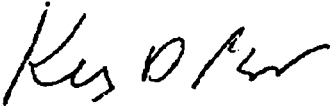
Member Fees	= \$ 4,450.00
Adjournment Fee	= \$ 1,250.00
Forum Fees	= \$ 9,500.00
<u>Administrative Costs</u>	<u>= \$ 225.00</u>
Total Fees	= \$15,425.00
<u>Less payments</u>	<u>= \$(4,675.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$10,750.00</b>

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.

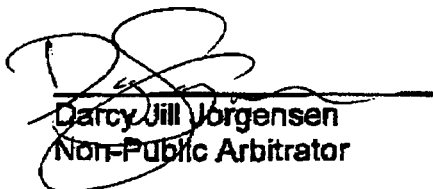
**ARBITRATION PANEL**

Keely D. Parr	-	Public Arbitrator, Presiding Chair
Beverly A. Fleming	-	Public Arbitrator
Darcy Jill Jorgensen	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**


  
\_\_\_\_\_  
Keely D. Parr  
Chair, Public Arbitrator

Dec 14, 2006  
Signature Date

  
\_\_\_\_\_  
Darcy Jill Jorgensen  
Non-Public Arbitrator

12/14/06  
Signature Date

**Dissenting Arbitrator's Signature**

  
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Beverly A. Fleming  
Public Arbitrator

12-14-06  
Signature Date

12/15/06  
Date of Service  
(NASD Use Only)