

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

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In the Matter of the Arbitration Between:

Susan Frances Bostian, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Robert F. Gallo, Respondents

Case Number: 04-05887

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimant:

James E. Towery  
Hoge Fenton Jones & Appel Inc.  
San Jose, California

For Respondents:

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

**CASE INFORMATION**

Statement of Claim filed: August 17, 2004

Claimant's Uniform Submission Agreement signed: August 27, 2004

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Robert F. Gallo: November 23, 2004

Respondent Merrill Lynch's Uniform Submission Agreement signed: September 29, 2004

Respondent Robert F. Gallo's Uniform Submission Agreement signed: October 8, 2004

**CASE SUMMARY**

Claimant alleged that her account suffered damages because of Respondents' breach of fiduciary duty and negligence. Claimant's dispute involved investments in Microcide Pharmaceuticals stock.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested damages in the amount of \$1,284,651.00 plus interest in the amount of \$385,395.00. Claimant also requested costs and attorney's fees.

Respondents requested dismissal of Claimant's claims and an award of costs. Respondent Robert F. Gallo also requested expungement of all reference to the above captioned arbitration from his registration records maintained by the NASD Central Registration Depository.

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

On November 19, 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.

Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimant 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.

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. All claims by Claimant are dismissed.
2. Respondent Robert F. Gallo's request for expungement of all reference to the above captioned arbitration from his registration records maintained by the NASD Central Registration Depository is denied.
3. Each party shall bear its own costs, including attorney's fees.
4. All other relief not expressly granted is denied.

### **FEEES**

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

**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, Merrill Lynch 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>
Total Member Fees	= \$8,550.00

**Adjournment Fees**

The following adjournment fees are assessed:

The Panel granted Respondents' request to postpone the September 20-23, 2005, hearing dates and waived the \$1,200.00 postponement fee.

**Three-Day Cancellation Fee**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session.

Cancellation of September 20-23, 2005, hearing dates = \$300.00

The Panel assessed \$300.00 of the three-day cancellation fee jointly and severally to Respondents Merrill Lynch and Robert F. Gallo.

**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/Panel. The following fees are assessed:

(1) Pre-hearing conference session with the Panel @ \$1,200.00/session	= \$1,200.00
Pre-hearing conference: February 15, 2005	1 session

(6) Hearing sessions @ \$1,200.00/session		= \$7,200.00
Hearing Dates:	January 17, 2005	2 sessions
	January 18, 2005	2 sessions
	January 19, 2005	2 sessions

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<b>Total Forum Fees</b>	<b>= \$8,400.00</b>
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The Panel assessed the \$8,400.00 in forum fees solely to Respondent Merrill Lynch.

**Fee Summary**

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

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

2. Respondents Merrill Lynch and Robert F. Gallo are charged jointly and severally with the following fees and costs:

Three-Day Cancellation Fee	= \$ 300.00
<u>Less Payments</u>	= \$( 0.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 300.00</b>

3. Respondent Merrill Lynch is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	= \$ 8,400.00
<b>Total Fees</b>	<b>= \$ 16,950.00</b>
<u>Less Payments</u>	= \$( 8,550.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 8,400.00</b>

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

**ARBITRATION PANEL**

Herbert L. Brown	-	Non-Public Arbitrator, Presiding Chair
Keely D. Parr, Esq.	-	Public Arbitrator
Peter Kassel	-	Public Arbitrator

**Concurring Arbitrators' Signatures**



Keely D. Parr, Esq.  
Public Arbitrator

Jan. 25, 2006

Signature Date

\_\_\_\_\_  
Peter Kassel  
Public Arbitrator

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

**Dissenting Arbitrator's Signature**

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Herbert L. Brown  
Chair, Non-Public Arbitrator

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

1/30/06

Date of Service

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Keely D. Parr, Esq.	-	Public Arbitrator
Peter Kassel	-	Public Arbitrator

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Public Arbitrator

  
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Peter Kassel  
Public Arbitrator

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Signature Date

1/30/06  
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Signature Date

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Herbert L. Brown  
Chair, Non-Public Arbitrator

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Keely D. Parr, Esq.  
Peter Kassel

Non-Public Arbitrator, Presiding Chair  
Public Arbitrator  
Public Arbitrator

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Public Arbitrator

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Signature Date

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Peter Kassel  
Public Arbitrator

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Signature Date

**Dissenting Arbitrator's Signature**

  
Herbert L. Brown  
Chair, Non-Public Arbitrator

1-26-06  
Signature Date

1/30/06  
Date of Service