

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Richard E. McNamara, Maryanne McNamara, and Coril, Inc. f/b/o Richard E. McNamara, Claimants v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, Respondent

Case Number: 05-01925

Hearing Site: Seattle, Washington

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Nature of the Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

For Claimants Richard E. McNamara, Maryanne McNamara, and Coril, Inc. f/b/o Richard E. McNamara:

Stephen M. Hansen, Esq.  
Lowenberg, Lopez &  
Hansen, P.S.  
Tacoma, Washington

For Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated:

Geoffrey S. Beckham,  
Esq.  
Bingham McCutchen  
East Palo Alto, California

**CASE INFORMATION**

Statement of Claim filed: April 11, 2005

Claimants Richard E. McNamara and Maryanne McNamara's Joint Uniform Submission Agreement signed: April 21, 2005

Claimant Coril, Inc. f/b/o Richard E. McNamara's Uniform Submission Agreement signed: May 2, 2005

Statement of Answer filed by Respondent: August 5, 2005

Respondent's Uniform Submission Agreement signed: June 7, 2005

### **CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary and contractual duties to prudently manage Claimant's account, unsuitability, unfair and deceptive trade practices (Revised Code of Washington section 18.86 et seq.), negligence, and failure to supervise involving unspecified securities. Claimants' causes of action relate to Respondent's alleged failure to communicate with Claimant Richard E. McNamara and failure to implement and maintain an investment strategy that would preserve the value of his accounts.

Unless specifically admitted in its Answer, Respondent denied the allegations of wrongdoing set forth in Claimant's Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested in excess of \$800,000.00 in compensatory damages, treble damages in accordance with Revised Code of Washington section 19.86.090, pre- and post-judgment interest, and costs, including attorney's fees.

Respondent requested dismissal of Claimants' Statement of Claim in its entirety.

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

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 of Claimants' claims are dismissed with prejudice, as Claimants have failed to carry their burden of proof.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) Any and all relief not specifically addressed herein 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	= \$ 375.00
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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	= \$2,250.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$4,000.00
<b>Total Member Fees</b>	<b>= \$7,000.00</b>

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

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. The following forum fees are assessed:

One (1) pre-hearing conference session with the Panel	
@ \$1,200.00/session	= \$1,200.00
Pre-hearing conference: October 20, 2005 1 session	
Four (4) hearing sessions @ \$1,200.00/session	= \$4,800.00
Hearings: June 13, 2006 2 sessions	
June 14, 2006 2 sessions	
<b>Total Forum Fees</b>	<b>= \$6,000.00</b>

The Panel assessed \$6,000.00 of the forum fees jointly and severally to Claimants.

Paragraph 8(a) of the Initial Pre-Hearing Conference Scheduling Order, dated October 20, 2006 is hereby amended to read as follows: "The cost of this IPHC will be borne as follows: by the Claimants."

**Fee Summary**

1. Claimants Richard E. McNamara, Maryanne McNamara, and Coril, Inc. f/b/o Richard E. McNamara are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 6,000.00
Total Fees	= \$ 6,375.00
Less payments	= \$(1,700.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 4,675.00</b>

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


Member Fees	= \$ 7,000.00
Less payments	= \$(8,550.00)
<b>Refund Due Respondent Merrill Lynch, Pierce, Fenner &amp; Smith Incorporated</b>	<b>= \$(1,550.00)</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>Mark B. Moburg</b>	-	<b>Public Arbitrator, Presiding Chair</b>
<b>Joseph C. Roberts</b>	-	<b>Public Arbitrator</b>
<b>Kay A. Johnson</b>	-	<b>Non-Public Arbitrator</b>

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Mark B. Moburg  
Chair, Public Arbitrator

6-20-86  
Signature Date

\_\_\_\_\_  
Joseph C. Roberts  
Public Arbitrator

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

\_\_\_\_\_  
Kay A. Johnson  
Non-Public Arbitrator

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

6/21/06  
Date of Service

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Signature Date

  
\_\_\_\_\_  
Joseph C. Roberts  
Public Arbitrator

6.20.06  
Signature Date

\_\_\_\_\_  
Kay A. Johnson  
Non-Public Arbitrator

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

6/21/06  
Date of Service

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Kay A. Johnson  
Non-Public Arbitrator

6/19/06  
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Signature Date

6/21/06  
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Date of Service