

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

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In the Matter of the Arbitration Between:

Name of the Claimants

Charles and Margaret Zanders

Case Number: 05-01930

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;  
Citigroup Global Markets, Inc.; and,  
Michael Ronald Sparks

Hearing Site: Chicago, Illinois

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**NATURE OF THE DISPUTE**

Public Customers vs. Member Firms and Associated Person

**REPRESENTATION OF PARTIES**

Claimants Charles and Margaret Zanders, hereinafter collectively referred to as "Claimants": Sean M. Keane, Esq. and Bruce Oakes, Esq., of Simmons Cooper LLC, located in East Alton, Illinois.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Merrill Lynch": P. David Newsome, Jr., Esq. of the firm of Day Edwards Propester & Christensen, P.C., located in Oklahoma City, Illinois.

Respondents Citigroup Global Markets, Inc. ("Citigroup") and Michael Ronald Sparks ("Sparks"): Raul Sanchez, Esq., of Citigroup Global Markets, Inc., located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: April 12, 2005.

Claimants signed the Uniform Submission Agreement: March 30, 2005.

Statement of Answer filed by Respondent Merrill Lynch on: September 13, 2005.

Respondent Merrill Lynch signed the Uniform Submission Agreement: May 11, 2005.

Statement of Answer filed by Respondent Citigroup on: June 17, 2006.

Respondent Citigroup signed the Uniform Submission Agreement: June 1, 2005.

Respondent Sparks adopted Citigroup's Statement of Answer on: June 20, 2005.  
Respondent Sparks signed the Uniform Submission Agreement: August 18, 2005.

Claimants' Pre-Hearing Memorandum filed on: June 6, 2006.  
Respondent Merrill Lynch's Pre-Hearing Brief filed on: June 7, 2006.

Claimants' Motion for Transfer of Venue to Des Moines filed: June 9, 2006.  
Claimants' Withdrawal of Motion for Change of Venue filed on: June 19, 2006.

### **CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty; breach of contract; violation of the Securities Exchange Act; and, violation of the Iowa Uniform Securities Act. These causes of action related Sparks over concentrating Claimants' retirement funds in high-risk volatile growth stocks and equity based funds which were unsuitable for Claimants.

Unless specifically admitted in its Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a cause of action upon which relief can be granted;
2. Market forces, as a matter of law, are an intervening cause of any losses  
~~Claimants may have suffered at Merrill Lynch;~~
3. Claimants bear the burden of proof on any asserted causes of action, but cannot prove the required elements of any claim;
4. Claimants' own investment decisions, combined with market forces, were the legal cause of any losses;
5. Claimants failed to mitigate any alleged damages;
6. Any and all legal duties Merrill Lynch owed to the Claimant were fully and faithfully performed;
7. Merrill Lynch had in place adequate supervisory procedures that it reasonably and diligently implemented and followed;
8. The applicable statutes of limitations bar Claimants' asserted causes of action, in whole or in part;
9. Claimants' losses, if any, were not proximately caused by Merrill Lynch; and,
10. Claimants' claims are expressly contradicted by documentary evidence.

Unless specifically admitted their Answer, Respondents Citigroup and Sparks denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state any cause of action upon which relief can be granted;
2. Claimants' claims are barred by the principles of laches, waiver, estoppel and ratification;

3. All actions that Respondents took relating to Claimants and their accounts were required by, authorized by or consistent with applicable laws, statutes, regulations, procedures, standards or guidelines;
4. Claimants' claims, in whole or in part, are time barred;
5. The damages claimed by Claimants were not proximately or causally related to any alleged conduct attributable to Respondents, but instead resulted from Market forces and other causes outside the Respondents control;
6. The damages claimed are barred or limited since Claimant failed to mitigate damages;
7. The damages claimed are barred or limited because Claimants were contributorily negligent and assumed the risks involved;
8. The damages claimed are barred because Respondents at all times acted reasonable and prudently under the circumstances;
9. The damages claimed are barred because Respondents at all times acted in good faith and without any intent to harm Claimants;
10. Claimants' claims are barred because, to the extent representations were made regarding investments, they were merely expressions of opinion, not material fact, and as such are not actionable;
11. The damages claimed by Claimants are barred or limited by applicable provisions, restrictions and limitations in the account agreements and documentation relating to Claimants' accounts;
12. The damages claimed are barred or limited to the extent that the alleged damages were caused in whole, or in part, by Claimants' own conduct or by Claimants' failure to act when timely action on their part was necessary, reasonable and appropriate;
13. The damages claimed are barred or limited to the extent that the alleged damages are duplicative or do not legally follow or relate to the alleged causes of action set forth in the Claim;
14. Claimants are not entitled to any recovery of any damages because the overall performance of their portfolio during the relevant time indicates that Claimants did not suffer any legally recognizable injury or damages;
15. The damages claimed are barred because the alleged damages were caused or affected by market conditions and forces over which Respondents had no control;
16. Under applicable law and/or the facts and circumstances of this case, Claimants are not entitled to an award of punitive, statutory, or exemplary damages;
17. Under applicable law and/or the facts and circumstances of this case, Claimants are not entitled to an award of post-judgment or pre-judgment interest, rescission of any, or all, transactions, or lost opportunity damages; and,
18. Under applicable law and/or the facts and circumstances of this case, Claimants are not entitled to an award of attorneys' fees, or costs, or expenses.

### **RELIEF REQUESTED**

Claimants requested:

Compensatory Damages

In excess of \$233,000 (\$180,000 while Sparks was employed by Merrill Lynch and \$53,000 while Sparks was employed by Citigroup)

Punitive Damages

As determined by the Panel

Attorneys' Fees

As determined by the Panel

Other Costs

As determined by the Panel

Other Monetary/Non-Monetary Relief if any:

Including recovery of unnecessary taxes paid or tax penalties incurred.

Respondent Merrill Lynch requested that the Panel deny all claims with prejudice and that the Panel award Merrill Lynch its costs and attorneys' fees.

Respondents Citigroup and Sparks requested that the Statement of Claim be dismissed as result of the groundless nature of Claimants' claims, and Respondents be awarded their fees and expenses, including forum fees and all other costs of this proceeding.

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

The Director of Arbitration initially set venue for the hearing in this matter in Des Moines, Iowa. At the initial pre-hearing conference, the parties and arbitrators agreed to hold the hearing in Chicago, Illinois, subject to change upon Claimants' Motion. On June 9, 2006, Claimants filed a Motion to Change Venue.

At a June 16, 2006 pre-hearing conference, the Panel heard argument and considered Claimants' Motion to Change Venue to Des Moines, Iowa. After discussion, the Claimant determined that the Motion would be withdrawn.

At hearing, Citigroup moved to dismiss Claimant Margaret Zanders. After consideration of the parties arguments, the Panel determined that the Motion would be denied.

### **AWARD**

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

1. The claims asserted by Claimants Charles and Margaret Zanders against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc.,

- Citigroup Global Markets, Inc. and Michael Ronald Sparks are dismissed with prejudice and denied in their entirety;
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and is ordered to pay all costs and expenses associated with producing witness Connie Dullem at the hearing;
  3. All remaining costs of arbitration shall be borne by the party incurring that cost, including any attorneys' fees, except for those sums specifically enumerated in this decision;
  4. Any and all relief not specifically addressed herein, including punitive damages or expungement, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
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#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Citigroup Global Markets, Inc. are a party and the following member fees are assessed:

##### **Merrill Lynch**

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,750.00

##### **Citigroup**

Member surcharge	= \$ 1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 1,700.00

#### **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. Fees associated with these proceedings are:

Two (2) Decisions on discovery-related motions on the papers

with one arbitrator @ \$200.00 = \$ 400.00  
Claimant submitted two (2) discovery-related motions

Two (2) Pre-hearing sessions with Panel @ \$1,125.00 = \$ 2,250.00

Pre-hearing conferences: September 13, 2005 1 session  
June 16, 2006 1 session

Six (6) Hearing sessions @ \$1,125.00 = \$ 6,750.00

Hearing Dates: June 27, 2006 2 sessions  
June 28, 2006 2 sessions  
June 29, 2006 2 sessions

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Total Forum Fees = \$ 9,400.00

The Panel has assessed \$4,700.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., and the remaining \$4,700.00 of the forum fees to Respondent Citigroup Global Markets, Inc.

### **FEE SUMMARY**

Claimants Charles and Margaret Zanders are jointly and severally liable for:

Initial Filing Fee	= \$ 300.00
<u>Less payments</u>	<u>= \$ 1,575.00</u>
Balance Refunded by NASD Dispute Resolution	= \$ 1,275.00

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	<u>= \$ 4,700.00</u>
Total Fees	= \$ 9,900.00
<u>Less payments</u>	<u>= \$ 5,200.00</u>
Balance Due NASD Dispute Resolution	= \$ 4,700.00

Respondent Citigroup Global Markets, Inc. is solely liable for:

Member Fees	= \$ 3,550.00
<u>Forum Fees</u>	<u>= \$ 4,700.00</u>
Total Fees	= \$ 8,250.00
<u>Less payments</u>	<u>= \$ 5,200.00</u>
Balance Due NASD Dispute Resolution	= \$ 3,050.00

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

**ARBITRATION PANEL**

Susan L. Walker, Esq. - Public Arbitrator, Presiding Chairperson  
Stephen W. Heil - Public Arbitrator  
Ralph Pierce - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Susan L. Walker, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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Stephen W. Heil  
Public Arbitrator

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

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Ralph Pierce  
Non-Public Arbitrator

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Signature Date

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Date of Service (For NASD Dispute Resolution office use only)

ARBITRATION PANEL

Susan L. Walker, Esq. - Public Arbitrator, Presiding Chairperson  
Stephen W. Heil - Public Arbitrator  
Ralph Pierce - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Susan L. Walker  
Susan L. Walker, Esq.  
Public Arbitrator, Presiding Chairperson

7/8/06  
Signature Date

Stephen W. Heil  
Stephen W. Heil  
Public Arbitrator

Signature Date

Ralph Pierce  
Ralph Pierce  
Non-Public Arbitrator

Signature Date

7/13/06 MAM  
Date of Service (For NASD Dispute Resolution office use only)



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Public Arbitrator

  
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Ralph Pierce  
Non-Public Arbitrator

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Signature Date

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Stephen W. Heil  
Public Arbitrator

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

Ralph Pierce  
\_\_\_\_\_  
Ralph Pierce  
Non-Public Arbitrator

July 9, 2006  
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Signature Date

7/13/06      MM  
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Date of Service (For NASD Dispute Resolution office use only)