

**Award**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimants

Judith Goldman  
Kenneth B. Goldman

Case Number: 10-04386

vs.

Respondents

Morgan Stanley Smith Barney, LLC  
Citigroup Global Markets, Inc.  
Merrill Lynch, Pierce, Fenner & Smith Inc.  
Barry J. Guariglia  
William R. Meagher  
Carmela Nocerino

Hearing Site: Philadelphia, Pennsylvania

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Nature of the Dispute: Customers vs. Members and Associated Persons

This case was decided by a majority-public panel.

**REPRESENTATION OF PARTIES**

For Claimants Judith Goldman and Kenneth B. Goldman: Richard J. Gerace, Esq.,  
Gerace Law Office, Philadelphia, Pennsylvania.

For Respondents Morgan Stanley Smith Barney, LLC ("MSSB"), Citigroup Global  
Markets, Inc. ("Citigroup"), and Barry J. Guariglia ("Guariglia"): George D. Sullivan, Esq.,  
Evelyn Bukchin, Esq., and Toby S. Soli, Esq., Greenberg Traurig LLP, White Plains,  
New York.

For Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), William R.  
Meagher ("Meagher"), and Carmela Nocerino ("Nocerino"): Robert E. Goldberg, Esq.,  
Bressler, Amery & Ross, P.C., New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: September 28, 2010.

Judith Goldman signed the Submission Agreement: September 10, 2010.

Kenneth B. Goldman signed the Submission Agreement: September 10, 2010.

Joint Statement of Answer filed by Respondents MSSB, Citigroup, and Guariglia on or about: January 14, 2011.

MSSB signed the Submission Agreement: January 14, 2011.

Citigroup signed the Submission Agreement: September 18, 2014.

Guariglia signed the Submission Agreement: December 31, 2010.

Joint Statement of Answer filed by Respondents Merrill Lynch and Guariglia on or about: January 13, 2011.

Merrill signed the Submission Agreement: January 13, 2011.

Meagher did not file a Statement of Answer or sign the Submission Agreement.

Nocerino did not file a Statement of Answer or sign the Submission Agreement.

### **CASE SUMMARY**

Claimants asserted the following causes of action: securities fraud, violation of Rule 10b-5, fraudulent misrepresentation, lack of supervision, lack of suitability, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, negligence, respondeat superior, and vicarious liability. The causes of action relate to unspecified securities.

Unless specifically admitted in their Answers, Respondents MSSB, Citigroup, Merrill Lynch, and Guariglia denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested compensatory damages to be determined, punitive damages, attorneys' fees, and costs.

At the close of the hearing, Claimants requested all legal costs.

Respondents MSSB, Citigroup and Guariglia requested that the Panel deny Claimants' Statement of Claim in its entirety with prejudice, costs, and such other relief as deemed fair and equitable.

At the close of the hearing, Respondents MSSB, Citigroup, and Guariglia requested legal costs totaling \$371,987.41.

Respondents Merrill Lynch and Guariglia requested that Claimants' claim be dismissed in its entirety, attorneys' fees, costs, and expungement of this matter from the CRD records of Respondents Guariglia, Meagher and Nocerino.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On November 9, 2010, Claimants notified FINRA Dispute Resolution that they dismissed the claims against Respondents Meagher and Nocerino.

On October 27, 2011, Claimants notified FINRA Dispute Resolution that they settled the claims against Respondent Merrill Lynch and settled the claims against Respondent Guariglia limited to the time he was employed by Respondent Merrill Lynch.

At the conclusion of Claimants' case-in-chief, Respondents MSSB, Citigroup and Guariglia filed a Motion to Dismiss, for Expungement and for Attorneys' Fees dated March 4, 2014. Claimants filed a Response and Counter-Motion dated March 24, 2014 and Respondents MSSB, Citigroup and Guariglia filed a Reply on April 11, 2014. Claimants filed a Response to Respondents' Reply on April 21, 2014.

By Order dated April 28, 2014, the Panel granted Respondents MSSB, Citigroup, and Guariglia's Motion to Dismiss and denied the Motion for Attorneys' Fees. The Motion for Expungement was denied with leave to re-submit the Motion and a request for a separate hearing pursuant to FINRA rules.

On May 2, 2014, Respondents MSSB, Citigroup and Guariglia submitted a Motion to Expunge this matter from the CRD record of Respondent Guariglia. On May 12, 2014, Claimants submitted a Response to the Motion to Expunge.

The Panel conducted a recorded in-person hearing on September 3, 2014 so the parties could present oral argument on the request for expungement of Respondent Guariglia's CRD record.

Claimants did not participate in the expungement hearing. The Panel determined that Claimants received due notice of the expungement hearing and that the hearing would proceed without Claimants present.

The Panel reviewed Respondent Guariglia's BrokerCheck Report and the settlement documents related to the settlement between Respondents Merrill Lynch and Guariglia, considered the settlement amounts paid to Claimants, and considered the other relevant terms and conditions of the settlement with Respondents Merrill Lynch and Guariglia.

The Panel notes that Claimants' case included claims against member firms and an associated person who was employed by both firms. Respondents Merrill Lynch and Guariglia settled in a FINRA mediation. The Arbitrators were not involved in the mediation and have insufficient evidence to make a fact finding based on the dispute between Claimants and Respondent Merrill Lynch.

However, the Panel finds in favor of Respondents MSSB, Citigroup, and Guariglia's Motion for Expungement as it relates to the claims against Respondent Barry Gauriglia for his actions while employed at MSSB.

On September 18, 2014, Respondents Meagher and Nocerino notified FINRA Dispute Resolution that they do not wish to pursue the request for expungement contained in Respondent Merrill Lynch's Statement of Answer. Therefore, the request was not considered by the Panel.

### AWARD

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

1. Claimants' claims against Respondents MSSB, Citigroup, and Guariglia are dismissed.
2. The Panel recommends the expungement of all references to the above-captioned arbitration as it relates to his employment with Morgan Stanley Smith Barney from Respondent Barry Guariglia's (CRD # 1198059) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that, pursuant to Notice to Members 04-16, Respondent Barry Guariglia must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code, the arbitration Panel has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous; the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and the claim, allegation, or information is false.

The arbitration Panel has made the above Rule 2080 findings based on the following reasons:

The Panel reviewed the pleadings of the parties in the expungement motion, considered the testimony of Barry Guariglia at the expungement hearing in response to questions from his attorney as well as a series of questions from all three arbitrators on the Panel. The Panel also reviewed the transcripts of the entire case in consideration of Claimants' position that the Panel erred in its decision to grant Respondents' Motion to Dismiss.

Claimants failed to produce evidence to support any count against Guariglia while he was employed by MSSB.

Taking the Claimants' opposition first, Claimant asserted that the most egregious mistake was the Panel's failure to see the margin call ordered by Respondent Guariglia. Notwithstanding that Claimants failed to offer a scintilla of proof for such claim, the Panel questioned the Respondents further on this matter at the expungement hearing. We remain satisfied there was no margin call ordered.

Claimants also made many arguments regarding various frauds that were perpetrated on them. Yet, while the record is replete with arguments, there is no evidence or testimony of any kind of fraud committed by Respondents Guariglia or MSSB.

Finally, Claimants demanded an in-person hearing on the merits in their opposition to the expungement. Claimants asserted as part of the demand that Respondent Guariglia would be subject to cross examination "so that the merits of Respondents' motion, however predictable the outcome, can be preserved for the record". Claimants chose not to appear; therefore there is no cross examination for the record.

Disagreeing with the Claimants, though, is not enough for the Panel to decide on the Motion. Under the rules, the Panel is required to determine that at least one of the Rule 2080 grounds applies. Turning to the Respondents' arguments, the Panel finds that all three grounds apply.

The Statement of Claim alleges there is fraud. There was no evidence to support this claim. The Statement of Claim alleges that the Claimants' investments were not suitable for them. Claimant Kenneth Goldman's own testimony disposed of this claim. Besides having a law degree, he had previously held a securities license and he had been managing his own accounts for many years. The Statement of Claim repeatedly refers to margin calls. The evidence shows there were no margin calls while Claimants maintained their accounts at Morgan Stanley Smith Barney. Therefore the Panel finds the initial claim was clearly erroneous.

The Claimants failed to prove that Respondent Guariglia was involved in a single sales practice violation. The Panel, though, remains concerned about the timeline surrounding the power of attorney for Claimant Judith Goldman after her account was moved to MSSB. However, the testimony of both Judith and Kenneth Goldman amply demonstrated that Kenneth Goldman made all of the decisions in his wife's account with her approval. There was no claim for unauthorized trades in the Judith Goldman account. In addition there were no losses in Judith Goldman's account while at Morgan Stanley Smith Barney. Finally, there was no violation, forgery, theft or misappropriation by Barry Guariglia.

Finally, the Panel granted the Respondents' Motion to Dismiss after more than ten days of hearings because there was simply no proof that the claims were true. While all the claims were quite stridently argued, not a single claim was proven to be true by evidence.

In conclusion, the Panel orders expungement of the Claimants' claim from Barry Guariglia's CRD records related to his employment at Morgan Stanley Smith Barney.

The Panel denies, without prejudice, the expungement of Barry Guariglia's CRD records in connection with his employment at Merrill Lynch. As noted earlier, the parties settled the claims arising from when Respondent Guariglia was employed by Merrill Lynch. The settlement alone does not prove that the complaint should be expunged from his CRD record. Furthermore, the Motion for Expungement and Claimants' Opposition focused on Respondent Guariglia's alleged actions or omissions while employed at MSSB.

3. Any and all other relief requests not specifically addressed herein, including punitive damages and attorneys' fees, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee = \$ 1,250.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

#### **Member Fees**

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

Member Surcharge = \$ 1,500.00  
Pre-Hearing Processing Fee = \$ 750.00  
Hearing Processing Fee = \$ 2,200.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

August 21, 2012 adjournment by Claimants = \$ 1,000.00  
January 23, 2014 adjournment by the parties = \$ 1,000.00  

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Total Adjournment Fees = \$ 2,000.00

1. The Panel has assessed \$1,500.00 of the adjournment fees jointly and severally to Claimants.
2. The Panel has assessed \$500.00 of the adjournment fees jointly and severally to Respondents MSSB, Citigroup and Guariglia.

**Discovery-Related Motion Fees**

Fees apply for each decision rendered on a discovery-related motion.

Two (2) Decisions on discovery-related motions on the papers  
with three (3) arbitrators @ \$600.00 = \$ 1,200.00

Claimants submitted (2) two discovery-related motions  
Total Discovery-Related Motion Fees = \$ 1,200.00

1. The Panel has assessed \$600.00 of the discovery-related motion fees jointly and severally to Claimants.
2. The Panel has assessed \$600.00 of the discovery-related motion fees jointly and severally to Respondents MSSB, Citigroup and Guariglia.

**Contested Motion for Issuance of a Subpoena Fees**

Fees apply for each decision on a contested motion for the issuance of a subpoena.

One (1) Decision on a contested motion for the issuance of a subpoena  
with (1) one arbitrator @ \$200.00 = \$ 200.00  
Total Contested Motion for Issuance of Subpoenas Fees = \$ 200.00

The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees jointly and severally to Claimants.

The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees jointly and severally to Respondents MSSB, Citigroup and Guariglia.

**Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. 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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00 = \$ 450.00  
Pre-hearing conference: June 20, 2011 1 session

Two (2) Pre-hearing sessions with the Panel @ \$1,000.00 = \$ 2,000.00  
Pre-hearing conferences: April 5, 2011 1 session  
August 26, 2011 1 session

Eighteen (18) Hearing sessions @ \$1,000.00			= \$18,000.00
Hearing Dates:	August 22, 2012	1 session	
	April 16, 2013	2 sessions	
	April 17, 2013	2 sessions	
	June 26, 2013	2 sessions	
	June 27, 2013	2 sessions	
	June 28, 2013	2 sessions	
	July 1, 2013	2 sessions	
	July 12, 2013	2 sessions	
	December 17, 2013	1 session	
	February 20, 2014	2 sessions	

Two (2) Hearing sessions on expungement request @ \$1,000.00			
Hearing Date:	September 3, 2014	1 session	= \$ 2,000.00
<b>Total Hearing Session Fees</b>			<b>= \$22,450.00</b>

1. The Panel has assessed \$15,725.00 of the hearing session fees jointly and severally to Claimants.
2. The Panel has assessed \$612.50 of the hearing session fees to Respondent Merrill Lynch.
3. The Panel has assessed \$6,112.50 of the hearing session fees jointly and severally to Respondents MSSB, Citigroup and Guariglia, which includes the \$2,000.00 fee for the September 3, 2014 expungement hearing.

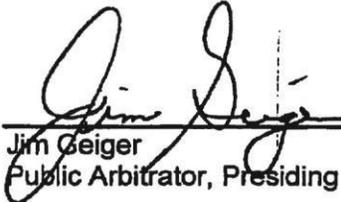
All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Jim Geiger	-	Public Arbitrator, Presiding Chairperson
Doris J. Dabrowski	-	Public Arbitrator
James T. McLaughlin	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Jim Geiger  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Doris J. Dabrowski  
Public Arbitrator

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

\_\_\_\_\_  
James T. McLaughlin  
Non-Public Arbitrator

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

October 2, 2014

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

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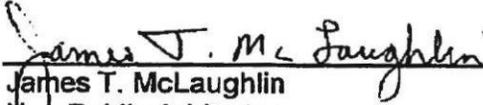
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Public Arbitrator

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Signature Date

  
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James T. McLaughlin  
Non-Public Arbitrator

9/30/14  
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Signature Date

October 2, 2014

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

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Signature Date

  
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Public Arbitrator

10/3/14  
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Signature Date

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James T. McLaughlin  
Non-Public Arbitrator

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Signature Date

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