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

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In the Matter of the Arbitration Between:

Names of the Claimants

Martin Boyer, Trustee, U/A DTD 3/1/85  
Mary L. Boyer, Trustee, U/A DTD 12/28/88  
Martin Boyer  
Mary Boyer

Case Number: 00-03643

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Kevin Cooper  
David Mowry

Hearing Site: Boca Raton, Florida

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

**REPRESENTATION OF PARTIES**

For Martin Boyer, Trustee, U/A DTD 3/1/85 ("Trust#1), Mary L. Boyer, Trustee ("Trust #2), U/A DTD 12/28/88, Martin Boyer and Mary Boyer, hereinafter collectively referred to as "Claimants": Matthew R. Rutherford, Esq., Rutherford & Rybacki, L.L.P., San Diego, California.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill"), Kevin Cooper ("Cooper"), and David Mowry ("Mowry"), hereinafter collectively referred to as "Respondents": David J. Campbell, Esq., Bressler Amery & Ross, P.C., New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: August 17, 2000.

Claimants signed but did not date the Uniform Submission Agreements.

Statement of Answer and Motion to Dismiss filed by Respondents on or about: November 13, 2000.

Respondent Merrill signed the Uniform Submission Agreement: November 10, 2000.

Respondent Cooper signed the Uniform Submission Agreement: November 10, 2000.

Respondent Mowry signed the Uniform Submission Agreement: October 25, 2000.

Motion to Dismiss filed by Respondents Merrill and Cooper on or about: July 21, 2003

Response to Respondents Merrill's and Cooper's Motion to Dismiss filed by Claimants on or about: July 30, 2003.

Second Motion to Dismiss filed by Respondents Merrill and Cooper on or about: January 5, 2004.

Opposition to Respondents Merrill's and Cooper's Second Motion to Dismiss filed by Claimants on or about January 12, 2004.

Reply to Claimants' Opposition to Respondents Merrill's and Cooper's Second Motion to Dismiss filed by Respondents Merrill and Cooper on or about: January 14, 2004.

### **CASE SUMMARY**

Claimants asserted the following causes of action: violations of §10(b) of the Securities Exchange Act of 1934; unsuitability; intentional or negligent misrepresentation of facts; concealment; breach of fiduciary duty; constructive fraud; vicarious liability, respondeat superior; control person liability; and failure to supervise. The causes of action relate to the purchase in Trust #1 and Trust #2 of shares of stock in the Merrill Lynch Senior Floating Rate Fund as well as the purchase in Trust #2 of the Massachusetts State Health Education Authority Revenue Caretas Christi Bond.

Unless specifically admitted in their Answer, Respondents denied the claims alleged in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested recovery of losses in the amounts of \$203,000.00 for Trust #1 and \$36,000.00 for Trust #2, disgorgement of all commissions, concession, spread and/or markup, management fees and other expenses charged to Claimants in the amount of \$100,000.00, punitive damages in the amount of \$800,000.00, attorneys' fees, costs, and such other relief as the Panel deemed just and appropriate.

Respondents requested denial of Claimants' claims, that the Statement of Claim be dismissed with prejudice, and that the costs of this proceeding, including attorneys' fees, be assessed against Claimants.

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

On or about January 30, 2002, Claimants and Respondent Mowry filed with NASD Dispute Resolution a Stipulation of Dismissal With Prejudice of all claims against Respondent Mowry.

Respondents Merrill and Cooper filed two motions to dismiss in which they requested that the Panel dismiss all claims against them pursuant to Rule 10305(b) of the NASD Code of Arbitration Procedure (the "Code") as a sanction for Claimants' failure to produce documents in violation of the Panel's orders. In their responses, Claimants asserted that Claimants' failure to produce documents was not "willful and intentional," that lesser sanctions had not yet been imposed by the Panel, and that Respondents had also failed to produce documents pursuant to the Panel's orders. The parties filed notices of dismissal and settlement before the Panel issued any rulings on these motions.

On or about January 16, 2004, Claimants and Respondents Merrill and Cooper filed with NASD Dispute Resolution a notice of settlement.

On or about January 21, 2004, Claimants dismissed, with prejudice, Respondent Cooper from this matter.

Claimants and Respondent Merrill entered into a confidential settlement agreement. In connection with that agreement, Claimants dismissed all claims against Respondent Merrill, with prejudice, in July 2004.

On or about July 27, 2004, the parties filed with NASD Dispute Resolution a proposed Stipulated Award for review and approval by the Panel.

The parties filed a notice of settlement with NASD Dispute Resolution within eight days of the first scheduled hearing date in this matter. The parties agreed that an additional forum fee of \$1,200.00 shall be assessed to Respondent Merrill, in lieu of retaining Claimants' initial hearing session deposit pursuant to Rule 10332(f) of the Code.

Prior to execution of the Stipulated Award, one of the public arbitrators passed away. Thereafter, the parties jointly elected to proceed with the two remaining arbitrators.

The parties in this matter have agreed that the Stipulated Award may be entered in counterpart copies or that a signed, handwritten Stipulated Award may be entered.

#### AWARD

After considering the pleadings and the proposed Stipulated Award submitted by the parties, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are hereby denied and dismissed with prejudice;
2. On the grounds that Respondent Mowry was named as a party to this arbitration by mistake, the Panel recommends the expungement of all references to the above captioned arbitration from Respondent Mowry's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09 and 99-54, Respondent Mowry must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
3. On the grounds that the claim against Respondent Cooper fails to state a claim upon which relief may be granted, the Panel recommends the expungement of all references to the above captioned arbitration from Respondent Cooper's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notice to Member 99-09 and 99-54, Respondent Cooper must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. Each party shall bear their own costs and expenses associated with the above-referenced arbitration, including attorneys' fees, except as fees are specifically addressed below; and
5. Any and all relief not specifically addressed herein is denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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 = \$ 500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Merrill is a member firm and a party.

Member surcharge = \$ 2,500.00

Pre-hearing process fee = \$ 600.00

Hearing process fee = \$ 4,500.00

Total Member Fees = \$ 7,600.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

February 11, 12, 13, 14 and 15, 2002, adjournment by Claimants and Respondents Merrill and Cooper. \$1,200.00

October 7, 8, 9, 10, and 11, 2002, adjournment by Claimants. \$1,200.00

August 25, 26, 27, 28, and 29, 2003, adjournment by Claimants and Respondents Merrill and Cooper. \$1,500.00

Pursuant to the agreement of the parties, the Panel has assessed the total adjournment fees of \$3,900.00 to Respondent Merrill.

#### **Three-Day Cancellation Fees**

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

No three-day cancellation fees were assessed in this matter.

#### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were assessed during these proceedings.

**Forum Fees and Assessments**

The Panel 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 hours or less.

Two (2) Pre-hearing sessions with the Panel @ \$1,200.00	= \$2,400.00
Pre-hearing conferences: May 10, 2001 1 session	
January 3, 2002 1 session	
<hr/> Total Forum Fees	<hr/> = \$2,400.00

Pursuant to the agreement of the parties, the Panel has assessed the total forum fees of \$2,400.00 to Respondent Merrill.

**Administrative Costs**

Administrative costs are incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

**Fee Summary**

Claimants are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 500.00
<u>Total Fees</u>	= \$ 500.00
<u>Less Payments</u>	= \$ 500.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondent Merrill is solely liable for:

Member Fees	= \$ 7,600.00
Forum Fees	= \$ 2,400.00
Additional Forum Fees pursuant to Rule 10332(f) of the Code	= \$ 1,200.00
<u>Adjournment Fees</u>	<u>= \$ 3,900.00</u>
<u>Total Fees</u>	<u>= \$15,100.00</u>
<u>Less Payments</u>	<u>= \$ 8,000.00</u>
<u>Balance Due NASD Dispute Resolution</u>	<u>= \$ 7,100.00</u>

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

**ARBITRATION PANEL**

Neale J. Poller, Esq.	-	Public Arbitrator, Presiding Chairperson
Robert S. Natiss	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/  
Neale J. Poller, Esq.  
Public Arbitrator, Presiding Chairperson

February 28, 2005  
Signature Date

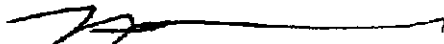
/s/  
Robert S. Natiss  
Non-Public Arbitrator

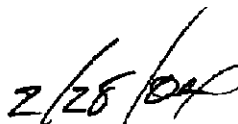
February 25, 2005  
Signature Date

March 3, 2005  
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution  
Arbitration No. 00-03643  
Stipulated Award Page 6 of 6

Concurring Arbitrators' Signatures

  
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Neale J. Poller, Esq.  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Robert S. Natiss  
Non-Public Arbitrator

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

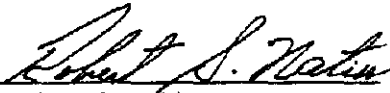
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Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution  
Arbitration No. 00-03643  
Stipulated Award Page 6 of 6

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Neale J. Poller, Esq.  
Public Arbitrator, Presiding Chairperson

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

  
Robert S. Natiss  
Non-Public Arbitrator

2-25-05  
Signature Date

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