

**Stipulated Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant  
Jacqueline P. Gilbert

Case Number: 02-06840

Names of the Respondents  
Merrill Lynch, Pierce, Fenner & Smith, Inc.  
J. Brendan Kelleher

Hearing Site: Raleigh, North Carolina

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

**REPRESENTATION OF PARTIES**

Claimant, Jacqueline P. Gilbert, hereinafter referred to as "Claimant", was represented by Mathew E. Bates, Esq., Attorney at Law, Greensboro, North Carolina.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and J. Brendan Kelleher ("Kelleher"), hereinafter collectively referred to as "Respondents", were represented by S. Lawrence Polk, Esq. and Scott N. Sherman, Esq., Sutherland, Asbill & Brennan, LLP, Atlanta, Georgia.

**CASE INFORMATION**

Statement of Claim filed on November 12, 2002.

Claimant signed the Uniform Submission Agreement on October 25, 2002.

Statement of Answer filed by Respondents on March 28, 2003.

A representative of Respondent Merrill Lynch signed the Uniform Submission Agreement on January 22, 2003.

Respondent Kelleher signed the Uniform Submission Agreement on February 25, 2003.

**CASE SUMMARY**

The causes of action relate to allegations that Respondents made unsuitable recommendations in her accounts in growth stocks, and that Ms. Gilbert understood that the investments in her account would be more conservative in nature. Claimant asserted misrepresentation in misleading Claimant as to how retirement funds would be managed, making unsuitable investments, following unsuitable investment strategy, failure to supervise, breach of fiduciary duty, unfair and deceptive trade practices in violation of North Carolina law causing its analysts to recommend purchases even when analysts knew stocks being recommended were grossly overvalued. Claimant asserted a claim against Merrill Lynch under the doctrine of *Respondeat Superior*, under Section 20 of the SEC Act of 1934 and under North Carolina General Statute Sec. 78-A-56(c).

Respondents denied all allegations of wrongdoing and asserted the following defenses:

Respondents contended that all trades were appropriate and suitable and that Claimant sought growth-oriented investments in her account in order to obtain the return on her investments which she requested.

### **RELIEF REQUESTED**

Claimant requested \$182,962.56 in compensatory damages; punitive damages; treble damages; attorneys' fees; and other costs.

Respondents requested an award rejecting Claimant's Statement of Claim in its entirety and an order that all costs of the arbitration be borne by Claimant.

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

Prior to the hearing, the parties fully and finally settled all claims by and between them. Therefore, the parties submit this Stipulated Award to the Arbitration Panel (the "Panel") for its consideration and request that it be entered.

The parties have agreed that the Stipulated Award in this matter may be executed in counterpart copies.

### **AWARD**

Pursuant to the above, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. That the parties have amicably resolved their differences and have requested this Stipulated Award;
2. That Claimant has dismissed all claims with prejudice against Respondents;
3. That the Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Kelleher's registration records maintained by the CRD with the understanding that, pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Kelleher must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. That each party shall bear its own costs and expenses, including attorneys' fees, except as Fees are specifically addressed below; and
5. That any and all relief not specifically addressed herein, including punitive damages and treble damages, is denied in its entirety.

### **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 = \$ 375.00

#### **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, Respondent Merrill Lynch is a party.

Member surcharge = \$ 2,250.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 4,000.00

#### **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:

One (1) Pre-hearing session with a single arbitrator @ \$ 450.00 = \$ 450.00

Pre-hearing conference: March 5, 2004 1 session

Two (2) Pre-hearing sessions with Panel @ \$ 1,200.00 = \$ 2,400.00

Pre-hearing conferences: October 2, 2003 1 session

April 2, 2004 1 session

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Total Forum Fees = \$ 2,850.00

1. The Panel has assessed \$ 1,425.00 of the forum fees to Claimant.

2. The Panel has assessed \$ 1,425.00 of the forum fees jointly and severally to Respondents.

### **Fee Summary**

1. Claimant is assessed and shall pay:

Initial Filing Fee = \$ 375.00

Forum Fees = \$ 1,425.00

Total Fees = \$ 1,800.00

Less payments = \$ 1,575.00

Balance Due NASD Dispute Resolution = \$ 225.00

2. Respondent Merrill Lynch is assessed and shall pay:

Member Fees = \$ 7,000.00

Total Fees	= \$ 7,000.00
<u>Less payments</u>	<u>= \$ 9,575.00</u>
Refund to Be Returned to CRD Account	= \$ 2,575.00

3. Respondents Merrill Lynch and Kelleher are jointly and severally assessed and shall pay:

<u>Forum Fees</u>	<u>= \$ 1,425.00</u>
Total Fees	= \$ 1,425.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

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

**ARBITRATION PANEL**

Seymour Freed	-	Public Arbitrator, Presiding Chairperson
Leonard Landsman	-	Public Arbitrator, Panelist
David P. McDuffee	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

Seymour Freed

Seymour Freed  
Public Arbitrator, Presiding Chairperson

1/06/2005

Signature Date

Leonard Landsman  
Public Arbitrator, Panelist

Signature Date

David P. McDuffee  
Non-Public Arbitrator, Panelist

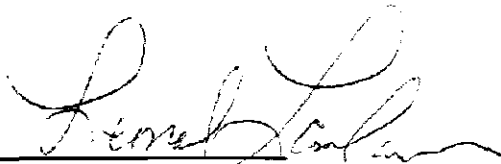
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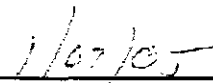
January 14, 2005  
Date of Service (For NASD Dispute Resolution office use only)

**Concurring Arbitrators' Signatures**

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Seymour Freed  
Public Arbitrator, Presiding Chairperson

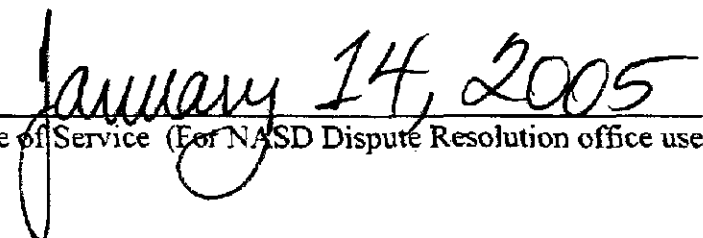
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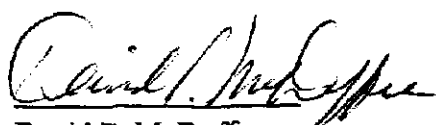
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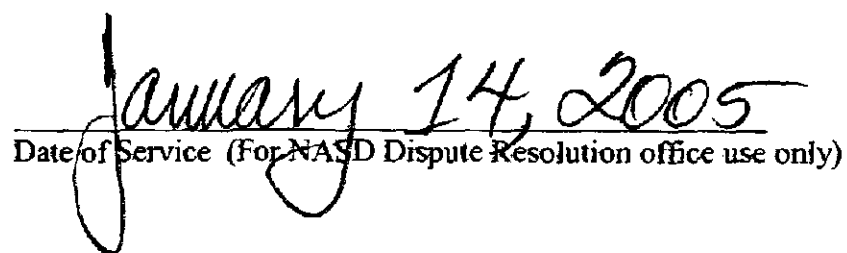
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