

---

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

---

In the Matter of the Arbitration Between:

Names of the Claimants

Case Number: 03-03975

Samuel Matter

Linda Matter

Linda Matter and Sam Matter JTWROS

Beth Lara Matter Custodial Account

Jason Eric Matter Custodial Account

Names of the Respondents

Hearing Site: Boca Raton, FL

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Marc J. Tendler

---

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

**REPRESENTATION OF PARTIES**

For Samuel Matter ("SM"), Linda Matter ("LM"), Linda Matter and Sam Matter JTWROS ("LM&SM"), Beth Lara Matter Custodial Account ("BLMCA") and Jason Eric Matter Custodial Account ("JEMCA"), hereinafter referred to as "Claimants": James Richard Hooper, Esq., Hooper & Weiss, L.L.C., Orlando, Florida.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS") and Marc J. Tendler ("Tendler"), hereinafter referred to as "Respondents": Neil S. Baritz, Esq., Baritz & Coleman, LLP, Boca Raton, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: May 15, 2003.

Claimants signed the Uniform Submission Agreement: June 28, 2003.

Statement of Answer filed by Respondent on or about: September 2, 2003.

Respondent MLPFS signed the Uniform Submission Agreement: July 17, 2003.

Respondent Tendler did not file an executed Uniform Submission Agreement.

**CASE SUMMARY**

Claimants sued Respondents to recover for breach of contract, breach of fiduciary duties, alleged violation of Florida Statute, Chapter 517, common law fraud, failure to supervise and negligence and gross negligence in connection with alleged unsuitable recommendations. The causes of action relate to purchases of Merrill Lynch Bank and Trust fund, as well as other unspecified investments in equities or equity based mutual funds.

Respondents denied Claimants' allegations and set forth numerous affirmative defenses to the claims presented.

### **RELIEF REQUESTED**

Claimants requested compensatory damages of approximately \$68,865.62, plus disgorgement of commissions, fees and other charges, interest, punitive damages, costs, attorneys' fees and such other as is deemed just and proper.

Respondents requested dismissal of Claimants' Statement of Claim, attorney's fees and arbitration costs associated with the defense of this proceeding.

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

Respondent Tendler did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the undersigned arbitrators (the "Panel") on all issues submitted.

An initial pre-hearing conference took place on December 4, 2003.

Final evidentiary hearings were scheduled for August 10, 2004, with the additional days of August 11, 2004 and August 12, 2004, if needed, which final dates were withdrawn by Claimants and Respondents upon their having entered into a written agreement resolving the matter.

The parties resolved the issues presented in their pleadings on August 6, 2004. In connection with the resolution of this matter, Respondents asserted that, because of the nature of the claims, this action should only have been filed against Respondent MLPFS, and not Respondent Tendler. Accordingly, Claimants dismissed Respondent Tendler from the action on August 5, 2004. Claimants agreed to cooperate with Respondent Tendler's efforts to have this matter expunged from his Central Registration Depository ("CRD") records maintained by NASD. In connection with the resolution of the claims, the Claimants and Respondents agreed that upon the satisfaction of the terms of resolution, that each of Claimants and Respondents shall be barred from bringing any action based on or including the claims for which this action has been or could have been brought and that this matter be dismissed with prejudice as to all Respondents. The only issue presented to the Panel is this Stipulated Award relating to expungement.

On or about August 9, 2004, Claimant's counsel advised NASD Dispute Resolution that the parties had settled the arbitration proceeding and requested cancellation of the evidentiary hearings. Also, on or about August 9, 2004, Claimants requested that NASD not release the Panel to allow Claimants and Respondent to submit a proposed Stipulated Award.

On or about September 9, 2004, Claimants and Respondents submitted a proposed Stipulated

Award.

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

### **AWARD**

After considering the pleadings, motions, other papers filed in this case, the stipulation of the parties and the proposed Stipulated Award, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' withdrawal of claims is accepted and Respondents are dismissed from this matter, with prejudice.
2. The Panel recommends the expungement of all references to the above-captioned arbitration from Respondent Tendler's public and non-public registration records maintained by NASD's CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Tendler must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

### **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	= \$ 225.00
--------------------------	-------------

#### **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 MLPFS is a member firm and a party.

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$1,700.00</u>
Total Member Fees	= \$3,550.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed.

No adjournment fees were incurred during these proceedings.

**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 incurred during these proceedings.

**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 incurred during these proceedings.

**Forum Fees and Assessments**

The Panel has assessed forum 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 the Panel @ \$750.00	= \$750.00
Pre-hearing conference: December 4, 2003	1 session
<hr/>	
Total Forum Fees	= \$750.00

The Panel has assessed \$375.00 of the forum fees jointly and severally to Claimants.

The Panel has assessed \$375.00 of the forum fees jointly and severally to Respondents.

**Administrative Costs**

Administrative costs are expenses 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 during these proceedings.

**Fee Summary**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 225.00
Retained Hearing Session Deposit	= \$ 375.00
Pursuant to Rule 10332(f) of the Code	
Forum Fees	= \$ 375.00
Total Fees	= \$ 975.00
Less payments	= \$ 975.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent MLPFS is solely liable for:

<u>Member Fees</u>	= \$3,550.00
<u>Total Fees</u>	= \$3,550.00
<u>Less payments</u>	= \$3,550.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondents MLPFS and Tendler are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 375.00
<u>Total Fees</u>	= \$ 375.00
<u>Less payments</u>	= \$ 375.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 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**

Steven N. Ainbinder, Esq.	-	Public Arbitrator, Presiding Chairperson
Gary Paul Whorton	-	Public Arbitrator
Kathleen A. Garske	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Steven N. Ainbinder, Esq.  
Public Arbitrator, Presiding Chairperson

December 21, 2004  
Signature Date

/s/  
Gary Paul Whorton  
Public Arbitrator

December 9, 2004  
Signature Date

/s/  
Kathleen A. Garske  
Non-Public Arbitrator

December 8, 2004  
Signature Date

December 22, 2004  
Date of Service (For NASD Dispute Resolution office use only)

Respondent MLPFS is solely liable for:

<u>Member Fees</u>	= \$3,550.00
<u>Total Fees</u>	= \$3,550.00
<u>Less payments</u>	= \$3,550.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondents MLPFS and Tendler are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 375.00
<u>Total Fees</u>	= \$ 375.00
<u>Less payments</u>	= \$ 375.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 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

Steven N. Ainbinder, Esq.	-	Public Arbitrator, Presiding Chairperson
Gary Paul Whorton	-	Public Arbitrator
Kathleen A. Garske	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Steven N. Ainbinder, Esq.  
Public Arbitrator, Presiding Chairperson

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

  
\_\_\_\_\_  
Gary Paul Whorton  
Public Arbitrator

12/09/04  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Kathleen A. Garske  
Non-Public Arbitrator

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

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

Respondent MLPFS is solely liable for:

Member Fees	= \$3,550.00
Total Fees	= \$3,550.00
Less payments	= \$3,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents MLPFS and Tendler are jointly and severally liable for:

Forum Fees	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ 375.00
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**

Steven N. Ainbinder, Esq.	-	Public Arbitrator, Presiding Chairperson
Gary Paul Whorton	-	Public Arbitrator
Kathleen A. Garske	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Steven N. Ainbinder, Esq.  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Gary Paul Whorton  
Public Arbitrator

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

Kathleen A. Garske  
Kathleen A. Garske  
Non-Public Arbitrator

Dec 8, 2004  
Signature Date

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

Respondent MLPFS is solely liable for:

<u>Member Fees</u>	= \$3,550.00
<u>Total Fees</u>	= \$3,550.00
<u>Less payments</u>	= \$3,550.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Respondents MLPFS and Tendler are jointly and severally liable for:

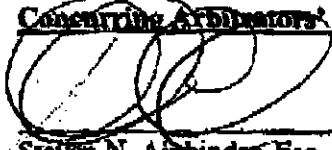
<u>Forum Fees</u>	= \$ 375.00
<u>Total Fees</u>	= \$ 375.00
<u>Less payments</u>	= \$ 375.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

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

**ARBITRATION PANEL**

Steven N. Ambinder, Esq.	-	Public Arbitrator, Presiding Chairperson
Gary Paul Whorton	-	Public Arbitrator
Kathleen A. Garske	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

  
Steven N. Ambinder, Esq.  
Public Arbitrator, Presiding Chairperson

12/21/04  
Signature Date

\_\_\_\_\_  
Gary Paul Whorton  
Public Arbitrator

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

\_\_\_\_\_  
Kathleen A. Garske  
Non-Public Arbitrator

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

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