

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

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In the Matter of the Arbitration Between:

James Miller, individually and as Trustee for BEK Marketing Services, Inc. (Profit Sharing Plan) (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Donald Barter, Mark Alton, & David Capraro (Respondents).

Case Number: 03-04236

Hearing Site: Buffalo, New York

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Nature of the Dispute: Customers v. Member and Associated Persons

**REPRESENTATION OF PARTIES**

Claimants James Miller ("Miller") and BEK Marketing Services, Inc. ("BEK") hereinafter collectively referred to as "Claimants": Donald McGrath, Esq., McGrath & Polvino, PLLC, Williamsville, NY.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Donald Barter ("Barter"), Mark Alton ("Alton"), and David Capraro ("Capraro") hereinafter collectively referred to as "Respondents": Donald J. Savery, Esq., Bingham McCutchen, LLP, Boston, MA.

**CASE INFORMATION**

Statement of Claim filed on or about: June 10, 2003.

Claimants signed the Uniform Submission Agreement: April 29, 2003.

Response to Counterclaim filed on or about: October 23, 2003.

Joint Answer and Counterclaim filed by Respondents on or about: October 10, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: August 28, 2003.

Respondent Barter signed the Uniform Submission Agreement: September 10, 2003.

Respondent Alton signed the Uniform Submission Agreement: September 10, 2003.

Respondent Capraro signed the Uniform Submission Agreement: September 5, 2003.

Respondents' Motion for a Protective Order Governing the Production of Merrill Lynch's Confidential Policy Manuals filed on or about: February 24, 2004.

**CASE SUMMARY**

Claimant asserted the following causes of action: churning; failure to supervise; failure to satisfy the "prudent man" duties required by ERISA; breach of contract; misrepresentations; omission of material facts and unsuitability. The causes of action relate to American Telsource Int'l, China.com, Exodus Communications Inc., Global Crossing Ltd., Internet Capital Group Inc.,

MRV Communications, Newbridge Networks Corp., Numerical Techs Inc., and Trerayon Communications Systems.

Unless specifically admitted in its Answer, Respondent denied the allegations of wrongdoing set forth in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$663,727.62 for Claimant Miller's individual account, \$107,263.88 for the BEK Profit Sharing account, \$53,720.23 for cancellation of the negative balance Miller's individual account; appropriate earnings and appreciation from the date of this filing; punitive damages; costs, expenses, disbursements, attorneys' fees; and for such other and further relief as the arbitration panel deems just and proper.

Respondents requested dismissal of the Statement of Claim in its entirety; that the costs of this proceeding be assessed against the Claimants; that Respondents be awarded attorneys' fees and costs; expungement of the CRD records of Donald Barter, S. Mark Alton, and David Capraro.

Respondent Merrill Lynch submitted a counter-claim seeking damages in the amount of \$47,788.99; interest, costs, attorneys' fees, and such other and further relief as is deemed just and proper.

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

On or about February 17, 2005, Claimant Miller withdrew his claims against Respondents, Barter, Alton and Capraro.

On or about June 2, 2005, Claimant Miller settled his claim against Respondent Merrill Lynch.

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

### **AWARD**

The parties entered into an agreement to present to the Panel a Stipulated Award. Now, in lieu of a hearing and upon motion of both parties for an entry of an award, the written stipulation thereto, the Panel grants the motion and enters this award granting the following relief:

1. Claimants' claims are dismissed in their entirety with prejudice.
2. Merrill Lynch's counterclaims are hereby dismissed in their entirety with prejudice.

3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Donald Barter, S. Mark Alton, and David Capraro's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondents Donald Barter, S. Mark Alton, and David Capraro must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 375.00
Counterclaim filing fee	= \$ 1,000.00

#### **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 persons at the time of the events giving rise to the dispute. In this matter, the member firm Merrill Lynch is a party.

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 4,000.00

#### **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:

February 23-25 and March 16-17, 2005 adjournment by Claimants	= \$ 150.00
February 23-24 and March 16-17, 2005 adjournment by Respondent Merrill	= \$ 150.00

#### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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. Forum fees associated with these proceedings are:

One (1) Pre-hearing session @ \$1,200.00	= \$ 1,200.00
Pre-hearing conference: September 17, 2004	1 session

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Total Forum Fees = \$ 1,200.00

1. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Claimant Miller has been assessed \$ 400.00 of the forum fees.
2. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Claimant BEK has been assessed \$ 400.00 of the forum fees
3. In accordance with Rule 10306 of the NASD Code of Arbitration Procedure Respondent Merrill Lynch has been assessed \$ 400.00 of the forum fees.

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Three-day Cancellation Fee	= \$ 150.00
<u>Forum Fees</u>	= \$ 400.00
<u>Total Fees</u>	= \$ 925.00
<u>Less payments</u>	= \$ 775.00
Balance Due NASD Dispute Resolution	= \$ 150.00

2. Claimant Miller is solely liable for:

<u>Forum Fees</u>	= \$ 400.00
<u>Total Fees</u>	= \$ 400.00
<u>Less payments</u>	= \$ 400.00
Balance Due NASD Resolution	= \$ 0.00

3. Claimant BEK is solely liable for:

<u>Forum Fees</u>	= \$ 400.00
<u>Total Fees</u>	= \$ 400.00
<u>Less payments</u>	= \$ 400.00
Balance Due NASD Resolution	= \$ 0.00

*Pursuant to Rule 10332(f) of the Code of Arbitration Procedure, NASD is retaining the total amount of the hearing session deposited by the Claimant because this office was notified by the parties that they settled this matter within eight business days of the first scheduled hearing.*

4. Respondent Merrill Lynch is solely liable for:

Counterclaim Filing Fee	= \$ 1,000.00
Member Fees	= \$ 7,000.00
Three-day Cancellation Fee	= \$ 150.00
<u>Forum Fees</u>	= \$ 600.00
<u>Total Fees</u>	= \$ 8,750.00

<u>Less payments</u>	= \$ 8,600.00
Balance Due NASD Dispute Resolution	= \$ 150.00

*Pursuant to Rule 10332(f) of the Code of Arbitration Procedure, NASD is retaining the total amount of the hearing session deposited by the Respondent because this office was notified by the parties that they settled this matter within eight business days of the first scheduled hearing.*

All balances are due and payable to NASD Dispute Resolution.

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Arbitration No. 03-04236  
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Partial Signatures

  
James Miller

7/25/05

  
BKK Marketing Services, Inc.  
Claimant

7/25/05  
Signature Date

McCall-Lynch  
Respondent

Signature Date

NASD Dispute Resolution  
Arbitration No. 03-04236  
Award Page 6 of 7


Parties' Signatures

\_\_\_\_\_  
James Miller  
Claimant

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

\_\_\_\_\_  
BEK Marketing Services, Inc.  
Claimant

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

  
\_\_\_\_\_  
Merrill Lynch  
Respondent

by Catherine W. H. Sa  
Director and Senior Counsel


June 27, 2005  
\_\_\_\_\_  
Signature Date

ARBITRATION PANEL

Ramona L. Gallagher	-	Public Arbitrator, Presiding Chair
David Buch, Esq.	-	Public Arbitrator
James Pasquale Nunciato	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

  
Ramona L. Gallagher  
Public Arbitrator, Presiding Chair

August 9, 2005  
Signature Date

\_\_\_\_\_  
David Buch, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
James Pasquale Nunciato  
Non-Public Arbitrator

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

August 15, 2005  
Date of Service (For NASD office use only)



ARBITRATION PANEL

Ramona L. Gallagher	-	Public Arbitrator, Presiding Chair
David Buch, Esq.	-	Public Arbitrator
James Pasquale Nunciato	-	Non-Public Arbitrator

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Ramona L. Gallagher  
Public Arbitrator, Presiding Chair

Signature Date

David Buch  
David Buch, Esq.  
Public Arbitrator

8/14/05  
Signature Date

James Pasquale Nunciato  
Non-Public Arbitrator

Signature Date

August 15, 2005  
Date of Service (For NASD office use only)

ARBITRATION PANEL

Ramona L. Gallagher	-	Public Arbitrator, Presiding Chair
David Buch, Esq.	-	Public Arbitrator
James Pasquale Nunciato	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

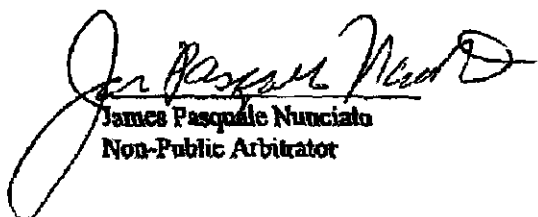
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\_\_\_\_\_  
Ramona L. Gallagher  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
David Buch, Esq.  
Public Arbitrator

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

  
James Pasquale Nunciato  
Non-Public Arbitrator

8-4-05  
Signature Date

August 15, 2005  
Date of Service (For NASD office use only)