

Stipulated Award  
NASD Dispute Resolution

---

In the Matter of the Arbitration Between:

Name of the Claimant

Case Number: 03-05143

Martha E. Jester IRA

Name of the Respondents

Hearing Site: Charlotte, North Carolina

Merrill Lynch, Pierce, Fenner, & Smith, Inc.  
J. Brendan Kelleher

---

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

REPRESENTATION OF PARTIES

Claimant, Martha E. Jester IRA, hereinafter referred to as "Claimant", was represented by Matthew E. Bates, P.A., 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 July 11, 2003.

Claimant signed the Uniform Submission Agreement on July 7, 2003.

Statement of Answer filed by Respondents on October 15, 2003.

Respondent Kelleher signed the Uniform Submission Agreement on October 8, 2003.

A representative of Merrill Lynch signed the Uniform Submission Agreement on October 10, 2003.

Motion to Dismiss filed by Respondents on October 15, 2003.

Reply Memorandum in Support of Motion to Dismiss filed by Respondents on February 16, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: fraud, misrepresentation, unsuitability, failure to supervise, breach of fiduciary duty, market manipulation and *respondeat superior*. The causes of action relate to the purchase and sale of mutual funds, primarily technology funds, and stocks, including technology stocks of Cisco Systems, Inc., EMC Corporation Mass, JDS Uniphase, Oracle, Intel, Sun Microsystems, Qualcomm, Nokia, Xilinx, Keyspan, and Worldcom.

Respondents contend that all trades were appropriate and suitable. Claimant sought growth-oriented investments in her account in order to obtain the return on her investments she requested. Respondents denied all allegations of wrongdoing and asserted the following defenses: failure to state a claim upon which relief may be granted, estoppel, laches, unclean hands, contributory negligence, waiver, ratification, assumption of risk, claims barred by applicable statutes of limitations, failure to use requisite due diligence, and failure to mitigate damages.

#### RELIEF REQUESTED

Claimant requested the following damages:

Compensatory Damages	\$ 167,878.60
Punitive Damages	amount unspecified
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified
Other Monetary Relief:	\$ 11,686.00

Respondents requested that the Statement of Claim be dismissed in its entirety and an award of costs be assessed against the Claimant.

#### OTHER ISSUES CONSIDERED AND DECIDED

By order dated March 30, 2004, the Panel denied Respondents' Motion to Dismiss.

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 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. The listed parties have amenablely resolved their differences and have requested this Stipulated Award;
2. All claims against Merrill Lynch and J. Brendan Kelleher are hereby dismissed with prejudice;
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Kelleher'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, Respondent Kelleher must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;

4. The parties shall bear their respective costs, including attorney's fees, except as Fees are specifically addressed below; and,

5. Any and all relief not specifically addressed herein, including punitive 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 = \$ waived

#### 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 person at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch is a party.

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 2,750.00</u>
Total Member Fees	= \$ 5,200.00

#### Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel @ \$ 1,125.00 = \$ 2,250.00

Pre-hearing conferences:	February 6, 2004	1 session
	<u>March 30, 2004</u>	<u>1 session</u>

Total Forum Fees = \$ 2,250.00

1. The Panel has assessed \$ 562.50 of the forum fees to Claimant.

2. The Panel has assessed \$ 1,687.50 of the forum fees jointly and severally to Respondents.

EEE SUMMARY

1. Claimant is assessed and shall pay the following fees:

<u>Forum Fees</u>	<u>= \$ 562.50</u>
<u>Total Fees</u>	<u>= \$ 562.50</u>
<u>Less payments</u>	<u>= \$ 00.00</u>
Balance Due NASD Dispute Resolution	= \$ 562.50

2. Respondent Merrill Lynch is assessed and shall pay the following fees:

<u>Member Fees</u>	<u>= \$ 5,200.00</u>
<u>Total Fees</u>	<u>= \$ 5,200.00</u>
<u>Less payments</u>	<u>= \$ 6,137.50</u>
Balance refunded to Merrill Lynch	= \$ 937.50

3. Respondents are jointly and severally assessed and shall pay the following fees:

<u>Forum Fees</u>	<u>= \$ 1,687.50</u>
<u>Total Fees</u>	<u>= \$ 1,687.50</u>
<u>Less payments</u>	<u>= \$ 1,687.50</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

Clarence C. Guy	-	Public Arbitrator, Presiding Chairperson
James A. Cormack	-	Public Arbitrator, Panelist
Glenn A. Clinefelter	-	Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

Clarence C. Guy  
Clarence C. Guy  
Public Arbitrator, Presiding Chairperson

10-5-05  
Signature Date

James A. Connack  
James A. Connack  
Public Arbitrator, Panelist

Signature Date

Glenn A. Clinefelter  
Glenn A. Clinefelter  
Non-Public Arbitrator, Panelist

Signature Date

October 18, 2005  
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Clarence C. Guy  
Public Arbitrator, Presiding Chairperson

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

James A. Cornack  
James A. Cornack  
Public Arbitrator, Panelist

October 6, 2005  
Signature Date

\_\_\_\_\_  
Glenn A. Clinesfelter  
Non-Public Arbitrator, Panelist

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

October 18 2005  
Date of Service (For NASD Dispute Resolution office use only)

Stipulated Award Page 5


Concurring Arbitrators' Signatures:

\_\_\_\_\_  
Clarence C. Guy  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
James A. Cormack  
Public Arbitrator, Panelist

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

  
Glenn A. Clinefelter  
Non-Public Arbitrator, Panelist

10/5/05  
Signature Date

October 18 2005  
Date of Service (For NASD Dispute Resolution office use only)