

**Stipulated Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of Claimant  
John F. Luby, III

Case Number: 03-05919

Names of the Respondents  
Merrill Lynch Pierce Fenner & Smith, Inc.  
Robert Ewing, IV  
Randy Kirby

Hearing Site: New Orleans, Louisiana

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

**REPRESENTATION OF PARTIES**

For John F. Luby, III hereinafter referred to as "Claimant": Samuel David Abraham, Esq., Law Offices of Samuel David Abraham, Lafayette, Louisiana.

For Merrill Lynch Pierce Fenner & Smith, Inc. ("MLPFS"), Robert Ewing, IV ("Ewing"), and Randy Kirby ("Kirby"), hereinafter collectively referred to as "Respondents": A. Inge Selden, III, Esq. and Julie Wilson Portera, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: August 14, 2003.

Claimant signed the Uniform Submission Agreement: July 29, 2003.

Statement of Answer filed by Respondents on or about: October 29, 2003.

Respondents did not file executed Uniform Submission Agreements.

Claimant's Motion to Supplement Statement of Claim filed on or about: April 19, 2004.

Respondents' Opposition to Claimant's Motion to Supplement filed on or about: May 7, 2004.

Claimant's Reply Brief in Support of Motion to Supplement filed on or about: May 27, 2004.

Respondents' Answer to Claimant's Motion to Supplement filed on or about: July 6, 2004.

**CASE SUMMARY**

Claimant asserted the following causes of action: 1) unsuitability; 2) fraud; 3) nondisclosure; 4) breach of fiduciary duty; 5) unauthorized trading; and, 6) failure to supervise. The causes of action relate to Claimant's investment in stocks including, but not limited to, Applied Micro Circuits, Ariba, Cisco Systems, Exodus, EMC Corporation,

TYCO, TYCOM, Internet Capital Group, Infospace Systems, Xilinx, and the mutual fund, Franklin Biotech Discovery FD CL A.

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

### **RELIEF REQUESTED**

Claimant requested: 1) compensatory damages in the amount of \$137,000.00 plus the captured gains made and loss of original principal in the amount of \$11,000.00; 2) alternatively, well-managed portfolio damages; 3) interest from April 2000 to the present; 4) return of all fees, commissions, and/or charges imposed upon or charged against Claimant's investment funds by Respondent from April 2000 to the present; 5) forum fees and costs; 6) attorneys' fees; and, 7) punitive damages.

Respondents requested: 1) dismissal of the Statement of Claim in its entirety; 2) costs; 3) an order directing expungement of all references to the allegations in this matter and this proceeding from Respondents Ewing and Kirby's registration records maintained by the NASD Central Registration Depository ("CRD"); and, 3) such other relief as is just and proper.

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

Respondents MLPFS, Ewing and Kirby did not file with NASD Dispute Resolution, Inc. properly executed uniform submission agreements but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure ("the Code") and, having answered the claim, are bound by the determination of the Panel on all issues submitted.

On or about June 7, 2004, the undersigned arbitrators (the "Panel") granted Claimant's Motion to Supplement the Statement of Claim.

On or about May 5, 2006, Claimant and Respondents entered into a confidential settlement agreement. In connection with that agreement, Claimant dismissed, with prejudice, all claims against Respondents.

On or about June 6, 2006, NASD Dispute Resolution received Claimant and Respondents' Joint Motion for Expungement of Complaint from Respondent Randy Kirby's NASD CRD Record and the parties' proposed Stipulated Award. On or about August 11, 2006, the Panel granted the Joint Motion for Expungement.

The parties agreed that the Stipulated 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. Upon motion of all 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. Any and all claims for relief asserted by Claimant are denied and dismissed with prejudice.
2. The Panel determined that Respondent Kirby was not involved in the alleged investment-related sales practice violation and that the claim, allegation or information is factually impossible or clearly erroneous. Accordingly, the Panel recommends the expungement of all references to the above captioned arbitration from Respondent Randy Kirby's registration records maintained by the NASD CRD. Pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Kirby must obtain confirmation from a court of competent jurisdiction before NASD CRD will execute the expungement directive.
3. Each party shall bear its own costs and expenses associated with the above-referenced arbitration, including attorneys' fees, except as fees are specifically addressed below.
4. Any and all claims for relief not specifically addressed herein, including Claimant's request for punitive damages and Respondent Ewing's request for expungement, are denied.

### **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	= \$ 300.00
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#### **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, Respondent MLPFS is a party and a member firm.

Member Surcharge	= \$1,700.00
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Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$2,750.00
Total Member Fees	= \$5,200.00

### **Adjournment Fees**

The following adjournment fees are assessed:

February 15-17, 2005 and February 22-24, 2005, adjournment requested by  
Respondents = \$1,125.00

The Panel assessed an adjournment fee in the amount of \$562.50 to the Claimant.

The Panel assessed an adjournment fee in the amount of \$562.50 jointly and severally to Respondents.

### **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:

There were no three-day cancellation fees assessed during these proceedings.

### **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:

Three (3) Pre-hearing conferences with the Panel @ \$1,125.00/session	= \$3,375.00
Pre-hearing conferences: April 5, 2004	1 session
February 17, 2005	1 session
August 10, 2006	1 session

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Total Forum Fees	= \$3,375.00
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The Panel has assessed \$1,687.50 of the forum fees to the Claimant.

The Panel has assessed \$1,687.50 of the forum fees to Respondent MLPFS.

### **Administrative Costs**

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

There were no administrative costs incurred during these proceedings.

**Fee Summary**

Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
Adjournment Fee	= \$ 562.50
Forum Fees	= \$1,687.50
Total Fees	= \$2,550.00
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution	= \$1,125.00

Respondent MLPFS is solely liable for:

Member Fees	= \$5,200.00
Forum Fees	= \$1,687.50
Total Fees	= \$6,887.50
<u>Less payments</u>	<u>= \$5,200.00</u>
Balance Due NASD Dispute Resolution	= \$1,687.50

Respondents are jointly and severally liable for:

Adjournment Fee	= \$ 562.50
Total Fees	= \$ 562.50
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 562.50

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

**ARBITRATION PANEL**

Cynthia Lee Traina	-	Public Arbitrator, Presiding Chairperson
Diane B. Elkins	-	Public Arbitrator
Troy C. Sumrall, CFP	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/

08/23/06

Cynthia Lee Traina  
Public Arbitrator, Presiding Chair

Signature Date

/s/

08/25/06

Diane B. Elkins  
Public Arbitrator

Signature Date

/s/

08/23/06

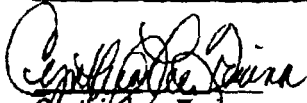
Troy C. Sumrall, CFP  
Non-Public Arbitrator

Signature Date

August 25, 2006

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

Concurring Arbitrators' Signatures



Cynthia Lee Traha  
Public Arbitrator, Presiding Chair

8/23/2006  
Signature Date

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Diane B. Elkins  
Public Arbitrator

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Signature Date

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Signature Date

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