

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

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**In the Matter of the Arbitration Between:**

**Gail M. Kessinger, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and James Scott Salmon, Respondents**

**Case Number: 03-06483**

**Hearing Site: Portland, Oregon**

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

**REPRESENTATION OF PARTIES**

**For Claimant:**

**Richard M. Layne, Esq.  
Layne & Lewis, LLP  
Portland, Oregon**

**For Respondents:**

**Curt Roy Hinline, Esq.  
Dorsey & Whitney  
Seattle, Washington**

**CASE INFORMATION**

**Statement of Claim filed: September 2, 2003**

**Amended Statement of Claim filed: September 30, 2004**

**Joint Statement of Answer filed: November 26, 2003**

**Joint Amended Statement of Answer filed: December 23, 2003**

**Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Uniform Submission Agreement  
signed: October 15, 2003**

**Respondent James Scott Salmon's Uniform Submission Agreement signed: November 24, 2003**

### **CASE SUMMARY**

Both Claimant's Statement of Claim and Amended Statement of Claim alleged negligence, breach of fiduciary duty, breach of contract, unsuitability, failure to supervise, and violations of federal and state securities laws with respect to the purchase and sale of unspecified securities described as "concentrated in the technology sector."

Both Respondents' Answer and Amended Statement of Answer denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Both Claimant's Statement of Claim and Amended Statement of Claim requested unspecified compensatory damages plus prejudgment interest at 9% per annum, or, in the alternative, statutory rescission of any transaction completed in violation of the Oregon Securities Act, or, in the alternative, compensation for losses which would have been avoided had respondents recommended a prudent and conforming portfolio, plus costs, including attorney's fees.

Both Respondents' Answer and Amended Statement of Answer requested dismissal of the Claimant's Statement of Claim in its entirety, and costs, including attorney's fees.

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

On September 27, 2004, Claimant filed a Motion to Amend her Statement of Claim. On October 25, 2004, Respondents filed a Statement of Non-Opposition. After due deliberation, the Panel granted the motion and deemed Claimant's Amended Statement of Claim filed as of September 30, 2004.

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**

After considering the pleadings, testimony, and evidence presented at the hearing, the Arbitration Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and James Scott Salmon are jointly and severally liable to and shall pay Claimant the sum of \$84,255.75 in compensatory damages, for making unsuitable recommendations with respect to the purchase of certain technology and telecommunications common stocks given the high concentration of such risky and speculative stocks in Claimant Kessinger's accounts, and the inadequate supervision of those accounts.
- 2) Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and James Scott Salmon are jointly and severally liable to and shall pay to Claimant pre-judgment interest in the sum of \$18,959.10.
- 3) This Award shall bear interest at the rate of 9% per annum on any balance that remains unpaid thirty (30) days after receipt hereof, unless a motion to vacate has been filed with a court of competent jurisdiction. If this award is the subject of a motion to vacate that is subsequently denied, this award shall bear interest at the rate of 9% per annum on any balance that remains unpaid from date of the court's order denying said motion to vacate.
- 4) The parties shall bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 250.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,200.00</u>
<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

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

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair.

The following fees are assessed:

One (1) Pre-hearing conference session with a single arbitrator @ \$450.00/session	= \$ 450.00
Pre-hearing conference: May 3, 2004	1 session

One (1) Pre-hearing conference session with the Panel @ \$1,000.00/session	= \$ 1,000.00
Pre-hearing conference: February 2, 2004	1 session

Ten (10) Hearing sessions @ \$1,000.00/session	= \$10,000.00
Hearings: November 16, 2004	2 sessions
November 17, 2004	2 sessions
November 18, 2004	2 sessions
November 19, 2004	2 sessions
January 21, 2005	2 sessions

<b>Total Forum Fees</b>	<b>= \$11,450.00</b>
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1. The Panel assessed \$2,862.50 of the forum fees to Claimant.
2. The Panel assessed \$8,587.50 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and James Scott Salmon.

**Fee Summary**

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 250.00
<u>Forum Fees</u>	= \$ 2,862.50
Total Fees	= \$ 3,112.50
<u>Less payments</u>	= \$(1,250.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 1,862.50</b>

2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
<u>Less Payments</u>	= \$(4,450.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

3. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and James Scott Salmon are charged jointly and severally with the following fees and costs:

<u>Forum Fees</u>	= \$ 8,587.50
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 8,587.50</b>

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

ARBITRATION PANEL

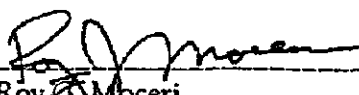
James F. Zotter, Esq.  
Roy J. Mocer, Esq.  
John F. Harris

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

Concurring Arbitrators' Signatures

James F. Zotter, Esq.  
Chair, Public Arbitrator

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Signature Date

  
\_\_\_\_\_  
Roy J. Mocer  
Public Arbitrator

1-31-05  
\_\_\_\_\_  
Signature Date

John F. Harris  
Non-Public Arbitrator

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

January 31, 2005  
\_\_\_\_\_  
Date of Service

**ARBITRATION PANEL**

James F. Zotter, Esq.	-	Public Arbitrator, Presiding Chair
Roy J. Mocerì, Esq.	-	Public Arbitrator
John F. Harris	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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James F. Zotter, Esq.  
Chair, Public Arbitrator

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Signature Date

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Roy C. Mocerì  
Public Arbitrator

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Signature Date

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John F. Harris  
Non-Public Arbitrator

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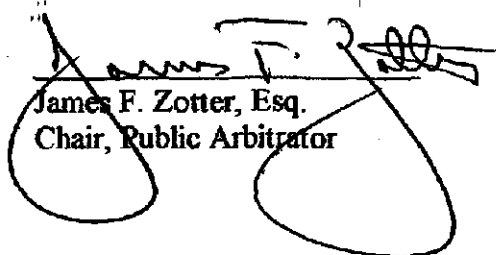
Signature Date

January 31, 2005  
Date of Service

**ARBITRATION PANEL**


James F. Zotter, Esq.	-	Public Arbitrator, Presiding Chair
Roy J. Mocer, Esq.	-	Public Arbitrator
John F. Harris	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
James F. Zotter, Esq.  
Chair, Public Arbitrator

Roy C. Mocer  
Public Arbitrator

John F. Harris  
Non-Public Arbitrator

 Feb. 1, 2005  
Signature Date

Signature Date

Signature Date

January 31, 2005  
Date of Service