

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

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In the Matter of the Arbitration Between:

Vivion S. Kearney, Claimant v. Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Pawel Szott, and Joseph J. McLaughlin, Respondents

Case Number: 04-01277

Hearing Site: Las Vegas, Nevada

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

**REPRESENTATION OF PARTIES**

For Claimant:

Grenville Pridham, Esq.  
Law Offices of Grenville  
Pridham  
Las Vegas, Nevada

For Respondents:

Joseph L. Hood, Jr., Esq.  
Scott, Hulse, Marshall,  
Feuille, Finger & Thurmond,  
P.C.  
El Paso, Texas

**CASE INFORMATION**

Statement of Claim filed: February 25, 2004

Claimant's Uniform Submission Agreement signed: February 25, 2004

Joint Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Pawel Szott, and Joseph J. McLaughlin: June 9, 2004

Respondent Merrill Lynch, Pierce, Fenner & Smith's Uniform Submission Agreement signed: May 13, 2004

Respondent Pawel Szott's Uniform Submission Agreement signed: May 24, 2004

Respondent Joseph J. McLaughlin's Uniform Submission Agreement signed: May 24, 2004

**CASE SUMMARY**

Claimant alleged control person liability, churning, negligence, breach of fiduciary duty, fraud, deceit, misrepresentation, omission of material fact, unsuitability, failure to supervise, and elder

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exploitation. Claimant's allegations involved transactions in his margin account and the purchase and sale of JDS Uniphase shares.

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

### **RELIEF REQUESTED**

Claimant requested \$300,000.00 in compensatory damages, restitution of commissions earned, unspecified punitive damages, pre- and post-judgment interest and costs, including attorney's fees and filing fees.

Respondents requested dismissal of Claimant's Statement of Claim in its entirety, an order of expungement of this matter from Respondents Pawel Szott and Joseph J. McLaughlin's CRD records, and costs, including attorney's fees.

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

On March 30, 2004, Claimant filed a correction to the name of one of the individual Respondents in this matter. Claimant clarified that it intended to name Joseph J. McLaughlin as an individual Respondent rather than Mike McLachland.

On March 31, 2005, the parties stipulated to the fact that Merrill Lynch, Pierce, Fenner & Smith Incorporated was the proper broker-dealer Respondent named in this matter and agreed to the substitution of Merrill Lynch, Pierce, Fenner & Smith Incorporated for Merrill Lynch & Co., Inc., which had been initially named in the Statement of Claim.

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 Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimant's claims are denied in their entirety.
- 2) The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Joseph J. McLaughlin's registration records maintained by NASD's Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Joseph J. McLaughlin must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) 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	= \$ 300.00
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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 Incorporated is a party, and the following fees are assessed:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
<b>Total Member Fees</b>	<b>= \$ 5,200.00</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 or the parties and the Panel. The following fees are assessed:

One (1) pre-hearing conference session with a single arbitrator @ \$ 450.00/session	= \$ 450.00
Pre-hearing conference: January 21, 2005 1 session	

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One (1) pre-hearing conference session with the Panel @ \$1,125.00/session	= \$1,125.00
Pre-hearing conference: September 17, 2004 1 session	
Four (4) hearing sessions @ \$1,125.00/session	= \$4,500.00
Hearings: March 31, 2005 2 sessions	
April 1, 2005 2 sessions	
<b>Total Forum Fees</b>	<b>= \$6,075.00</b>

The Panel assessed \$6,075.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated.

**Fee Summary**

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

Initial Filing Fee	= \$ 300.00
Less payments	= \$(1,575.00)
<b>Refund Due Claimant Vivion S. Kearney</b>	<b>= \$(1,275.00)</b>
2. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
<u>Forum Fees</u>	<u>= \$ 6,075.00</u>
Total Fees	= \$11,275.00
<u>Less payments</u>	<u>= \$ (5,200.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 6,075.00</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.

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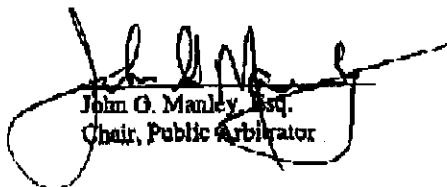
**ARBITRATION PANEL**

*John G. Manley, Esq.*  
*Edward Thomas Leech*  
*Gary Lee Abraham*

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*Public Arbitrator, Presiding Chair*  
*Public Arbitrator*  
*Non-Public Arbitrator*

**Concurring Arbitrators' Signatures**

  
John G. Manley, Esq.  
Chair, Public Arbitrator

4-4-2005  
Signature Date

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Edward Thomas Leech  
Public Arbitrator

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

\_\_\_\_\_  
Gary Lee Abraham  
Non-Public Arbitrator

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

4/5/05  
Date of Service

**ARBITRATION PANEL**

<i>John G. Manley, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Edward Thomas Leech</i>	-	<i>Public Arbitrator</i>
<i>Gary Lee Abraham</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**

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John G. Manley, Esq.  
Chair, Public Arbitrator

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Signature Date

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*Edward T. Leech*  
Edward Thomas Leech  
Public Arbitrator

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*4-5-05*  
Signature Date

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Gary Lee Abraham  
Non-Public Arbitrator

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Signature Date

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*4/5/05*  
Date of Service

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*Edward Thomas Leech*  
*Gary Lee Abraham*

*Public Arbitrator, Presiding Chair*  
*Public Arbitrator*  
*Non-Public Arbitrator*

**Concurring Arbitrators' Signatures**

John G. Manley, Esq.  
Chair, Public Arbitrator

Signature Date

Edward Thomas Leech  
Public Arbitrator

Signature Date

*Gary Lee Abraham*  
Gary Lee Abraham  
Non-Public Arbitrator

*April 4, 2005*  
Signature Date

*4/5/05*  
Date of Service