

# **Exhibit 1**

BEFORE THE THIRD-STAGE HEARING PANEL  
ESTABLISHED UNDER SECTION 7.11(3) OF THE STIPULATION OF SETTLEMENT  
CREMIN V. MERRILL LYNCH CLASS ACTION LITIGATION

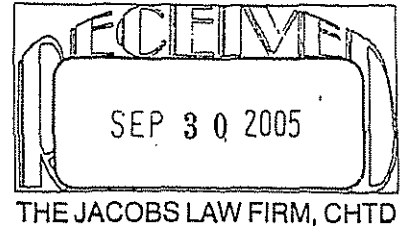
SONIA ANNELLA INGRAM,

Claimant,

v.

MERRILL, LYNCH, PIERCE, FENNER  
& SMITH, INCORPORATED,

Respondent.



FINAL DECISION AND ORDER

Third-Stage Hearing Panel:

Mary A. Lau, Esquire, Chair  
Ira F. Jaffe, Esquire, Member  
Nancy F. Lesser, Esquire, Member

Appearances for the Parties:

For Claimant:

The Jacobs Law Firm  
John G. Jacobs, Esquire  
Jeffrey Grant Brown, Esquire

For Respondent:

Morgan, Lewis & Bockius, LLP  
Andrew K. Schaffran, Esquire  
Christopher K. Ramsey, Esquire  
Brennan S. McDonough, Esquire

This action is before the Third-Stage Hearing Panel in the above matter pursuant to Section 7.11(3) of the Stipulation of Settlement in the matter of *Cremin v. Merrill, Lynch, Pierce, Fenner & Smith Incorporated*, U.S. District Court (E.D. Illinois) Case No.: 96-C-3773 ("the *Cremin Suit*"). The Panel, having considered the submissions of the parties, the evidence presented at the hearing, the applicable law and the pertinent provisions of the Settlement Stipulation governing this proceeding, and being fully advised, issues its decision and order.

## Background Facts

Claimant Sonia Annella Ingram ("Claimant") is a female, African American and a Native American (Lacoda and Cherokee) (Tr. 1583)<sup>1</sup>. Respondent Merrill, Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch") is a full service investment firm operating multiple offices nationwide.

Claimant attended the Hunter School of Economics, graduating Phi Beta Kappa, and received a Master's Degree in City Planning from Harvard University (Tr. 1584-1585). After earning her Master's Degree, Claimant worked at Metropolitan Life Insurance Company from 1975 to 1981 as a salesperson. She testified that she was ranked in the top one percent of a 22,000 person workforce for three years, doing primarily "cold call" sales work. She was promoted to sales manager and then to strategic planning manager for corporate pensions (Tr. 1585). In 1981, Claimant began work at the Port Authority of New York and New Jersey ("Port Authority") as a Senior Financial Analyst, assisting with preparation of capital budgets and municipal bond issues (Tr. 1585-1586). She left the Port Authority in 1988 to start her own health products company (Tr. 1587).

Within a short time, Claimant decided to return to a career in financing and began looking for an investment banking position. She saw a Merrill Lynch representative at a job fair, and submitted a resume, expressing interest in an investment banking, financial analysis or portfolio management position (Tr. 945-946, 1587). In late 1990, Merrill Lynch contacted Claimant, indicating that there were no investment banking positions available, but offering to consider her for a Financial Consultant ("FC") position in a retail office of the firm in New York City (Tr. 1588-1591).

Claimant interviewed with Frank Sullivan, then Office Manager of the Merrill Lynch private client group office located on Park Avenue in New York City and known as the "Grand Central" office. Sullivan hired her for a FC position in the Grand Central office. She attended the Merrill Lynch training program, and began work as a Financial Consultant in August, 1991 after passing her Series 7 licensing examination (Tr. 857, 1581-1594).

At the time Claimant began work in the Grand Central office, the role of FCs in the private client group was to provide a range of investment and asset management services to individuals and small to medium sized businesses (Tr. 1205). A typical FC book of business included corporate accounts, individual accounts, family accounts, pension plans and other business accounts requiring money management services (Tr. 845). The office consisted of a Manager, one or more Sales Managers with responsibility for compliance issues and management of the FC work force, 70-75 FCs, a group of Sales Assistants ("SAs") who performed administrative duties for the FCs, and an Administrative Manager who managed the SAs. The Grand Central office was part of the New York District. During Claimant's tenure

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<sup>1</sup> In this decision, references to the Third-Stage Hearing transcript shall be cited as "(Tr. Page No.)", and the Exhibits submitted to the Panel shall be cited as "(Cl.-. Exh. No.)", "(R- Exh. No.)".

with Merrill Lynch, the District Director for the New York District was Linda Marchelli, a Caucasian female (Tr. 390-392, 722).

FCs were required to develop their own business and client base.<sup>2</sup> Claimant's personal strategy for developing new business focused on business clients. She attempted to develop a strategy of offering a range of business services directly to the top level of corporations, to benefit not only the individuals that worked there, but also the organizations themselves. By assisting corporate clients with financing, pension services or whatever else they needed, Claimant hoped to gather larger assets for management. (Tr. 419-420).

Merrill Lynch offered specialty lending services to FCs in the private client group that worked with corporate clients where the clients needed services other than traditional asset management. The Business and Financial Services Group ("BFS") provided asset-based lending services to small and mid sized businesses (under fifty million dollars in annual sales) (Tr. 1099). The International Private Finance Group provided loans secured by marketable securities in amounts over one million dollars (Tr. 241-244). These lending groups worked as marketing support for the FCs to expand the services available to clients. The FCs maintained the direct relationships with the clients (Tr. 245, 1102-1103).

Like most Merrill Lynch retail offices, the Grand Central office measured individual FC performance in terms of assets under management, new accounts opened, and production credits ("PCs") generated from accounts. Merrill Lynch published periodic reports called Excel reports for each FC that showed annual production credits, the number of new accounts opened, and other data tracking the FC's success in developing new and existing client business. FCs were "ranked" based on length of service ("LOS") in quintiles, as compared to other FCs nationwide with the same LOS in terms of PCs, new accounts opened, and growth in assets under management. The top 20 percent of FCs in any category were the first quintile ("1Q"), the second 20 percent the second quintile ("2Q"), and so on, with the bottom 20 percent comprising the fifth quintile ("5Q"). Separate reports issued from time to time also rated FCs for their success in office contests, usually designed to promote a specific product such as comprehensive financial plans (Tr. 1060-1061).

Claimant was not a successful producer during her tenure at Merrill Lynch by any standard of measurement. Between 1994 and 1996, she had the lowest volume of assets under management of any FC in the office with her LOS, and during some periods her assets and production were the worst in the office regardless of LOS. (Tr. 169-174, R-5-9). For most of that time period, Claimant was in the 5Q in assets, new account development and PCs (R-5-9).<sup>3</sup>

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<sup>2</sup> The allocation of accounts of departing brokers among FCs and the fairness of practices in that regard was a significant issue in the class action proceedings and in Claimant's Third-Stage Hearing. This issue is discussed below. However, there is no dispute that all Financial Consultants spent a great deal of time and a large percentage of their careers prospecting for and developing new clients whether or not they were assigned accounts by management (Tr. 1094).

<sup>3</sup> Claimant acknowledged that her 1994 performance was poor as measured by the type of tracking records Merrill Lynch maintained (Tr. 894). She admitted that she managed only \$3.1 million in assets at the end of 1994 versus the standard for financial consultants at her level of \$14 million; she also conceded that her draw was reduced in 1995 due to her poor production in 1994 (Tr. 896-900). Claimant's assets by May 1996 were \$5 million versus the minimum standard for her LOS of \$20 million and the goal of \$39 million (Tr. 1155).

By the end of 1994, the Grand Central Office was one of the weaker performing offices in the New York District (Tr. 1040, 1041). Up to that time, Sullivan had managed the office, George Dembski, a Caucasian male, was the Sales Manager, and Nancy Romanza, a Caucasian female, was the Administrative Manager for the office. In January 1995, following Dembski's transfer to another office, (Tr. 1321), District Director Marchelli asked the District Sales Manager for the BFS Group, Robert Ross, an African American male, to replace Dembski as sales manager in an effort to turn the office around (Tr. 1040-1041, 1321). Within five or six months after Ross joined the Grand Central office, David Sims, a Caucasian male, replaced Frank Sullivan as the Office Manager (Tr. 1041).

Ross and Sims began a process of improving the office performance. They succeeded in growing annual revenues for the office from \$24 million to \$42 million between 1995 and 1997 (Tr.1043). As part of the process, Ross and Sims identified 15-20 underperforming FCs and began "out-counseling" the group. Claimant was "out-counseled" near the end of that process. (Tr. 1141-1142, 1309-1316, 1350-1351). Claimant's assets and production declined throughout the first half of 1996, and in early June, 1996, Sims advised Claimant that she should consider a different career. She wrote a letter describing a number of prospects that she had in development with the BFS Group, seeking more time to improve her performance (Tr. 1142, 1145, R-61). Ross checked with the BFS Group to see if any of these prospects were imminent, and was advised that they were not (Tr. 1147-1148, 1260-1261). During the last week of June, Sims made the decision to terminate Claimant's employment, and offered to allow her to resign. Claimant resigned and left employment with Merrill Lynch by the end of June, 1996 (Tr. 917-918, 967).

### Administrative Record and Third-Stage Hearing

Following her departure from Merrill Lynch, Claimant participated in the *Cremin* litigation as one of the original named class representatives. Pursuant to the Stipulation of Settlement, Claimant filed her initial Statement of Claim on January 15, 2003.<sup>4</sup> On February 24, 2003, Merrill Lynch filed its Answer and Defenses. The above listed Panel was appointed on March 26, 2003.

The Panel conducted nine conferences with the parties prior to the commencement of formal Third-Stage Hearing proceedings on November 24, 2003, to resolve discovery issues and other matters.<sup>5</sup> During a conference on April 10, 2003, the parties agreed that the Panel should review video tapes and written expert reports of the class-wide statistical evidence referred to in Section 7.15(6) of the Stipulation of Settlement in lieu of a public hearing. In response to an

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<sup>4</sup> The Administrative Record of this Third-Stage Hearing process was adopted in its entirety and incorporated as part of the official record of the Third-Stage Hearing at the first formal hearing session on November 24, 2003 (Tr. 81).

<sup>5</sup> Claimant was then represented by Ares Demetrius Axiotis, Esq. (Law Firm of Ares Demetrius Axiotis). Attorney Axiotis continued to represent the Claimant in this matter through the prehearing and the beginning of the hearing in this matter. The Panel's Order dated November 17, 2003, describes in detail the history of discovery and other prehearing issues, which ultimately resulted in cancellation of the first two scheduled hearing dates of November 17-18, 2003.

Order of the Panel of September 8, 2003, Claimant filed an Amended Statement of Claim on September 19, 2003. On October 8, 2003, the Panel granted Merrill Lynch's motion to dismiss a quid pro quo sexual harassment claim added to the Amended Statement of Claim for the first time, but ruled that evidence regarding the subject matter of the claim could be presented in support of other pending gender discrimination claims.

The Third-Stage Hearing commenced during the two-day period of November 24-25, 2003. Prior to the commencement of the Third-Stage Hearing, the Panel, after consulting with the parties, issued an Order on November 19, 2003, confirming that the formal hearing sessions would be conducted on November 24-25, 2003, and on June 1-4, 2004. In response to a motion by Merrill Lynch to exclude Claimant's expert testimony because of the failure to produce an expert report, the Panel gave Claimant's counsel the option either to produce a report by November 21, 2003, or to produce a report by December 19, 2003 and pay the costs, if any, associated with delaying Merrill Lynch's presentation of expert testimony until the June hearing dates.

At the opening session of the Third-Stage Hearing on November 24, 2003, Counsel for Claimant advised the Panel that Claimant would waive opening statement and would waive presentation of any expert testimony on behalf of Claimant (Tr. 6, 82-83)<sup>6</sup>. At that time, Claimant had not produced any expert report or other expert materials on damages or any other issue in the case, despite numerous requests by Respondent and rulings by the panel requiring production of such information.

On February 2, 2004, the Panel received notice that Claimant had discharged her attorney. On March 3, 2004, the Panel received notice that Claimant had retained new counsel. Pursuant to a series of conferences with the Panel conducted on March 18, April 5, April 29, and May 19, 2004, the parties agreed to proceed with the Third-Stage Hearing as scheduled on June 1-4, 2004.

The Third-Stage Hearing resumed on June 1-4, 2004, and concluded with additional sessions on October 22 and December 2, 2004. At the closing session on December 2, 2004, the parties waived the requirement provided in the Stipulation of Settlement for issuance of a decision within fourteen days of the close of the record of the Third-Stage Hearing (Tr. 2263-2264). The parties submitted post-hearing briefs between January 21, 2005 and March 7, 2005.

#### Pending Claims By Claimant

The following claims presented by Claimant are submitted to the Panel for decision by the Amended Statement of Claim and presentations at the Third-Stage Hearing.

1. Class-wide claims of discrimination in compensation based upon gender in violation of Title VII and the Equal Pay Act.

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<sup>6</sup> During the presentation of testimony by Respondent's expert on November 24, 2003, Counsel for Claimant requested a new opportunity to retain an expert to review and respond to the testimony given at the hearing (Tr. 226-237). The Panel denied this request as untimely.

2. Individual claims by Claimant of discrimination in compensation based upon gender in violation of Title VII and the Equal Pay Act, including discriminatory allocation of accounts of departing brokers and allocation of broker of the day and walk in referrals.
3. Class-wide claims of discrimination in promotional opportunities based upon gender in violation of Title VII.
4. Individual claims by Claimant of discrimination in promotional opportunities based upon gender in violation of Title VII.
5. Individual claims by Claimant of hostile work environment based upon gender in violation of Title VII.
6. Individual claims by Claimant of wrongful termination based upon gender.
7. Individual claims by Claimant of discrimination in compensation, training, promotion and wrongful termination based upon race.
8. Individual claims by Claimant of a right to recover in *quantum meruit* for finders fees based upon business prospects developed by her during her tenure at Merrill Lynch with the Peoples Republic of China.<sup>7</sup>

### Decision and Order

#### 1. **Class Claims of Discrimination in Compensation, Including Account Distributions, and in Other Factors Affecting Compensation**

In connection with and prior to the commencement of the Third-Stage Hearing on November 24, 2003, the Panel viewed almost 30 hours of videotaped presentations of expert witness testimony, statistical evidence and oral argument by counsel addressing class-wide claims of gender discrimination in the compensation system for financial consultants and in promotions to management positions. The Panel also received and reviewed written reports by the parties' expert witnesses.

With respect to compensation, Class Counsel argued that Respondent engaged in a pattern and practice of discriminating against female financial consultants throughout the country by utilizing a production-based compensation system which, in practice, favored male FCs. That favoritism was alleged to be as a result, in part, of consistent disparities in the assignment of client accounts in favor of the males. FC compensation was a straight commission system, based upon the number of PCs that could be generated from the clients and assets developed by and/or assigned to each consultant (R-53) (Tr. 1044-1051). The size of a financial consultant's book of business (assets under management) directly impacted the ability of that financial consultant to generate production credits. Thus, to the extent that Class Counsel could demonstrate that

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<sup>7</sup> The Amended Statement Of Claim also included claims for libel and defamation and breach of contract (Am. St. of Claim Pg. 25-26). These claims asserted in the Amended Statement of Claim were not pursued by Claimant at the Third-Stage Hearing. The panel further finds that no evidence supporting such claims was adduced by Claimant, and they are denied in their entirety.

management disproportionately delivered business in the form of new client accounts or departing FC accounts to male FCs, but not to female FCs, this would support their claim that the system effectively reduced compensation to female FCs on the basis of gender.

A number of other Third-Stage Hearing Panels have considered this issue and determined that Respondent engaged in a pattern and practice of discriminating against female FCs in its compensation system, particularly in the distribution of client accounts.<sup>8</sup> During the June 1, 2004 session of the Third-Stage Hearing in this case, Claimant submitted a motion asking the Panel to apply the April 19, 2004, Third-Stage Hearing decision in *Hydie Sumner v. Merrill Lynch*, one of the first cases to find such a pattern and practice of gender discrimination in compensation. The Panel received written briefs and argument from the parties during and after the Third-Stage Hearing in this case, and Claimant's motion is pending for decision at this time.<sup>9</sup>

This Panel determines that it is not necessary to rule on the issue of whether Respondent engaged in a pattern or practice of gender discrimination, although it notes that the class-wide statistical evidence demonstrates significant differences in the account distributions given to male financial consultants compared to females, and statistically significant disparities in the earnings of males versus females. The effect of a finding of pattern and practice discrimination is to shift both the burden of going forward and the burden of persuasion to the defendants to show by a preponderance of the evidence that the employment decisions in question were lawful. *Teamsters v. U.S.*, 431 U.S. 324, 362 (1977). In the Stipulation of Settlement, Paragraph 7.11(8)(e) states "The Firm, without admitting liability, will have the burden of going forward with respect to Class Claims..." Further, Merrill Lynch agreed in this proceeding that it would accept the burden of persuasion as well with respect to Class Claims of discrimination in pay and promotion. (Merrill Lynch's Response to Claimant's Motion to Apply Collateral Estoppel at 2-3). Since the effect is the same, there is no need for the Panel to make such findings based on the Class evidence.

For the same reasons, we need not and do not reach the issue of whether this Panel should give collateral estoppel effect to the *Sumner* decision. Since Merrill Lynch has accepted both the burden of going forward and the burden of persuasion on the Class Claims, it makes it unnecessary to decide whether the *Sumner* panel's finding of a pattern and practice of discrimination should bind this Panel.

There is a third and final reason why this Panel need not address the Class statistical evidence. The result in this case is the same whether or not a finding of pattern or practice gender discrimination is made and regardless of who bears the ultimate burden of proof. We find, as discussed below, that there has been no persuasive evidence that this Claimant was discriminated against in compensation on the basis of her gender. Accordingly, we turn to the evidence presented by both parties on the Class Claims in light of the foregoing.

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<sup>8</sup> An excellent summary and discussion of other Panel decisions is set forth in the decision published on July 14, 2005, with names redacted in accordance with CRP policy.

<sup>9</sup> Class counsel initiated proceedings before Judge Castillo to determine whether individual Third-Stage Hearing panel *must* give the *Sumner* decision preclusive effect. At a hearing before Judge Castillo on March 1, 2005, Judge Castillo ruled that whether or not to give collateral estoppel effect to the *Sumner* decision "ultimately has to be a decision that is made by each and every neutral" (March 1, 2005 Hearing Transcript Page 15).



## 2. Claimant's Individual Claims for Discrimination in Compensation

As noted above, Merrill Lynch has assumed the burden of proof as to of the Class Claims of compensation discrimination. The practical effect of that is to create a presumption, albeit a rebuttable one, in Claimant's favor that specific decisions regarding distributions of accounts and application of the compensation system to Claimant were the product of illegal gender discrimination. Respondent bears the burden of persuasion that compensation decisions and practices affecting Claimant individually were based upon lawful reasons. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001).

Neither party introduced direct evidence as to FC compensation. Although there is some indication, based upon the PC rankings, that male FCs may have higher earnings than female FCs in the Grand Central Office, Claimant offered no analysis of that information that could form a basis for finding that there was statistically valid evidence of discrimination in FC compensation. The only evidence offered by either party germane to the discriminatory compensation claim was that relating to factors affecting compensation, such as account distributions, assignments of administrative assistants and offices, and training and business development opportunities.

Respondent presented expert testimony by Bernard R. Siskin, Ph.D., regarding his analysis of account transfer patterns<sup>10</sup> at the Grand Central office during the period from January 1, 1994 to July 1, 1996, when Claimant's employment with Respondent terminated. He found the pattern of account distributions in this office to be directly contrary to the pattern found nationwide as shown in the class-wide presentations (Tr. 105-107). In the Grand Central office, particularly after 1994, account distributions disproportionately favored female financial consultants (Tr. 120, R-2, 2A, 2B). Dr. Siskin testified that the pattern he found was consistent whether he looked at account transfers overall, or looked at large account transfers. The pattern was more pronounced in favor of female financial consultants when he controlled for LOS. Dr. Siskin acknowledged that he included two high producing female financial consultants who were out of the office on maternity leave during 1994 because they remained eligible for account transfers, and for 1995 he omitted a high producing male financial consultant who left for management training in October of 1994 (Tr. 222-281). Dr. Siskin acknowledged that these assumptions favored Respondent, but when he ran the regression without the females on maternity leave, the pattern still favored female financial consultants (Tr. 287).

Claimant offered no expert testimony on the pattern in the Grand Central office, but argued from Dr. Siskin's tables that the average distributions to male brokers in Claimant's LOS level for each of the years from 1994 to 1996 favored males (Tr. 980-986).

From the testimony, it appears that during the period from January 1994 to early 1995 when Frank Sullivan managed the office, he monopolized the account transfer process and decided who got accounts. Claimant testified that she requested account transfers, but did not receive them. In 1995, after Robert Ross became sales manager in the Grand Central office, he

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<sup>10</sup> Dr. Siskin studied transfers of accounts from departing and retiring financial consultants (Tr. 103).

and Sullivan's successor, David Sims, implemented an account distribution system based on growth in assets, expansion of financial planning business, ranking in masters and other business development contests, and other factors that demonstrated that a financial consultant was growing his or her practice (Tr. 1089-1093, 1236-1237). Under the system developed by Ross and Sims, production credits were not considered as a factor (Tr. 1239).

Claimant contended that male financial consultants were preferred over females in account distributions, and also in assignment of walk-in and call-in clients (Tr. 1002, 1597-1600). However, Claimant could not identify any specific clients represented by male financial consultants and had no knowledge of their business assets or how the assets were developed. Claimant did testify that Andy Ford, a very high producing male financial consultant, had a special relationship with a banking client, but acknowledged that he had worked for the bank prior to joining Respondent (Tr. 1002-1003).

The record fails to establish that gender-based discrimination in account distributions adversely affected the compensation of female FCs in the Grand Central Office or adversely affected Claimant. It is clear from the record that Claimant was an extremely poor performer, whether her performance is compared to the male FCs or to the female FCs in that office, and her performance adversely affected her compensation.

Moreover, apart from Claimant's bald assertions, there was no evidence of any other indicia of discrimination or disparate treatment in the office, in categories such as administrative support, assignment of office space, sales incentives or other support, the quality of referrals, teams and partnerships, or training and business development opportunities.<sup>11</sup>

Claimant testified that she had five or six administrative assistants during her tenure with Respondent, and that she shared these assistants with other FCs. She identified one female and three male FCs who shared her assistants. She testified that she didn't keep files on her administrative assistants, and could not remember any of them. She recalled that the assistants were overburdened and it was difficult to get the help she needed. (Tr. 375-379, 414). The Grand Central office followed the New York District practice of requiring an individual financial consultant or a group to achieve annual production of over one million dollars to qualify for a one-on-one assistant, regardless of gender. Claimant never reached anywhere near annual PCs of \$1,000,000; her best year in terms of production was 1995 in which her PCs were \$206,623. Nor did Claimant complain about assignment of administrative assistants based upon gender while she worked for Respondent (Tr. 1507).

Claimant testified that she was offered training in the Grand Central office, but did not receive "CONSULTS" training and was not allowed to attend Respondent's advanced training program offered by Respondent's training department at Princeton (Tr. 808, 944). The CONSULTS training required a Series 65 license, which Claimant did not have before November, 1994 (Tr. 809-812). The Princeton advanced training program required an FC to be

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<sup>11</sup> To the extent the Amended Statement of Claim purports to state independent claims for discrimination based upon administrative support, training or business development opportunities, or other factors affecting compensation, the Panel concludes that no evidence supports relief for such claims, and Claimant did not offer proof of damages on any such basis.

working in the top production quintiles which Claimant never achieved (Tr. 1245-1249, 1365-1366).

Claimant did benefit from other training and business development activities. The Grand Central office was unique in that they had a sales promotion room which contained all of the marketing materials published by Respondent and a full time person assigned to help financial consultants find what they needed (Tr. 1513). Robert Ross, Claimant's sales manager from January 1995 to June 1996, provided her with business development assistance on occasion, including attending a business development seminar with her at her church (Tr. 646-647). Claimant attended in-office training sessions. The District Director, Linda Marchelli, organized training at the district level that financial consultants in the Grand Central office attended in groups by LOS level to avoid any stigma to underperforming financial consultants (Tr. 1332-1334). Claimant attended a program for African-American financial consultants in 1995 and 1996 which she found to be a good program, prompting her to write a letter to management praising the experience (Tr. 818-828, R-7).

Claimant contends that management failed to support her efforts to develop business with Native American Tribal Nations. In August or September of 1994, Claimant spoke by telephone with Deni Leonard, a principal in a company engaged in developing financing for various projects for Native American Tribal Nations (Tr. 594-596, 1700, 1718). Claimant identified at least two major projects that she discussed with Leonard, the expansion of a casino facility for the Lummi Tribe, and a \$126 million cogeneration plant project for the Assinboine Tribe (Tr. 585, 590). Sullivan referred Claimant to Peter Hamm, who worked with Respondent's International Private Finance group which made loans in excess of \$1 million against marketable securities. Sullivan asked Hamm to discuss his group's services with Claimant to assist in her professional development, which he found unusual, something he was only asked to do two or three times (Tr. 249). In subsequent conversations with Hamm, Claimant raised the possibility of the Private Finance Group participating in the Tribal projects she had discussed with Leonard. However, at that time, Respondent had made a business decision not to become involved in financings for Tribal Nations because there were uncertainties about their sovereign immunity status (Tr. 250-251). Hamm's group did not make any loans to the Tribal Nations that Claimant discussed with Leonard (Tr. 251-252). Without question, Sullivan ultimately discouraged Claimant from pursuing any business prospects with Leonard, calling him a "scam artist." Sullivan also denied Claimant permission to attend a conference in San Francisco for all of the Tribal Nations that Leonard invited her to attend (Tr. 591, 605, 1710-1711). The record provides no evidence that Respondent discouraged Claimant's efforts for any reasons other than its belief that Leonard truly was a scam artist, and because the firm had made a business decision not to finance Tribal Nations projects. There is no evidence that Respondent's business decision not to follow up on Claimant's Tribal Nation leads was motivated, in whole or in part, by her gender.

Similarly, to the extent that Claimant contends that management impeded her development of business in China (discussed in detail *infra* in connection with her claims for relief in *quantum meruit*), there is no evidence that male FCs were encouraged or permitted to develop such business or afforded opportunities for such business, and no evidence that any other female financial consultants were impeded by management from pursuing such business. Claimant provided no evidence that male FCs received more or more effective business development assistance or training, or that training eligibility requirements were applied

differently to males than females, other than to identify one business networking event at the Museum of Natural History attended by three male FCs in 1994 (Tr. 1611-1613). There is no evidence that Respondent's business decision not to follow upon Claimant's China leads was motivated, in whole or in part, by her gender.

When all the evidence is considered, there was no showing that Claimant was the victim of discrimination in compensation. We find that Merrill Lynch rebutted any presumption of discrimination with respect to compensation of Claimant. Our findings would remain the same even if this Panel were to find, based upon its own independent review of the statistical class record or upon application of collateral estoppel, that there was proof of a pattern and practice of discrimination on the basis of sex in the application of Respondent's compensation program.

### **3. Class Claims of Discrimination in Promotions to Management Positions**

As with the Class Claim of compensation discrimination, we decline to make a finding as to the sufficiency of the Class evidence of promotion discrimination in light of the fact that Merrill Lynch has assumed both the burden of going forward and of persuasion with respect to this claim. As with the compensation claim, our decision regarding this claim is the same whether or not a finding of class-wide pattern and practice discrimination is made relative to promotion of women into management positions. We turn, then, to Claimant's individual claim of promotion discrimination.

### **4. Claimant's Individual Claim of Discrimination in Promotions**

Claimant did not apply for any promotions to management during her tenure with Respondent.<sup>12</sup> She cites the promotions of Andy Ford and John Branhart to producing manager positions in 1994 as promotions for which she felt qualified by age, education and experience. No party presented evidence regarding the qualifications of Ford and Branhart for their promotions, other than their production and asset reports which far exceed the production of Claimant (Tr. 717-718). However, Claimant's performance during the period from January, 1994 to July, 1996 was consistently and dramatically below others in the office, both in her LOS level and in the office generally, both males and females (172-174, 192-193, R-5). For example, at the end of 1994, Claimant had \$3.1 million in assets compared with the standard for financial consultants at her LOS level of \$14 million (Tr. 896-899, R-7). Claimant failed the Series 65 license examination, a key to managed accounts and investment advisory account business, three times before finally passing it in November, 1994 (Tr. 809-815, 1515-1518)<sup>13</sup>. In the Grand Central office, Nancy Romanza held the Administrative Manager position, and Nancy Matta held a product coordinator position. The District Director over the Grand Central office, Marchelli, was a female.

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<sup>12</sup> Claimant did not testify that she wanted or sought any promotion in the retail area where she worked, but testified that she thought Sullivan as her manager should have facilitated her transfer into the investment banking side of the Respondent's organization, although she did not directly ask him to do that either (Tr. 467-470).

<sup>13</sup> The Administrative Manager testified that in her 20 years as Administrative Manager, Claimant was the only Financial Consultant to fail the Series 65 test three times (Tr. 1518).

As discussed above, the Panel reviewed all of the evidence on this claim in light of the fact that Claimant was entitled to a presumption that she had been the victim of discrimination in promotion opportunities. We find, however, that there was a dearth of evidence that Claimant was subject to any discrimination in this regard. First, there was no evidence at all that Claimant had even applied for particular positions and was denied those opportunities. This alone sounds the death knell for Claimant's claim. Further, Merrill Lynch amply rebutted any presumed discrimination by demonstrating Claimant's poor performance as an FC. The Panel finds no basis to conclude that Claimant was denied promotional opportunities based upon her gender and finds that Respondent has met its burden of showing that the failure to promote Claimant to management positions during the period of January 1994 to July 1996 was due to legitimate, non-discriminatory reasons. All relief on this claim is, therefore, denied.

#### **5. Claimant's Individual Claims of Hostile Work Environment Based Upon Gender**

We now turn to Claimant's non-Class Claims, claims upon which Claimant bears the burden of proof. Claimant offered evidence and argument that she was subjected to a hostile work environment based upon gender. In general, Claimant's evidence consisted of no specifics other than vague assertions of denial of support, and testimony that at the office Christmas party in 1994, she was "shunned" by the other financial consultants (Tr. 1606).

The Third-Stage Hearing record contains no evidence that the Grand Central office experienced the crude language, sexual jokes, or other harassing behavior described in other Panel decisions about other offices. In fact, the evidence consistently demonstrated that in this office, female financial consultants did well professionally and did not complain about gender-based mistreatment (Tr. 1339). Claimant described a single incident where she went to meet with Jerome Corcoran, the Managing Director of the Respondent's investment banking group, about a business opportunity in China, a meeting which took place at his office, not in the Grand Central office. In her Amended Statement of Claim Claimant asserted that she had been subject to quid pro quo sexual harassment by Mr. Corcoran. According to the Amended Statement of Claim (which raised this claim explicitly for the first time), Mr. Corcoran alleged that Corcoran "offered Claimant sexual quid pro quo: if Claimant would engage in sexual activity with Corcoran, Corcoran promised to forward Claimant fees, commissions, annuities, and deferred compensation generated by said projects." (Amended Claim, Para. IV. A). However, during the Third-Stage hearing, Claimant testified only that during the meeting, she found Corcoran's body language ("writhing" on a "divan") to be sexually suggestive, although she conceded he had not made any sexually suggestive or inappropriate statements. (Tr. 473-487). Corcoran described Claimant's testimony about that meeting as a "scurrilous lie", and noted that he had no furniture in his office such as Claimant described (Tr. 1460-1462).

Under cross examination, Claimant admitted that the allegations in her Claim were untrue, and at various points both admitted she had read the Statement before she signed it, and then denied having read it. (Tr. 482, 485). Claimant testified, "If I had realized when this was written that you were going to cross-examine me on the details of this subject with regard to its explicit accuracy, I would have made sure that when it was written, that it was written in a different way." (Tr. 484).

The Panel is very troubled by this aspect of the Claimant's case. The allegations made by Claimant against Mr. Corcoran are very serious indeed, and appear to have been made without serious regard for whether or not they were accurate. We find Claimant's inconsistent testimony as to whether she did or did not review her own Statement of Claim as casting serious doubt upon her credibility, not only with respect to this alleged incident, but with regard to other aspects of her testimony. Given that Claimant adduced no evidence of sexual harassment other than this questionable testimony, we have no hesitation in concluding that Claimant failed her burden of proof with respect to this claim. The Panel finds that Claimant has not proved any right to relief based upon a claimed hostile work environment related to gender.

#### 6. Claimant's Claim of Wrongful Termination Based Upon Gender

Claimant bears the burden of proof on this claim. Claimant resigned, rather than be terminated at the end of June 1996, due to her poor performance. Her production and asset growth were far below standards during 1994 and 1995, and declining substantially during the first half of 1996 (Tr. 914-916).<sup>14</sup> At the beginning of 1996, Ross noted that Claimant's business was in trouble and she was initially a candidate for discharge at that time (Tr. 1129-1141). A number of other FCs were in the same position. Ross and Sims held a series of monthly counseling meetings with Claimant during the first half of 1996, at one point in May or June telling her that she needed to do something else for a career. During that meeting, she asked for more time to improve, and Sims asked her to write down her business prospects which she did (Tr. 1142-1145, R-61).<sup>15</sup> Ross and Sims contacted the BFS Group to determine whether any of Claimant's prospects were real or imminent, and determined that they were not.<sup>16</sup> Sims made the decision to terminate Claimant's employment and so advised Claimant before the end of June, 1996.

The undisputed evidence indicates that numerous male and female financial consultants were terminated at the same time for poor performance. Ross described the office at the time he arrived as a "barbell office" with high producers at one end and low producers at the other end (Tr. 1161-1164). Ross and Sims "out-counseled" fifteen to twenty financial consultants during

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<sup>14</sup> Claimant did experience a spike in her production during 1995 without any significant growth in assets, due to her decision to shift most of her clients into mutual funds (Tr. 180, 1075-1076). Although there was some suggestion at first by Respondent that this was inappropriate, the parties ultimately stipulated that her mutual fund investments in 1995 were not improper and not a basis for her termination (Tr. 1560). However, the client funds placed into mutual funds in 1995 were not available for trading or other investments that could generate production going forward. This left Claimant vulnerable to a drop in production in the next year, 1996, which in fact occurred (Tr. 1076-1082).

<sup>15</sup> At the Third-Stage Hearing, Claimant denied that she prepared the list of prospects in response to Sims to avoid termination (Tr. 1953-1954), however, this contradicts the statements in her Amended Statement of Claim (Amended Claim Pg. 18).

<sup>16</sup> The parties stipulated that the CFO of Renaissance Cosmetics, one of the prospects on Claimant's list before her termination, would testify that he worked with Claimant and Jay Serniak of Respondent's BFS group on a credit facility, and closed a \$75 million working capital loan with GE Capital, not Respondent, in 1997. The parties further stipulated that the Vice-President of Respondent's BFS group would testify that he searched Respondent's records and could not find any record of Respondent receiving fees from this transaction (Tr. 1984-1985). This evidence does not demonstrate that Ross and Sims had reason to disbelieve what BFS was telling them about this prospect at the time of Claimant's termination, or what impact, if any, this transaction would have had on Claimant's business.

the same time as Claimant, including nine or ten males and three females, one of which was Claimant (Tr. 1314-1316, 1330). Of that group, Ross testified that only two males and two females survived and continued to work for Respondent. Three Caucasian males were terminated for poor performance at the same time as Claimant (Tr. 182, 185). Respondent did not retain any male financial consultant that had a similar or worse production record than Claimant (Tr. 185-189).

The Panel finds that Claimant's termination from employment by Respondent was not based upon her gender and denies relief for wrongful termination.

**7. Claimant's Claims of Discrimination in Compensation, Training, Promotion and Wrongful Termination Based Upon Race**

The Panel finds that Claimant presented no evidence from which the Panel could find that she suffered discrimination in the terms and conditions of employment or that she was terminated because she is African-American or Native American. There was no record evidence of discrimination in the office on the basis of race. There was no showing that the Claimant was the victim of any discriminatory behavior on the basis of race.<sup>17</sup> The Panel denies relief on these claims.

**8. Claimant's Claim For Relief in *Quantum Meruit* For Finders Fees**

Following the June 2004 Third-Stage Hearing sessions and the October 22, 2004 session, a dispute arose between the parties as to whether Claimant could present a stand-alone *quantum meruit* claim for a finders' fee for business prospects developed by Claimant in China. The Panel received written briefs from both parties regarding this issue. On October 17, 2004, the Panel ruled, over Respondent's objection, that Claimant could present this claim.

Claimant's introduction to business prospects in China came from Joseph Russo, who was associated with the Port Authority of New York. In 1994, Russo was the product manager in charge of providing construction suppliers with export services through a Port Authority subsidiary called "Xport" (Tr. 1763-1764). Russo knew Claimant because she was his personal investment advisor (Tr. 1784).

In April 1994, Russo traveled to China on behalf of Xport to evaluate the construction markets (Tr. 1772-1773). In particular, he met with representatives of the People's Republic of China regarding the proposed Guangzhou Baiyun Airport project (Tr. 1779-1781). On his return, Russo contacted Claimant by telephone to discuss the possibility of involving Respondent in financing for the airport project, and potentially other public works projects (Tr. 436, 1626, 1786).

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<sup>17</sup> Claimant did testify to the failure of certain coworkers to socialize with her at a Christmas party, but even if credited, there was no showing that such behavior was due to Claimant's race or that management had orchestrated or knew of the alleged "shunning."

In late May or early June, 1994, Claimant attended a trade fair in New York City at Russo's invitation (Tr. 429,435). At that time Claimant collected "a pile of business cards" and discussed with other attendees a variety of public infrastructure projects under consideration (Tr. 1626-1629).<sup>18</sup>

After the trade fair, Claimant recognized the need to involve Respondent's investment banking department in her efforts. Unlike the BFS group and the Private Finance Group that were accustomed to working with FCs in Respondent's retail offices, the investment banking group typically worked with institutions (Tr. 1105-1106). At the time of Claimant's contacts with Russo in 1994, Respondent's investment banking group was focused on doing only landmark transactions in China. The investment banking group participated in major bond issues prior to the time that Claimant began her contacts with Russo, but did not engage in project financing for specific projects (Tr. 1393-1399).

Claimant contacted Jerome Kenney in investment banking, who in turn suggested she contact Jerome Corcoran, the managing director of international investment banking (Tr. 1631, 1989-1994). She sent a letter to Corcoran on June 30, 1994, her first contact with Respondent's investment banking group, attaching a June 29, 1994 proposal letter from Russo (Tr. 461, 494, R-13, 497, Cl.-9, R-14). Claimant also met with Corcoran at his office for about an hour. Up to this time Claimant had not advised Sullivan, her office manager, that she had contacted the investment banking group (Tr. 1644).

On or about July 11, 1994, Claimant sent correspondence to Sullivan to inform him that she was involved in a possible project for China (Tr. 1647-1648, R-17).<sup>19</sup> On or about July 28, 2004, Claimant met with a group of Respondent's investment banking representatives, including Charles Wang, who normally worked in China. At this meeting, Claimant introduced Russo and the attendees discussed infrastructure projects generally (Tr. 1649-1654).

Claimant attended a final meeting with a group of Respondent's investment banking representatives and representatives of the Peoples Republic of China on or about September 28, 1994 (Tr. 569-581, 782-789, 1660-1661). During that meeting, Claimant introduced Bai Xin Gji, who was employed by the China International Trust and Investment Corporation ("CITIC") to the Respondent's investment banking representatives (Tr. 421-422, 569-581). Claimant testified that she met Bai three or four times over a three month period prior to this meeting, and that they discussed power plant projects and the need to get financing for such projects (Tr. 441-442). The parties stipulated that if Bai had testified, he would state that he was the chief representative for CITIC in New York from 1992 to 1999, that he met with Claimant and Russo at the CITIC office in New York to discuss potential projects, and that he later attended the meeting with the investment banking group to discuss possible infrastructure projects utilizing the resources of Respondent to finance such projects. He would further testify that he never

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<sup>18</sup> Claimant did not attend the trade fair at Respondent's request, and no one in her office was aware she was attending (Tr. 430-431).

<sup>19</sup> The draft letter from Russo contemplated representing to third parties that Respondent had committed funds to the proposed project, which was not true. Claimant was instructed by her supervisor not to allow the letter to be sent for that reason (Tr. 507-515). Claimant acknowledged at the Third-Stage Hearing that the Port Authority never asked the government of China to approve the development team proposed by Russo, and that Respondent never agreed to have Russo be its representative for the airport project (Tr. 1945-1949).



spoke to those representatives of Respondent again (Tr. 1926-27). Claimant testified that she believed there were other meetings between CITIC and the investment banking group, but she was not included in those further discussions. (Tr. 449-450, 1939-1940). However, Mr. Bai's testimony was that he never met with those investment bankers again, and he does not reference any other meetings with Merrill Lynch representatives. (Tr. 1927-28).

By September 1994, Russo left Xport and by January 1995, he left the Port Authority (Tr. 1798-1799, 1801). The Port Authority made a decision to focus on its "core" businesses including the New York and New Jersey ports and airports and the World Trade Center (Tr. 1801, 1821). Within a year after Russo's departure, the Port Authority abolished Xport altogether (Tr. 1801).

At the Third-Stage Hearing, Claimant attempted to introduce so-called "tear sheets," obtained from the Internet, which contained information as to public offerings between 1997 and 2003, most of them after 2000, for financings for public infrastructure projects in China (Cl. Exh. 11, R-29).<sup>20</sup> Claimant contends that these documents reflect that at some point, Respondent participated in some fashion in public works project financings with the government of China, based upon the contacts initiated by Claimant in 1994. These documents constitute Claimant's only information suggesting that Respondent may have been involved in some business transactions in China in some way at some point in time (Tr. 1668-1672). Claimant acknowledged that she was not present at the closings of any transactions (if any occurred) reflected in the tear sheets, and stipulated that she had no knowledge of the transactions (Tr. 1935-1936).

There was simply no evidence whatsoever that Respondent engaged in any transactions as a result, in whole or in part, of Claimant's modest efforts years earlier in introducing Russo and Bai Xin Gji to certain of Respondent's investment banking representatives. It is absurd to believe that Claimant's efforts, none of which bore any fruit at the time, somehow entitle her to finders' fees on Respondent's dealings with the Peoples Republic of China that occurred years after her termination. There was no showing of any factual nexus between Claimant's 1994 efforts and Respondent's dealings, if any, in China years later. The claim for finders' fees is rejected by the Panel in its entirety.

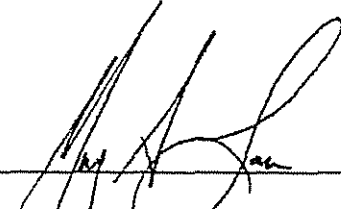
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<sup>20</sup> The Panel granted Respondent's motion to strike the tear sheet exhibits during the Third-Stage Hearing session on October 22, 2004 on the grounds that there was insufficient proof of any connection between Claimant's activities in 1994 and Respondent's role, if any, in business transactions in China subsequent to her termination from employment to establish the relevance of those documents (Tr.-1923-1929). Claimant moved on February 27, 2005 for reconsideration of that ruling. The Panel, having considered the motion and the briefs submitted by both parties, determines that its prior ruling stands affirmed and Claimant's Motion for Reconsideration is denied.

ORDER


The claims of the Claimant, Sonia Annella Ingram, are denied in their entirety.

September 28, 2005



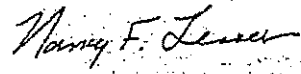
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Mary A. Lau, Esquire  
Chair, TSH Panel



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Ira F. Jaffe, Esquire  
Member, TSH Panel



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Nancy F. Lesser, Esquire  
Member, TSH Panel