IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARYBETH CREMIN, NANCY THOMAS, ANNE KASPAR, SONIA INGRAM, ALICE MOSS, LINDA CONTI, ANNE MARIE KEARNEY and ANGELA COVO, on behalf of themselves and all others similarly situated,	)	No. 96 C 3773
Plaintiffs,	)	Judge Ruben Castillo
v.	)	Magistrate Judge Ronald A. Guzman
MERRILL LYNCH, PIERCE, FENNER & SMITH INC., and JOSEPHY GANNOTTI,	)	
Defendants.	)	

PETITION OF PLAINTIFF SONIA INGRAM TO VACATE ARBITRATION AWARD AND FOR OTHER RELIEF PURSUANT TO 7.11(1)) OF THE STIPULATION OF SETTLEMENT

Pursuant to Section 7.11(10) of the Stipulation Of Settlement in this matter, plaintiff-claimant Sonia Ingram seeks by this petition to vacate the Final Decision And Order of the Arbitration Panel of September 28, 2005, a copy of which is attached hereto as Exhibit 1.

INTRODUCTION

Ms. Ingram was one of eight plaintiffs who initiated this matter as a class action against Merrill Lynch, alleging, among other things, illegal gender discrimination. The class's claims were settled pursuant to the parties' Stipulation of Settlement, filed June 8, 1998, and approved by this Court on September 2, 1998, effective November 2, 1998. (A copy of the relevant portion of the Stipulation of Settlement is attached hereto as Exhibit 2.) Ms. Ingram remained a

participant and Claimant in the proceedings, and proceeded through the Third Stage Hearing, which was governed by the Stipulation of Settlement. The Stipulation of Settlement provides, at § 7.11(10), that:

> Third-Stage Hearing awards rendered in the C(laim) R(esolution) P(rocess) shall be final and binding on the Respondent(s) and Claimant(s) and shall be reviewable and may be vacated only by the District Court and only on the following grounds:
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> (iii) where the Neutral(s), the CRP Administrator or the Special Master were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of the parties have been prejudiced; and
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> (iv) where the Neutral(s), the CRP Administrator or the Special Master exceeded their powers as set forth in the Settlement Agreement or so imperfectly executed those powers that a mutual, final and definite award upon the subject matter submitted was not made.

On September 28, 2005, the Third Stage Hearing Panel rendered its Order, some nine months after the conclusion of Ms. Ingram's Third Stage Hearing in December, 2004. The Panel denied Ms. Ingram all relief. The Panel acknowledged (Order at 7) "that a number of other Third-Stage Hearing Panels have considered this issue:" namely, whether Merrill Lynch engaged in a pattern and practice of discrimination against female financial consultants by utilizing a production-based compensation system that, in practice, favored males, as the Panel described its workings in the immediately prior paragraph of its Order (at 6-7). It noted that a number of other Panels had "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." *Id.* at 7. It then noted 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." *Id.*

Nonetheless, the Panel refused to make any ruling as to whether Respondent engaged in a pattern or practice of discrimination (Order, p. 7). Perhaps more importantly, it also refused to decide whether a previous panel's decision that Respondent had engaged in such a pattern and practice should collaterally estop Respondent from denying that it did so. *Id.* As we will discuss below, this was error and in violation of the Panel's obligations under both the Stipulation of Settlement and this Court's order of August 3, 2004.

While we respectfully disagree with the Panel's general conclusion, it is the Panel's resolution – actually, *non*-resolution – of Claimant's Equal Pay Act claim that is the focus of this appeal. Thus, while the Order correctly lists Ms. Ingram's Equal Pay Act claim as one of the claims she asserts (Order at 6) – and it certainly was the focus of a good deal of argument and analysis in closing argument and the briefing – the words "Equal Pay Act" never again appear in the Panel's order, much less any analysis of that claim or possible statutory defenses, as required by law. This was plain error.

Claimant's rights were prejudiced by the Panel's decision, and the decision was "imperfectly executed." Claimant requests that the Order be vacated and that an order be entered allowing Claimant damages on her Equal Pay Act in the amount proven at the Third Stage Hearing, $1,300,000, plus her costs and reasonable attorney's fees; or, alternatively, that this matter be remanded for a new Third Stage Hearing.

I.
THE PANEL FAILED TO RENDER A DECISION ON THE QUESTION OF CLASSWIDE DISCRIMINATION – WHETHER ON ITS OWN REVIEW OF THE EVIDENCE OR ON CLAIMANT'S MOTION TO APPLY COLLATERAL ESTOPPEL

As noted in the Order (at 7), during the June 1, 2004 session of the Third-Stage Hearing in this case, Claimant submitted a motion asking the Panel to apply the findings in the April 19, 2004, Third-Stage Hearing decision in *Hydie Sumner v. Merrill Lynch* to her claims. The *Sumner* decision was the first panel decision – but not the only one – to find a pattern and practice of gender discrimination in compensation at Merrill Lynch, as the Panel noted. Claimant's motion was fully briefed before the Panel.[1] The Panel took note of the March 1, 2005 hearing before this Court, in which this Court held, with regard to deciding whether to apply collateral estoppel, that this has to be

> "a decision that is made by each and every neutral" and that "I think that every neutral – and I have to respect the elaborate resolution process that has been set up by the stipulation – every neutral has to make that decision."

March 1, 2005 Tr. at 16, attached hereto as Exhibit 4.[2]

Despite the Panel's acknowledgment of this Court's order, and the tremendous attention paid to the question by the parties, the Panel refused to rule on the issue of classwide discrimination, either from its own review of the evidence or on the motion to apply collateral

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[1] Copies of the briefing with regard to collateral estoppel and relevant transcript pages are attached hereto as Group Exhibit 3. Please note that we do not have a signed copy of the original motion as it was filed; the copy attached hereto is printed from counsel's hard-drive and believed to be an exact duplicate of the motion handed the Panel at the hearing.

[2] Merrill Lynch's position on this is no different: "Thus, this Panel has the **authority** and **responsibility to decide** for itself whether or not to give collateral estoppel effect to the Sumner Panel's decision." See, Christopher Ramsey March 4, 2005 Sur-Reply Email Letter to The Panel, included in Group Exhibit 3.

estoppel. It explained that such a decision is not "necessary:"

> "The Panel determines that it is not necessary to rule on the issue on 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. *** [T]here is no need for the Panel to make such findings based in the Class evidence.
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> * * *
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> **"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." Order at 7; emphasis added.

By failing to rule, the Panel deprived Claimant of a "mutual, final and definite award upon the subject matter submitted." Stipulation of Settlement, ¶7.11(10). This failure is reviewable on appeal. As this Court stated previously:

> I think that every neutral – and I have to respect the elaborate resolution process that has been set up by the stipulation – every neutral has to make that decision, I think ultimately Merrill Lynch's history will be properly evaluated by each panel. And if it is not, then at the end of the day, subject to the appropriate standard, there will be an opportunity for one final review by this Court.

March 1, 2005 Tr. at 15-16 (emphasis added).

II.
THE PANEL'S REFUSAL TO RULE IS REVERSIBLE ERROR

Had the Panel properly ruled on the collateral estoppel motion, the Order it handed down would have looked much, much different, at *least* with respect to some of the claims. Despite

the Panel's suggestion that its "findings would have remained the same even if the Panel were to find . . . application of collateral estoppel," it seems patent that, had the Panel applied collateral estoppel, all of Ms. Ingram's discrimination-based claims – Title VII, Equal Pay Act, and their state-law counterparts – would have succeeded. Thus, its failure to so decide is clearly reversible error.

It is to be noted that the Panel did not rule that under the law Ms. Ingram was not entitled to collateral estoppel, nor did it rule that its own independent review of the evidence caused it to conclude there was not a classwide pattern or practice of discrimination. The former ruling would have been a plain error of law; the briefing left no room for doubt that under either Seventh or Second Circuit law, Ms. Ingram was plainly entitled to have collateral estoppel applied to the *Sumner* decision. We will not repeat all the case law demonstrating this (found in Group Exhibit 3 hereto), but we will venture that Merrill Lynch will not challenge that proposition on appeal. Similarly, had the Panel found from its own review that there was not classwide discrimination, that would certainly have been against the manifest weight of the evidence. But, as noted, the complete refusal to rule constituted a complete failure to execute the Settlement Agreement as called for by Section 7 thereof. And while the Panel didn't think a ruling was important, it couldn't have been more wrong. A correct ruling would have necessarily affected, most clearly, Ms. Ingram's Equal Pay Act claim. The binding issues in *Sumner* included, *inter alia*, the following:

> • Merrill was engaged in "...a pattern and practice of gender discrimination adversely affecting the pay of female F[inancial] C[onsultants]." *Sumner* decision, p. 6.

• “Class-wide statistical evidence demonstrates gross disparities in earnings between male and female FC’s.” *Id.*

• “...(T)hese statistically significant disparities in earnings between female and male FC’s are not explained by non-discriminatory factors.” *Id.*, at p. 7.

• “...(T)he disparate earnings of females and males were the result of Merrill’s discriminatory practices including, but not limited to an unequal distribution of accounts to female FC’s (see Dr. Madden’s report and testimony) and a male-dominated organizational structure at Merrill which created an environment in which managerial discretion was influenced by gender stereotypes adversely affecting female FC’s (See reports of Dr. Bielby and Dr. Fiske).” *Id.*

• “...gross disparities between males and females in management positions as of 1995....” *Id.*

• “This disparity is most evident in Dr. Goldman's chart entitled "Distribution of 1995 ML-Los 10+FC'S INTO QUINTILES," showing that female FC's with an LOS of 10+ are grossly under represented in Quintile 1 and grossly over represented in Quintile 5, while the reverse is true of similarly situated male FC's.” 6-7

• “In addition the Panel finds that the record clearly supports Sumner's allegations of class-wide discrimination against female FC's with respect to promotions to management positions as of 1995 (see Goldman's chart entitled Male/Female Managers 1995, and related testimony. As of 1999, there was only one female District Director, 11 female RVPs, 5 female Sales Managers, 3 female Producing Sales Managers and 1 female home office manager (CLEX 18, at PIT16-002).” Page 7

• With regard to Merrill’s argument that its pay system qualified under the “quantity and quality of production” exception to equal pay laws, “[T]he Panel finds that Merrill has not met its burden of proving that the Grid system applicable to FC’s falls within the exemption, because it was tainted by pervasive discrimination which impaired the ability of women to earn equal pay for equal work.” Page 12

• “The class-wide statistics regarding the under representation of women in

managerial positions support a finding that recommendations for MAC were tainted by the same bias against female FC's as were other terms and conditions of employment." Page 13

• "Recommendations for MAC were largely at the discretion of local managers." *Id.*

• Regarding Merrill's compensation incentive system, "it was not applied consistently and even handedly between male and female FC's." *Id.*

Second Circuit law and the Seventh Circuit[3] law are no different in their application. The law of both Circuits fully supports – compels – the application of collateral estoppel here, as discussed in the briefing below, found in Group Exhibit 3 hereto. The classwide findings and legal resolutions made in the *Hydie Sumner* case are clearly binding here, and should be given their appropriate effect. That effect is, at a minimum, to destroy any Affirmative Defense to Ms. Ingram's Equal Pay Act claims.

Claimant requests now that this Court do what the Panel failed to do when it had the case**:** rule on the collateral estoppel issue and apply the *Sumner* findings to this case. The effect of that application would be, *inter alia*, to find in favor of Claimant on her Equal Pay Act claims, as we shall now discuss.

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[3] In its August 3, 2004 Order, attached hereto as Exhibit 10, this Court explained:

"It appears on the record before us that the requirements for the application of collateral estoppel have been satisfied and, at least in our circuit, collateral estoppel may attach to arbitration awards, although Plaintiffs are correct that this is a question for the Panel or Neutral to decide." (Opinion at 7)

Here, the Panel *refused* to decide the issue.

III.
THE PROCESS FOR DETERMINING AN EQUAL PAY ACT CLAIM

The Equal Pay Act "prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for 'equal work'." *Ryduchowski v. Port Authority of NY*, 203 F.3d 135, 142 (2d Cir.2000); *Stewart v. S.U.N.Y. Maritime College*, 2000 WL 1218379, p. 2 (S.D.N.Y.2000).

Under *Hernandez v. Kellwood Company*, 2003 WL 22309326 (S.D.N.Y.), *Gerbush v. Hunt Real Estate Corp*, 234 F.3d 1261 (2nd Cir. N.Y. 2000), and *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)), the process for establishing an Equal Pay Act[4] claim is that plaintiff first provide evidence satisfying three prima facie elements: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions.

Once the plaintiff satisfies these elements, a presumption of discrimination under the Equal Pay Act is created. The employer must then attempt to rebut this presumption with evidence of one of the four available affirmative defense, on which the employer has the burden of proof. "The burden of establishing one of the four affirmative defenses is "a heavy one," *Timmer v. Michigan Dep't. of Commerce*, 104 F.3d 833, 843 (6th Cir.1997), because the statutory exemptions are "narrowly construed." *Aetna Ins. Co.*, 616 F.2d at 724 (citing *Hodgson v. Colonnades, Inc*., 472 F.2d 42, 47 (5th Cir.1973)). *Ryduchowski v. Port Authority of New York*

[4] 29 U.S.C. §206(d)(1).

and New Jersey, 203 F.3d 135, 143 (2nd Cir. 2000).

There are four affirmative defenses, well-documented in case law, which an employer may assert. The employer may claim that the disparity in pay rates was a result of:

1. a seniority system
2. a merit system
3. a system which measures earnings by quantity or quality of production, or
4. a differential based on any other factor than sex.

"To successfully establish the "factor other than sex" defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential." *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d. Cir. 1999).

If the employer can produce evidence on any one of these theories, the plaintiff then has the opportunity to counter the defense by producing evidence demonstrating that the reasons the employer advances for the disparity in pay are really a pretext for sex discrimination. Pretext is determined by the reasonableness of the employer's claimed reason/affirmative defense for the disparity. The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has used the factor reasonably in light of the employer's stated purpose, as well as its other practices. *Belfi, supra*, quoting *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir.1986)).

Importantly, the Equal Pay Act provides for strict liability. It does not require that a plaintiff establish intent. *Belfi, supra*.

IV.

THE PANEL IGNORED CLAIMANT'S EQUAL PAY ACT CLAIMS

The Panel didn't use the above analysis. It acknowledged that Ms. Ingram asserted an Equal Pay Act claim, noting that she has "Individual claims... of discrimination in compensation based upon gender in violation of Title VII and the Equal Pay Act...." (Order at 6, ¶ 2), lumping together those two very different claims. But a careful review of the remainder of the Panel's decision will not reveal the words "Equal Pay Act" ever again, much less an analysis of that claim under the well-established format discussed in Section III above, much less any discussion of how a classwide finding would impact that consideration (as it so expressly did in the *Sumner* case).[5]

There is no discussion of whether Ms. Ingram demonstrated the three *prima facie* elements of an Equal Pay Act claim; there is no discussion of whether Merrill Lynch rebutted the presumption created by the establishment of those elements; and there is no discussion of the four possible statutory affirmative defenses to an Equal Pay Act claim. There is simply no discussion of the Equal Pay Act.

That the Panel did not discuss those things - the *prima facie* case, the rebuttal of it, and any affirmative defenses - is particularly surprising, since the parties spent a good deal of effort submitting evidence and argument in connection with Ms. Ingram's Equal Pay Act claims. Indeed, Merrill Lynch's counsel began his closing argument, on December 2, 2004, with an

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[5] Claims for violations of the Equal Pay Act and the New York State Equal Pay Act may be evaluated under the same standard. See, *Rose v. Goldman, Sachs & Co., Inc.*, 163 F. Supp. 238, 243 (S.D.N.Y., 2001).

acknowledgement that "Merrill Lynch has agreed to accept the burden of proof of persuasion in this third-stage hearing with respect to class claims of *discrimination in pay*." TR, p. 2035 (*emphasis supplied*). Shortly thereafter, counsel argued that Merrill Lynch's compensation system was based on "quantity and quality of production," one of the available affirmative defenses. TR, p. 2046. (See Exhibit 9 hereto.) Likewise, Claimant's counsel put on substantial evidence that Merrill Lynch's "grid," the simple mathematical formula it used to pay Financial Consultants based on a percentage of assets and production generated by the FC, was premised on a system of rewarding success, which in turn was created by favoring male FC's over female FC's at nearly every turn, and devoted closing argument to the point as well. Yet the Panel simply did not address whether Merrill's supposed defense to an Equal Pay Act claim was really a pretext for discrimination, much less whether Merrill had met its "heavy burden" of so proving. That failure would itself be reversible, since the Panel, at that point, "imperfectly executed" its decision. But the Panel's order becomes all the more so when coupled with its refusal to apply collateral estoppel from the *Sumner* holding, because the *Sumner* findings would have disintegrated Merrill Lynch's affirmative defense to an Equal Pay Act claim.

A. Claimant's Prima Facie case

The Panel's Order noted that "the class-wide statistical evidence demonstrates ... statistically significant disparities in the earnings of males versus females." Order, p. 7. It would be virtually impossible *not* to so note, in light of the expert testimony given on behalf of the plaintiff class.

The Panel acknowledged during the hearing, as recently as during the last day of closing

argument on December 2, 2004 (at page 2), that it had been presented with class wide statistical data presentations, which it had reviewed even prior to the start of Ms. Ingram's hearing.

Dr. Jerry Goldman's Statistical Analysis of Merrill Lynch Pierce Fenner & Smith Financial Consultant Workforce Patterns and Practices [6]presents expert testimony on the disparity in pay between genders. In part II of this report, regarding compensation of Financial Consultants in the Professional Development program ("PDP") (which is the training program for the first few years of a Merrill Lynch Financial Consultant), Dr. Goldman notes, at page 26:

> "As Graph 21, whose bars represent the algebraic difference... between male and female median compensation for each in PDP for the four classes makes clear, womens' median incomes exceed men's median incomes *only 4 years out of 22* possible comparison years. ...(T)he *probability of this event is* .001744, *less than 2 times in one thousand*...."
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> "The striking consistency of *significant disparities* for four consecutive classes is further illustrated in Graph 22. Here the yearly *excess of male over female median compensation* is detailed within PDP class. The predominating bars to the right show the amount and frequency of dispartiy during cruial years of a Financial Consultant's career."[7]

Dr. Goldman's Statistical Analysis continued with an analysis of the 7,762 individual brokers for whom he was given data - 1,062 females, and 6,664 males - in 1995. He began by noting that one would have expected 45.6 % of the brokers to be female, based upon the Statistical Abstract of the United States. He noted the probability of finding the makeup of men

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[6] Herein, "Goldman's Statistical Analysis". This is the very first report in the "Cremin v. Merrill Lynch Statistical Evidence Hearing" black binder, relevant portions of which are attached hereto as Exhibit 5.

[7] *Id*., at 26, 27.

vs. women that occurred at Merrill Lynch to be attributable to "pure chance is zero."[8]

Merrill admitted that there was no firm-wide policy on minimal education in hiring new candidates, that college education didn't matter, and age and prior experience didn't matter, so those explanations certainly wouldn't explain any disparity. Dr. Goldman noted that, of the total 1995 compensation earned by this group, women earned merely 10.94% of that compensation. He also concluded that the probability of this occurring "by chance in a non-discriminatory gender-neutral salary distribution is zero."[9]

Dr. Goldman's analysis showed the following in 1995[10]:

Male median compensation: $118,284.45 Female median compensation: $94,602.85

Male mean compensation: $161,510.94 Female mean compensation: $124,520.32

That analysis also reflected that these trends did not change, even after 25 years of service.[11] If FC's were broken down into three categories of Length of Service ("LOS"), from 1-5 years, 6-9 years, and 10-25 years, each category displayed a completely improbable likelihood that men would earn more than women - but men earned more than women:

<u>Category I - Less than five years' LOS</u>

Median income for males: $71,690.29 females: $60,609.62

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[8] *Id.*, p. 29.

[9] *Id.*, p. 30.

[10] *Id.*, p. 31.

[11] *Id.*, p. 32-34.

Mean income for males: $101,745.58 females: $76,349.18

The Panel's Order acknowledged receipt and review of this evidence. It acknowledged that it had viewed almost thirty hours of video taped presentations of expert witness testimony and statistical evidence.

In addition to this class-wide evidentiary support of a disparity in wages at Merrill Lynch, Claimant also proferred evidence of striking disparities between herself (and females with similar length of service) and comparable males in Merrill's New York office where Claimant worked. Thus, *using Merrill's expert's own tables*, Ms. Ingram compared for each relevant year – 1994 through 1996 – the amounts of assets under management for those men and for those women (Tr. 969-976); the production credits for the men and for the women (Tr. 976-980); and the accounts transferred by Merrill management to the men and to the women (Tr. 980-987). (All excerpts found at Exhibit 8.) In each instance, men in the relevant LOS category had many, many times more assets under management as peer women; many more production credits each year; and asset transfers that were multiples of those transferred to women of the same LOS every single year (and especially in 1994, when men averaged ten times more assets transferred than did peer women) . So, too, with bottom line comparisons of pay from Merrill's "grid" system. Plaintiff's Exhibit 18 (a copy of which is attached hereto as Exhibit 6) compared Ms. Ingram's pay off the grid for each year to the grid compensation due the men in the same LOS group as she for the relevant period, again using Merrill's experts own figures. Those figures showed her compensation as running as only a fraction of the comparable males (just as was shown in the classwide statistics).

Notwithstanding this, the Panel made the surprising statement in its order that, "Neither party produced direct evidence as to FC compensation." Order, p. 8. That statement is impossible to reconcile with the above evidence, and with the Panel's own, further holdings.

B. Merrill Lynch's Affirmative Defense

The Panel held that, even if it were to find a pattern and practice of discrimination by Merrill Lynch, the *effect* of a finding of pattern and practice discrimination is merely to shift the burden of persuasion to defendants "to show... that the employment decisions... were lawful." *Id.* Since the Stipulation of Settlement already required that burden-shifting, and since the Equal Pay Act itself, and the cases interpreting it, already require that the defendant employer rebut the presumption of an Equal Pay Act *prima facie* case with an affirmative defense, the Panel effectively held that a pattern and practice of discrimination makes no difference. *Id.* Thus, to the Panel, whether Respondent engaged in a pattern and practice of discrimination on a class-wide basis was irrelevant, even though it noted "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." But if Respondent intended to implement one of the four recognized Affirmative Defenses, and that defense is based upon – or even tainted by – discrimination on the basis of gender, then it is not a valid Affirmative Defense. If Merrill Lynch has no valid Affirmative Defense to Ms. Ingram's Equal Pay Act claim, then Ms. Ingram must receive an Award on that claim. And Merrill Lynch has no valid Affirmative Defense if the *Sumner* holdings are applied as collateral estoppel.

For example, in *Hernandez*, the Court held that the defendant's failure to offer evidence

proving that the male employees were "evaluated in a fashion similar to plaintiff," a woman, meant that the "merit system" defense was unavailable, because the "merit system" was not applied in a "reasonable fashion." In Ms. Ingram's case, Respondent's "merit system" defense boils down to a claim that its FCs – any and all FCs, male and female - were paid based solely and completely on a percentage of the business an FC brought to Merrill Lynch. That theory is premised upon an assumption that men and women were given equal treatment and support in generating business to bring to Merrill Lynch. Yet, the *Sumner* findings rebut - indeed, destroy – that assumption. Even the Panel acknowledged plenty of evidence of disparate treatment and support for female FC's, aside from the *Sumner* decision's holdings. *See, e.g.*, Order, p. 7[12]. In the New York office, the Panel acknowledged that Claimant "did not receive CONSULTS training;" was not allowed to attend Respondent's advanced training program offered by Respondent's training department at Princeton," Order, p. 9; that an FC only received an assistant if they had a million dollars in annual production; and that Respondent stymied Claimant's ability to conduct business with Native American Tribal Nations, *Id.* That evidence does away with any such Affirmative Defense. Coupled with the collateral estoppel effects of *Sumner*, though, such an Affirmative Defense becomes non-existent.

A merit system must not be gender based. *Ryduchowski*, 203 F.3d 135, 143; *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980). A merit system likewise cannot lack a "systematic administration and evaluation" of employees. *Ryduchowski, id.* Any such system

[12] The Stipulation of Settlement allows, at § 7.11(8)(d), for the admission of the videotape of the Statistical Evidence Hearing and its admission was made at Claimant's Third Stage Hearing.

upon which defendants rely suffers from both of these flaws, and more.

The Sumner panel's holdings demonstrate most centrally the importance of the class wide/collateral estoppel issue it refused to rule on. As *Sumner* made explicit: the "grid" could not be relied on to justify a disparity in pay since the grid itself was so thoroughly tainted by discrimination:

> With regard to Merrill's argument that its pay system qualified under the "quantity and quality of production" exception to equal pay laws, "[T]he Panel finds that Merrill has not met its burden of proving that the Grid system applicable to FC's falls within the exemption, because it was tainted by pervasive discrimination which impaired the ability of women to earn equal pay for equal work." *Sumner* at 12

The Panel held that "there has been no persuasive evidence that this Claimant was discriminated against in compensation on the basis of her gender." *Id.* But that completely begs the question. Here, there is no question but that Claimant received a fraction of the compensation similarly situated males received (just as was true throughout Merrill). Indeed, even the Panel acknowledged that "the class-wide statistical evidence demonstrates disparities in the earnings of males versus females." It cannot logically be the case that *both* 1) the evidence demonstrates disparities in earnings between genders, and 2) there is no persuasive evidence that Claimant was discriminated against in compensation on the basis of her gender, if the *Sumner* panel's decisions are applied, because the difference in compensation must be based upon gender.

The Panel suggested it made no difference whether it applied collateral estoppel. But its decision contradicts that suggestion. Mechanically, it claimed that, if it had found a pattern and

practice to collaterally estop Merrill Lynch, it would use that finding merely to establish Claimant's three *prima facie* case elements, creating a presumption of discrimination. But *that* presumption already exists, in any Equal Pay Act claim. *See, Hernandez, supra*. Then, instead of requiring Merrill Lynch to produce evidence of one of the four affirmative defenses, the Panel allowed Merrill Lynch to either pose a lawful explanation for Ingram's different compensation, or evidence demonstrating that Claimant's evidence is insufficient (from Teamsters). That presumption also already existed under any Equal Pay Act claim. Merrill Lynch chose the latter, combating the class's expert witness with testimony from its own expert witness, but limited to evidence about account transfers. The Panel ignored Ms. Ingram's other evidence of discriminatory treatment(calling her own testimony "bald", as though her own testimony about how she was mistreated is not evidence). But if the Panel truly accepted the findings of the Sumner panel, it would have no choice but to accept Ms. Ingram's evidence of discriminatory treatment, and would have been required to find that there was no successful rebuttal of Ms. Ingram's *prima facie* case.

The Panel did not follow even standard analysis in its analysis of Ms. Ingram's Equal Pay Act claims. At the beginning of the Order, the Panel held that Merrill Lynch had the burden of proving a lawful reason for its disparity in compensation. However, the Panel then focused exclusively on Claimant's assertions and Claimant's supposed inability to prove these assertions – as though all burdens of proof were hers – and discounted her own testimony of her own experiences as "bald assertions." Order, p. 9.

The Panel stated that neither party presented direct evidence of FC (financial consultant)

compensation. But if that were true, if Merrill Lynch did not produce evidence of financial compensation, it would logically be impossible to rebut a presumption of discrimination.

The fact is, Claimant did present evidence on FC compensation, both through Dr. Goldman's evidence of disparate compensation based on gender, and, in addition, Claimant herself provided direct evidence and comparisons between herself (and other women in her LOS) and the men in her LOS for each of the relevant years, as discussed above. The Panel later left-handedly acknowledged Claimant's evidence,[13] but held that Claimant did not provide an "analysis of that information" that could form a basis for finding statistically valid evidence of discrimination in pay. We are at a loss to understand what kind of "analysis" would be necessary: these are simple numbers, which show the woman is clearly earning less than the men.

Claimant's counsel cited Teamsters in closing argument for the proposition that when a pattern or practice is determined, this raises the presumption that *any* employment decision made in that time was a product of the discriminatory policy. The employer then has the burden of showing that the claimant's evidence is inaccurate or insignificant. It is true that, under Teamsters, the employer can simply produce evidence showing that the claimant's evidence of inequality in pay is incorrect, instead of submitting other evidence that shows its system is proper - if that evidence is conclusive. But here, Merrill Lynch's expert, Dr. Siskin, simply stated that there was not a disparity in regards to account distribution. This evidence is not enough to rebut a presumption of discrimination, and to rebut the compelling evidence of Dr. Goldman that men

[13] "Although there is some indication, based upon the PC rankings, that male FC's may have higher rankings that female FC's in the Grand Central Office...." Order, p. 8.

earned significantly more than women at Merrill Lynch, and that the likelihood of doing so purely by chance was impossible.

Therefore, Claimant should have received a presumption of discrimination, Merrill's implicit affirmative defenses should have failed, and Claimant should get an award for an Equal Pay Act claim.

RELIEF SOUGHT

At the hearing on this matter, Claimant introduced evidence of the amount of her damages, for violations of the New York State Human Rights Law, and the Equal Pay Act, which demonstrated that she was entitled as of that time to some $1,300,000 in damages on those claims (as noted, the EPA claim and the New York Human Rights Law claim are largely duplicative of each other). (Tr. 2203-2215, attached hereto at Exhibit 7). Merrill Lynch argued that Claimant is not entitled to any damages; but did not proffer any argument for a reduction in the damages sought by Claimant or a different calculation.

For the foregoing reasons, Plaintiff-Claimant Sonia Ingram seeks the entry of an order vacating the Final Decision And Order of the Arbitration Panel of September 28, 2005, and entering judgment against Defendant-Respondent Merrill Lynch Pierce Fenner & Smith, Inc. in the amount set forth at the hearing, or, in the alternative, the setting of a new hearing, and for all such further and other relief as the Court shall deem appropriate.

Dated: December 27, 2005

Respectfully submitted,

s/ John G. Jacobs
One of the attorneys for Claimant

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Exhibit 5

Statistical Analysis of Merrill Lynch Pierce Fenner & Smith Financial Consultant Workforce Patterns and Practices

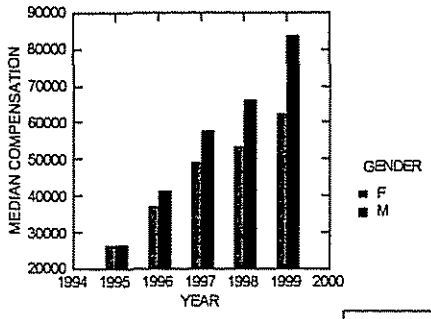
Jerry Goldman, Ph.D.

Introduction

This report is submitted to the law firms of Stowell & Friedman, Ltd. and Meites, Mulder, Burger & Mollica, Ltd., in response to their request that I analyze relevant data associated with hiring, promotion, and compensation of the Financial Consultant workforce at Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch") with respect to gender-neutrality during the class period covered by the class action lawsuit, Cremin, et al. v. Merrill Lynch, et al. I have performed and supervised this analysis based upon compensation, production, performance, and personnel data provided over the years by Merrill Lynch consonant with settlement stipulations for data analysis in this matter. A large amount of time and effort was expended by attorneys on both sides in the attempt to deal with data definition, anomalies, and exceptions which arose and this report is founded upon the best data available to both sides at this time per the agreement of the parties. Should new information or data changes arise during the time period between the date of this report and the statistical hearing date, correlative changes in my conclusions may be made.

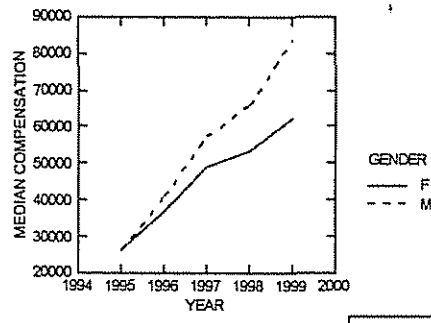
This report is organized into an overview and four general parts. The Overview initially details a descriptive statistical makeup of the 1995 private client group workforce by job categories and compensation earned by employees from the perspective of gender and relevance to later analyses. Then some inferences are drawn concerning the correspondence of compensation and job groupings by gender as well as some ramifications concerning management. Part I of this report considers hiring and certain

MEDIAN COMPENSATION FOR 1995 PDPs



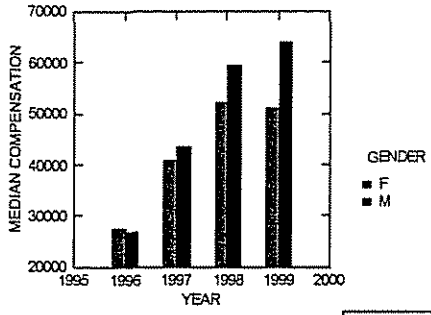
Graph 17

MEDIAN COMPENSATION FOR 1995 PDPs



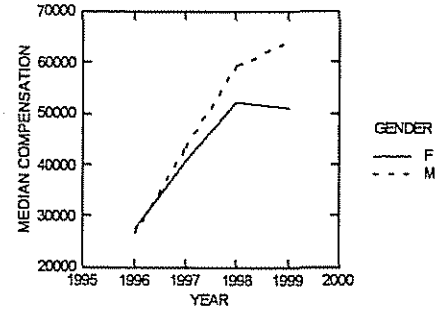
Graph 18

MEDIAN COMPENSATION FOR 1996 PDPs



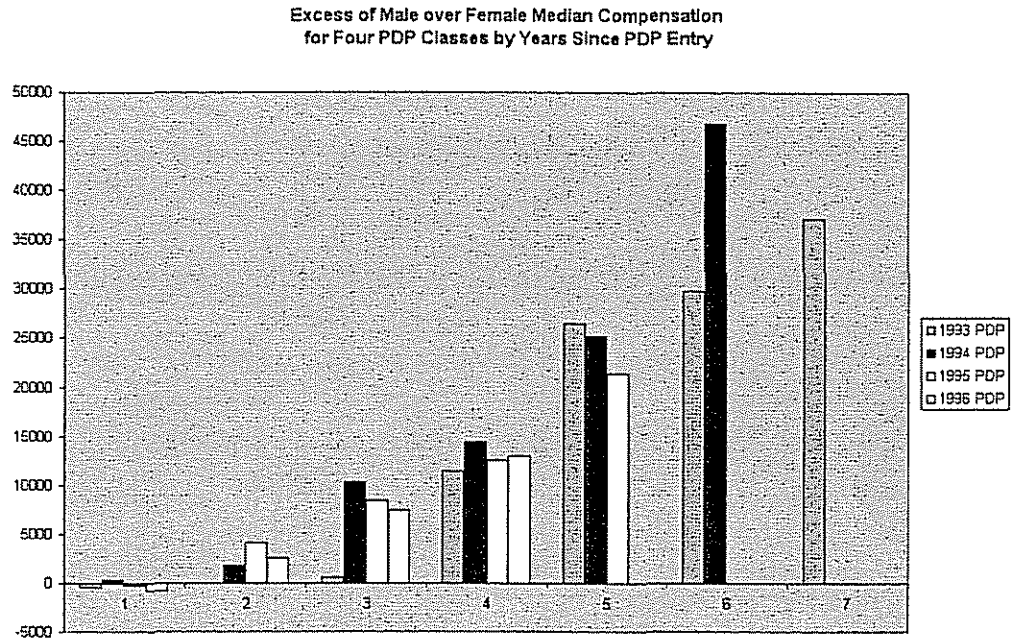
Graph 19

MEDIAN COMPENSATION FOR 1996 PDPs



Graph 20

As Graph 21, whose bars represent the algebraic difference (bars above axis when male median exceeds female; bars below axis when female median exceeds male) between male and female median compensation for each year in PDP for the four classes makes clear, women's median incomes exceed men's median incomes only 4 years out of 22 possible comparison years. If in each year men and women had independent equal probabilities of one gender median income exceeding the other, then an elementary binomial probability calculation shows the probability of this event is .001744, less than 2 times in one thousand. Moreover, 3 of the 4 negative values occur in the initial year.



Graph 21

The striking consistency of significant disparities repeated for four consecutive classes is further illustrated in Graph 22. Here the yearly excess of male over female median compensation is detailed within PDP class. The predominating bars to the right show the amount and frequency of disparity during crucial years of a Financial Consultant's career.

7,726 individual brokers for whom we have complete data consists of 1,062 females (13.75%) and 6,664 males (86.25%).

By using only the lowest percentage representation of women, namely 45.6%, cited from the Statistical Abstract of the United States in Part I, one would expect to find about 45.6% of 7,726, or 3,523 women in the Merrill Lynch broker workforce in a gender-neutral environment. The actual 1,062 individuals constitute only 30% of the expected number of women. In fact, if the women were chosen independently in a gender-neutral process, a count of at most 1,062 is more than 56 standard deviations below the expected number of women, an event whose probability of occurrence by pure chance is zero.

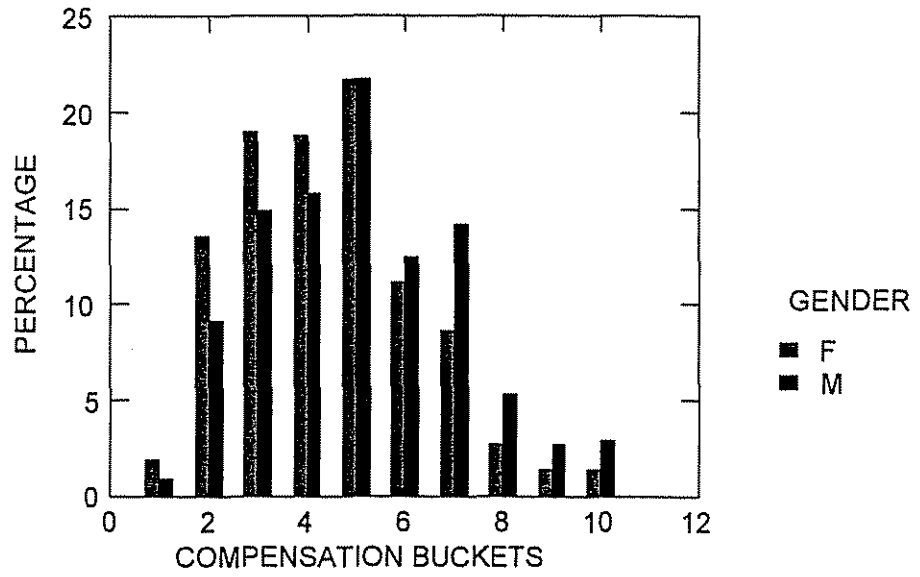
In his deposition of 12/29/99, Robert Bowman, a Merrill Lynch national sales manager and former resident vice-president in 1993, indicated that there was no particular background he was looking for to hire candidates who would be successful Financial Consultants. There was no firm-wide policy on minimal education and college education did not matter. Age and prior work experience did not matter to him. Moreover, Mr. Bowman indicated that there were hiring goals for increasing numbers of women and minorities. These goals were not defined in terms of retention, but a resident vice-president's compensation would be diminished for people who did not complete the Professional Development Program. If a person completed the PDP program, then left Merrill Lynch, the resident vice-president's compensation was unaffected.

Turning to Financial Consultant compensation for the full-year 1995 group, the aggregate compensation paid to women was approximately $132,241,000 and the aggregate compensation for males was about $1,076,950,000. Thus, females earned

10.94% of the total 1995 compensation of $1,209,191,000. If the Financial Consultant compensation distribution per gender reflected the (low) proportion of female Financial Consultants, then the actual 10.94% is over 7 standard deviations below the expected 13.75%. The probability of this occurring by chance in a nondiscriminatory gender-neutral salary distribution is zero.

Instead of studying 1995 compensation in the aggregate, it is possible to focus on the distribution by gender of compensation into compensation levels, or "buckets" defined by various compensation amounts. This is done in Table 17 and illustrated in the corresponding Graph 23.

DISTRIBUTION OF 1995 FINANCIAL CONSULTANT COMPENSATION



Graph 23

It is clear from this graph that the distribution for men is skewed to the right, or higher compensation levels, while the distribution for women is skewed to the left, the domain of lower compensation levels. Thus, buckets 7 – 10, reflecting incomes above the $200,000.00 level, represent compensation for 25.1% of the male Financial Consultants in 1995 as opposed to 13.85% of their female colleagues. On the other end of the distribution, 53.29% of the female Financial Consultants occupy the bottom four buckets, representing compensation of at most the $100,000.00 level, in contradistinction to 40.67% of the males. The female percentage representation at this lower portion of the compensation distribution is over 7.7 standard deviations above the male percentage.

That the female and male compensation distributions into the above levels differ significantly overall may be precisely demonstrated by a chi-square test for the difference of two distributions. The distributions given in Table 17 are not gender independent since the value of the chi-square statistic is 95.733, which implies that these distributions by gender could only occur with probability zero in a gender-neutral process.

We now turn to an analysis of 1995 full-year Financial Consultant compensation data in terms of averages. The overall male median compensation was $118,284.45, whereas the overall female median compensation was $94,602.85. The Mann-Whitney U test statistic indicates statistically significant differences between male and female compensation distributions with these medians (at a .000 significance level) since the value of chi-square here is 87.358. Moreover, the male mean compensation was $161,510.94, while the female mean compensation was $124,520.32, which under the assumption of normally distributed populations, differ by 7.629 standard deviations – an event whose chance occurrence would be of probability zero under conditions of gender-

neutrality. Under the assumption of lognormal compensation distributions, the means with respect to the logarithmic metric differ by 8.958 standard deviations.

Compensation Disparities Within Service Time Categories

The compensation disparities noted in the previous paragraphs will be seen to increase over time, but do not depend either solely or strongly upon many years of experience as a Financial Consultant at Merrill Lynch and are not an artifact of the fact that greater numbers of men than women have been brokers at the firm for long service periods. These assertions will be the subject of analysis in this and later sections of this report.

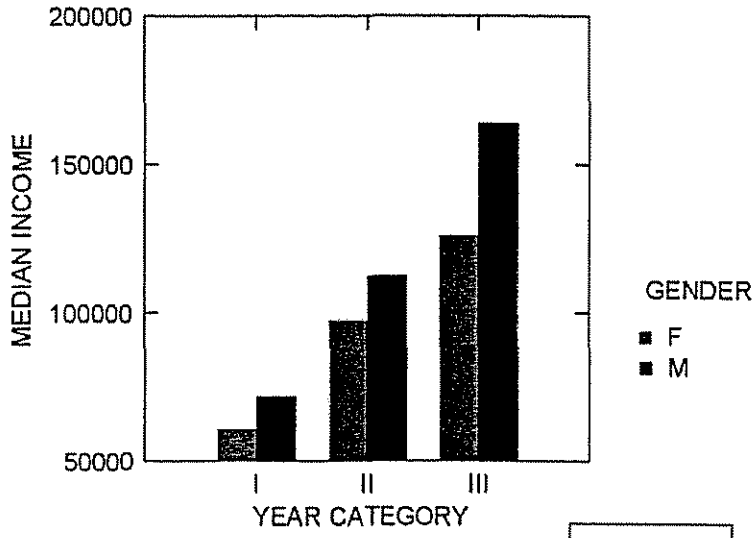
Table 18 presents mean, logarithmic mean, and median 1995 compensation statistics by gender and by several intervals of service time as a full-year Financial Consultant at Merrill Lynch. The corresponding Graphs 24 and 25 display median compensation as a function of membership in three time categories (which are chosen to reflect the same LOS categories chosen by Merrill Lynch and to reflect the fact that we only have complete data for 3 women with longer LOS):

Category I, less than 6 years,

Category II, 6 to less than 10 years,

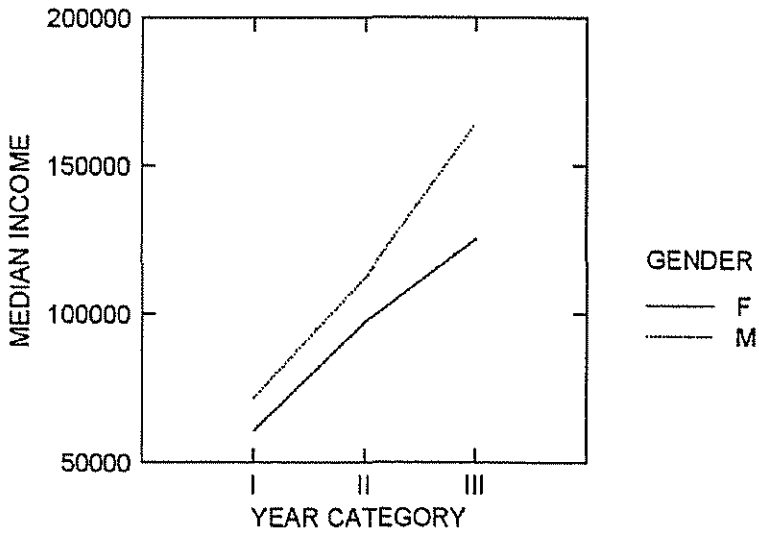
and Category III, 10 to 25 years

1995 MEDIAN COMPENSATION BY YEARS AS FC AT ML



Graph 24

1995 MEDIAN COMPENSATION BY YEARS AS FC AT ML



Graph 25

There were 2,103 males (86.22%) in Category I and 336 females (13.78%) for a total population of 2,439 individuals. The median income for males in this category was $71,690.29 and for females was $60,609.62. With a value for chi-square of 24.15, the difference between the two compensation distributions with these medians is statistically significant at the .000 level. The mean compensation for males in this category was $101,745.58 and that for females was $76,349.18, means which differ by 4.05 standard deviations. The probability of this difference occurring by chance is .000. The logarithmic means differ by 5.226 standard deviations. See Table 18.

There are 1,686 individuals in Category II, 1,384 males (82.09%) and 302 females (17.91%). The median compensation for males was $112,286.15 and median compensation for females was $97,498.44. The difference between these two compensation distributions with these medians is significant at the .000 level with chi-square equal to 16.61. The mean compensation for men was $144,917.02 while the mean compensation for women was $121,448.63. The mean men's compensation was 3.52 standard deviations above the women's compensation, an event of probability zero in a gender-neutral situation. Moreover, the difference of the means in the log metric is 3.799 standard deviations.

For Category III, there were 2,908 full-time men (87.33%) with 1995 median compensation of $163,945.60 and 422 full-time women (12.67%) with 1995 median compensation of $125,909.50. The difference between the two compensation distributions with these medians is significant at the .000 level with a chi-square value of 51.47. The mean compensation of the males was $208,875.32 and that of the females was $164,301.47, a distance of 5.05 standard deviations apart. The probability of this