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727-299-1800  
fund advisers



May 5, 2003

Office of Applications and Report Services  
Securities and Exchange Commission  
450 Fifth Street, NW  
Judiciary Plaza  
Washington, DC 20549



**PROCESSED**  
MAY 09 2003  
THOMSON FINANCIAL

Re: Filing Pursuant to Section 33 of the Investment Company Act of 1940


Dear Sir or Madam:

On behalf of IDEX Mutual Funds (File No. 33-2659), enclosed is a copy of a Statement of Claim and Demand for Arbitration in response to a complaint filed by Stephen McKendry and his wife, Kari L. McKendry against Merrill Lynch, Pierce, Fender & Smith, Inc., a broker-dealer, IDEX Mutual Funds, an investment mutual funds company, and InterSecurities, Inc. dated March 17, 2003. This complaint is being filed pursuant to Section 33 of the Investment Company Act of 1940.

If you have any questions regarding this filing, please contact me at (727) 299-1824.

Please acknowledge receipt of this filing by date-stamping the enclosed copy of this letter and returning it in the envelope provided.

Sincerely,

  
John K. Carter  
General Counsel, Senior Vice President and  
Secretary

Enclosure  
Cc: ICI Mutual

100 Mitchell

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MAY - 1 2003

LAW DEPT - JKC

7 Counsel for Claimants  
8 Stephen M. McKendry  
Kari L. McKendry  
9

10 **IN AN ARBITRATION BEFORE THE**  
11 **NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

13 \_\_\_\_\_ )  
STEPHEN M. MCKENDRY and )  
14 KARI L. MCKENDRY, husband and wife, )  
 )  
15 Claimants, )  
 )  
16 vs. )  
 )  
17 MERRILL LYNCH, PIERCE, FENNER & )  
18 SMITH, INC. (a/k/a MERRILL LYNCH), )  
a broker-dealer, IDEX Mutual Funds, an )  
19 investment mutual funds company; )  
20 INTERSECURITIES, INC., a distributor )  
for IDEX Mutual Funds, )  
21 )  
Respondents. )  
22 \_\_\_\_\_ )

**STATEMENT OF CLAIM  
AND DEMAND  
FOR ARBITRATION**

23 Claimants Kari L. McKendry and Stephen M. McKendry, for their Statement of Claim and  
24 Demand for Arbitration against Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill  
25 Lynch") IDEX Mutual Funds, and Intersecurities, Inc., allege as follows:  
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The Parties.

Claimant Kari L. McKendry is a woman residing in Scottsdale, Arizona. Stephen M. McKendry is the spouse of Kari L. McKendry.

Respondent Merrill Lynch is a registered broker-dealer firm which transacts business in states across the country, including Arizona.

Respondent IDEX Mutual Funds is a mutual fund company located at PO Box 9015 Clearwater, Florida 33758-9015, which transacts business in states across the country, including Arizona. Intersecurities, Inc. is the distributor for IDEX Mutual Funds. (IDEX Mutual Funds and Intersecurities, Inc. are collectively referred to herein as "IDEX".)

The Relevant Facts.

Kari L. McKendry has maintained an IRA account with Respondent Merrill Lynch for a number of years. Several years ago, Respondent Merrill Lynch invested Mrs. McKendry's IRA into a fund Merrill Lynch recommended named IDEX Janus Growth. (IDEX JCC Growth - T) Initially, the fund appeared to perform well, and Mr. and Mrs. McKendry would generally review the account statements as they were received from IDEX.

However, in November of 2000, IDEX changed the mailing address for receipt of the IDEX statements from the McKendrys' residence to Merrill Lynch's Jersey City, New Jersey address. See Exhibit 1, November 2000 IDEX letter.

Up to that time, the statements had been addressed to:

MERRILL LYNCH CUST  
FBO KARI MCKENDRY IRA  
9875 N. 111TH PL  
SCOTTSDALE, AZ 85259-4829

1 9875 North 111th Place, Scottsdale, Arizona is the McKendry's home address. The  
2 statements were sent starting in November, 2000 to:

3 MERRILL LYNCH CUST  
4 FBO KARI L. MCKENDRY IRA  
5 101 HUDSON ST FL 8  
6 JERSEY CITY NJ 07302-3915

7 On November 16, 2000, Mr. McKendry wrote IDEX asking them why the account mailing  
8 address was changed to the Merrill Lynch address in New Jersey from the McKendrys' former  
9 registration address which was their residence address. See Exhibit 2, November 16, 2000 letter to  
10 IDEX.

11 On November 27, 2000, IDEX sent a response letter to the McKendrys explaining why the  
12 address had been changed. See Exhibit 3, November 27, 2000 letter from IDEX. IDEX responded  
13 as follows:

14 Your account is registered as a custodial account under Merrill  
15 Lynch. According to Internal Revenue Service (IRS)  
16 regulations all custodial accounts must have the custodian's  
17 address as the address of record for the account. However, we  
18 have added your address to our records and you will be  
receiving a copy of all transactions notices regarding account  
activity.

19 However, after the address change, neither IDEX nor Merrill Lynch ever sent the  
20 McKendrys anymore copies of statements. The last statement the McKendrys received was for the  
21 period ending September 30, 2000. See Exhibit 4, Account Statement.

22 Mr. McKendry recently began to try to investigate the status of the IRA account again,  
23 knowing that the last statement received reflected a value of \$73,838.05, to no avail. Neither  
24 Merrill Lynch nor IDEX could tell the McKendrys anything about the account. The only response  
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1 Mr. McKendry received from IDEX was a verification that the account remained in the IDEX Fund,  
2 but that he needed to contact Merrill Lynch for more information.

3 When Mr. McKendry called Merrill Lynch to inquire as to the status of the account, Merrill  
4 Lynch knew nothing of the account and informed Mr. McKendry that the account numbers he  
5 provided to them did not match anything in their database.  
6

7 Obviously, by now, the McKendrys were very concerned. Mr. McKendry asked a  
8 stockbroker friend from PaineWebber, Jeff Kramer, to move the account over to him at  
9 PaineWebber so that they could monitor the account.

10 After the account was successfully moved to Mr. Kramer's care, Mr. Kramer forwarded to  
11 the McKendrys the most recent IDEX statement for the period ending December 3, 2002. In  
12 December 2002, the McKendrys' account was valued at \$28,615.40, reflecting a drop in value of  
13 \$45,222.65 from the last statement the McKendrys saw in September of 2000 reflecting a balance of  
14 \$73,838.05 (a 61% loss in value). See Exhibit 4, Account Statements.  
15

16 If the McKendrys had been provided with statements and had observed the decline in the  
17 mutual fund value, they would have sold the fund to preserve Ms. McKendry's retirement assets.  
18 The McKendrys were improperly deprived of the opportunity to do so by the Respondents' failure to  
19 provide customer account statements.  
20

21 The Respondents' negligence and lack of professional care have injured Mr. and Mrs.  
22 McKendry. Accordingly, in this arbitration proceeding, the Claimants seek recovery of their  
23 damages of at least \$45,000.00, plus interest and/or lost opportunity damages, together with an  
24 award of attorney's fees, costs, and punitive damages, in a specific amount to be proved at the  
25 arbitration hearing.  
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1 Legal Claims.

2 Mr. and Mrs. McKendry's legal claims against Respondents Merrill Lynch and IDEX in this  
3 matter<sup>1</sup> may be summarized as follows:

4 **FIRST CLAIM FOR RELIEF**

5 **(Negligence)**

6  
7 In handling their customers' investment accounts, investment firms are obligated to use the  
8 skill, knowledge and training associated with their profession.<sup>2</sup> The NASD Conduct Rules, as well  
9 as the rules of other regulatory organizations, require investment firms to deal fairly with the public,  
10 and adhere to the highest standards of just and equitable conduct. NASD Conduct Rule 2340  
11 requires that customers be sent regular account statements. These rules represent an industry  
12 standard of care.  
13

14 A negligence claim arises where there is a duty owed to the plaintiff, a breach thereof, and  
15 an injury caused by that breach. Wisener v. State, 123 Ariz. 148, 149, 598 P.2d 511 (1979). The  
16 question of duty is determined on the basis of the relationship between the parties. Markowitz v.  
17 Arizona Parks Bd., 146 Ariz. 352, 706 P.2d 364 (1985); Kesselman v. National Bank of Arizona,  
18 188 Ariz. 419, 937 P.2d 341 (App. 1996). Here, at a minimum, the Respondents owed Claimants an  
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22 <sup>1</sup> The McKendrys' claims against the named Respondents arise out of the Respondents' primary  
23 liability for their own misconduct, as well as their secondary liability provided by law, including secondary  
24 liability arising out of, *inter-alia*, respondeat superior, principal-agent liability, participant liability, aiding  
and abetting liability, and controlling person liability.

25 <sup>2</sup> "[A] person who holds himself out to the public as possessing special knowledge, skill or expertise  
26 must perform his activities according to the standards of his profession. If he does not, he may be liable  
27 under ordinary principles of negligence. . . ." Darner Motor Sales v. Universal Underwriters, 140 Ariz.  
28 383, 682 P.2d 388, 403 (1984).

1 ordinary duty of care. (In fact, as described later herein, the Respondents owed the Claimants a  
2 fiduciary duty of care.)

3  
4 Normally, the standard of care focuses on the conduct of a reasonably prudent person under  
5 the circumstances; however, when a person holds himself out to the public as possessing special  
6 knowledge, skill, or expertise, he must perform according to the standard of his profession. *See*  
7 Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 183 Ariz. 444, 448, 904 P.2d 1268  
8 (App. 1995). The Respondents held themselves out as investment professionals and firms able to  
9 professionally advise their customers, and to manage and invest the accounts of their customers.  
10 Respondent Merrill Lynch was under a duty to act with reasonable care as a licensed broker-dealer  
11 and investment professionals in the handling of the McKendrys' account.

12  
13 By failing to advise the McKendrys of the status of their investment, Merrill Lynch and  
14 IDEX acted negligently, *i.e.*, it failed to exercise the care and skill which the public is entitled to  
15 expect from stockbrokers and investment professionals. Merrill Lynch and IDEX also acted  
16 negligently by failing to send the McKendrys copies of their account statements, thereby leaving the  
17 McKendrys in the dark as to their account's performance. The McKendrys had received copies of  
18 their account statements until September 30, 2000, at which point they stopped receiving the  
19 statements, leaving the McKendrys oblivious as to their account's performance. The Respondents'  
20 negligence in failing to send these statements was in contravention of their commitment and  
21 obligation to do so. *See* Exhibit 3, November 27, 2000 letter from IDEX. If the McKendrys had  
22 been provided with statements and had observed the decline in the mutual fund value, they would  
23 have sold the fund to preserve Ms. McKendry's retirement assets.  
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1 The McKendrys have been damaged as a direct result of the negligence of Merrill Lynch and  
2 IDEX, and are entitled to recover their damages, plus interest and/or lost opportunity damages,  
3 together with an award of attorney's fees, costs, and punitive damages, in a specific amount to be  
4 proved at the arbitration hearing.  
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## 6 SECOND CLAIM FOR RELIEF

### 7 (Breach of Fiduciary Duty)

8 The McKendrys invested with Respondent Merrill Lynch and IDEX because they were led  
9 to believe the Respondents were skilled and reputable investment professionals. At the hearing, the  
10 McKendrys will testify that they trusted Merrill Lynch and IDEX, and were led to believe their trust  
11 was well placed. As a result of the relationship of trust that existed, Merrill Lynch and IDEX are  
12 subject to the duties of good faith, fair dealing, reasonable care and integrity that govern fiduciaries.  
13

14 There is a fiduciary duty owed from an investment firm and broker to their customers. *See*,  
15 *e.g.*, Conway v. Icahn & Co., 16 F.3d 504 (2nd Cir. 1994) (finding that the relationship between a  
16 stockbroker and customer is that of principal and agent and is fiduciary in nature). This relationship  
17 imposes the duty of utmost good faith, integrity, honesty and loyalty in the agent's transactions with  
18 the principal. *See* Musselman v. Southwinds Realty, Inc., 146 Ariz. 173, 704 P.2d 814 (1985);  
19 Hassenpflug v. Jones, 84 Ariz. 33, 323 P.2d 296 (1958); Jennings v. Lee, 105 Ariz. 167, 461 P.2d  
20 161 (1969).  
21

22 As the Jennings court stated:

23 Mosier's [the broker's] liability is based on the breach of his fiduciary relationship  
24 with Mrs. Jennings. . . A broker is under a duty to disclose to his client information  
25 which he possesses pertaining to the transaction in question.  
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1 Jennings v. Lee, supra 105 Ariz. at 173. See also Blankenheim v. E. F. Hutton & Company, Inc., 90  
2 D. A. R. 1788 at 1791.

3 In Baker v. Wheat First Securities, 643 F. Supp. 1420 (S. D. W. V. 1986), the court held (i)  
4 that an agent owes a fiduciary duty to his principal and (ii) that a stockbroker is an agent of his  
5 client. *Id.* at 1428-9. See also Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206,  
6 1216 (8th Cir. 1990). The court in Davis noted that:

8 [S]ecurities brokers . . . are 'licensed professional[s] holding [themselves] out as  
9 trained and experienced to render a specialized service.' . . . securities customers  
10 'rely on the agent's expertise and expect the agent to act in their best interests.'

11 See also Gochnauer v. A. G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987). The  
12 court in Gochnauer stated:

13 The law is clear that a broker owes a fiduciary duty of care and loyalty to a securities  
14 investor. Thompson v. Smith Barney, Harris, Upham & Co., Inc., 709 F.2d 1413,  
15 1418 (11th Cir. 1983); Dupuy v. Dupuy, 551 F.2d 1005, 1015 (5th Cir. 1977). See  
16 also Restatement (2d) of Agency § 425 (agents employed to make, manage, or advise  
17 on investments have fiduciary obligation).

18 *Id.*<sup>3</sup>

21  
22 <sup>3</sup> Brokerage firms often contend a fiduciary relationship can exist only when the broker has written  
23 discretionary authority. While some cases say this, the better reasoned decisions recognize reality and hold  
24 that a broker may as a practical matter gain his client's trust and control the account to the point that the  
25 broker should be treated as a fiduciary. See, e.g., Davis v. Merrill Lynch, 906 F.2d 1206, 1215-16 (8th Cir.  
26 1990) ("if for all practical purposes the broker exercised de facto control over a nondiscretionary account  
27 and the client routinely follows the recommendations of the broker, then a finding of fiduciary duty may be  
28 warranted."); Lindemuth v. Shannon Fin. Corp., 660 F. Supp. 261, 265 (N. D. Cal. 1987) (fiduciary duties  
exist if broker "for all practical purposes" controls the account). In this case, Respondent gained the  
McKendrys' complete trust and confidence, and therefore control exists for purposes of establishing a  
fiduciary duty to the McKendrys.

1 In Duffy v. Cavalier, 215 Cal. App. 3d 1517, 264 Cal. Rptr. 740 (1989), a seminal case  
2 regarding broker-dealer fiduciary duty, the California appellate court reiterated that the relationship  
3 between a stockbroker and his customer is that of a fiduciary; that the stockbroker has a duty to act  
4 in the highest good faith toward his customer. The court in Duffy stated:

5  
6 We conclude that the state common law of stockbroker fiduciary duty . . . is  
7 one of general application; it imposes a duty on all stockbrokers, regardless of the  
8 identity of their customers, and runs in favor of all customers of stockbrokers.

9 *Id.* 264 Cal. App. at 1530. The court in Duffy relied on and quoted the holding in Twomey v.  
10 Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), that:

11 "Confidential and fiduciary relations are, in law, synonymous, and may be  
12 said to exist wherever trust and confidence is reposed by one person in the integrity  
13 and fidelity of another . . . An agent is a fiduciary. His [or her] obligation of  
14 diligent and faithful service is the same as that imposed upon a trustee. . . . The  
15 relationship between broker and principal is fiduciary in nature and imposes on the  
16 broker the duty of acting in the highest good faith toward the principal. . . . With  
17 respect to stockbrokers it is recognized, the duties of the broker, being fiduciary in  
18 character must be exercised with the utmost good faith and integrity."

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20 *Id.* 264 Cal. App. 3d at 1531.<sup>4</sup>

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<sup>4</sup> In a speech recently given by former SEC Chairman Harvey L. Pitt on November 8, 2002, who  
resigned under criticism that he was not strong enough in the area of investor protection, Mr. Pitt stated:

it's incumbent upon the private sector [of the securities industry]- you who are  
responsible for making our markets function - to ensure you meet *and exceed* the  
highest standards for professional conduct. Regulation can never substitute for  
people doing their jobs honestly, dedicated to serving their customers *as the*  
*fiduciaries they are.*

[Emphasis added.]

In short, no less than the Chairman of the SEC has acknowledged the well established principle - -  
one certainly embraced by the public - - that securities professionals are fiduciaries to their customers,  
members of the investing public. See SEC Chairman Remarks At Securities Industry Association Annual  
Meeting, November 8, 2002, [www.sec.gov/news/speech/spch603.htm](http://www.sec.gov/news/speech/spch603.htm). This Panel should not hesitate to  
hold the Respondent to the standard of a fiduciary toward the McKendrys.

1 In this case, the funds in the account the McKendrys entrusted to the Respondents' care and  
2 handling were specifically known by Merrill Lynch and IDEX to be Kari McKendry's retirement  
3 account funds. Furthermore, Merrill Lynch and IDEX ignored and disregarded their fiduciary duties  
4 to their customers when they failed to keep the McKendrys informed about their account's  
5 performance, even after they promised to do so. See Exhibit 3, November 27, 2000 letter from  
6 IDEX. Because of the Respondents' failure to keep the McKendrys apprised of their account's  
7 performance despite Merrill Lynch's and IDEX's obligation and commitment to do so, Merrill Lynch  
8 breached its fiduciary duty to the McKendrys in handling their account, entitling the McKendrys to  
9 recover their damages, plus interest and/or lost opportunity damages, together with an award of  
10 attorney's fees, costs, and punitive damages against Merrill Lynch and IDEX.  
11

### 12 **THIRD CLAIM FOR RELIEF**

#### 13 **(Breach of Contract)**

14 An enforceable contract exists where there is an offer, an acceptance, consideration, and  
15 sufficient specification of terms so that obligations involved can be ascertained. K-Line Builders,  
16 Inc. v. First Federal Sav. & Loan Ass'n., 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). In  
17 this case, the Respondent expressly or impliedly agreed to open an account for the McKendrys, and  
18 to discharge their obligation as fiduciaries and agents for the McKendrys by providing full and  
19 complete information to them about the investments made by Merrill Lynch and IDEX.  
20

21 The conduct of Merrill Lynch and IDEX alleged herein constitutes a breach of contract.  
22 Express, or at least implicit, in every agreement between a securities professional and their  
23 customer, is the commitment on the part of the firm and broker to follow the rules and regulations of  
24 the NASD and any other self-regulatory organizations to which the firm and its brokers are subject.  
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1. This would, of course, include NASD Conduct Rule 2340, which requires that customer account  
2 statements be provided to customers on not less than a quarterly basis. There is also an implied  
3 commitment to conduct their business in a manner consistent with well-recognized securities  
4 industry standards. Further, there is implied in every contract the duty of good faith and fair  
5 dealing. There is also an obligation to perform competently in handling the customer's investments.  
6  
7 The Respondents breached all of the foregoing duties by the conduct alleged herein.

8  
9 Courts have held that upon a breach, a customer is entitled not only to recovery of their out-  
10 of-pocket losses, but also to benefit of the bargain damages. *See, e.g., Davis v. Merrill Lynch*  
11 *Pierce, Fenner & Smith*, 906 F.2d 1206 (8th Cir. 1990); *Hershock, et al. v. Fiascki, et al.*, 1992 U. S.  
12 Dist. LEXIS 9305 (E. D. Pa. 7/2/92); *Levine v. Futransky*, 636 F. Supp. 899, 900 (N. D. Ill. 1986).

13 As a result of the Respondents' breach of contract in connection with the McKendry  
14 retirement account, the McKendrys have been damaged and are entitled to recover their damages  
15 against Merrill Lynch and IDEX in a specific amount to be proved at the arbitration hearing.

#### 16 **FOURTH CLAIM FOR RELIEF**

##### 17 **(Failure To Supervise)**

18  
19 By failing to supply the McKendrys with any information concerning the performance of  
20 their investment, Respondent Merrill Lynch failed to supervise the McKendry retirement account as  
21 is required by, *inter alia*, NASD Conduct Rule 3010 (formerly known as NASD Rules of Fair  
22 Practice, Article 3, Section 27), and as required under the legal doctrine of *respondeat superior*. *See*  
23 *e.g., Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P.2d 107, 113 (1963); *Anderson v.*  
24 *Gobeau*, 18 Ariz. App. 277, 501 P.2d 453, 456 (1972). *See also* Restatement of Agency 2d § 219.  
25 As was held in *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N. D. Cal. 1968), stock brokerage  
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1 firms can act only through their various partners, employees and agents, and the acts of their  
2 employees and agents, in the course of their employment, are acts of the firm. *Id.* at 443. *See also*  
3 In re Sutro Bros. & Co., SEC Release No. 7052 (4/10/63).

4  
5 In an often cited decision of the Securities and Exchange Commission, Reynolds and Co., 39  
6 S.E.C. 902 (1960), the duty of supervision was summarized as follows:

7 We have repeatedly held that brokers and dealers are under a duty to supervise the  
8 actions of employees and that in large organizations it is especially imperative that  
9 the system of internal control be adequate and effective and that those in authority  
10 exercise the utmost vigilance whenever even a remote indication of irregularity  
11 reaches their attention . . . .

12 The SEC has also stated in the Matter of Hodgdon & Co., Admin. Proc. File No. 3-533,  
13 1969 SEC Lexis 2920 at page 87 (5/15/69), that:

14 [i]t has long been established that the relationship of a securities dealer or a salesman  
15 to an uninformed client is one of trust and confidence which approaches and perhaps  
16 equals that of a fiduciary . . . [i]t arises out of the superior sophistication of the  
17 dealer, the reposal of special confidence by the customer in the dealer as specially  
18 qualified in the securities field and the dealer's acceptance of this reliance . . . [i]t  
19 imposes upon the dealer the responsibility and duty to act in the customer's best  
20 interest in effecting transactions in his account (citing Lawrence R. Leehy, 13 S.E.C.  
21 449, 505 (1943); Mason, Moran & Co., 35 S.E.C. 84, 89 (1953); Looper & Co., 38  
22 S.E.C. 294, 300 (1958) and Haley & Company, Inc., 37 S.E.C. 100, 106 (1956).

23 The administrative decisions of the SEC recognize a comprehensive duty of supervision  
24 which extends well beyond the branch office level to include regional sales managers, compliance  
25 officers and, in certain circumstances, attorneys in the legal departments of brokerage firms.

26 As a direct and proximate result of the negligence and failure to supervise the account, the  
27 McKendrys have been damaged and are entitled to recover against Respondent Merrill Lynch their  
28 damages, plus interest and/or lost opportunity damages, together with an award of attorney's fees,  
costs, and punitive damages, in a specific amount to be proved at the arbitration hearing.

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**FIFTH CLAIM FOR RELIEF**

**(Punitive Damages)**

Under Arizona law, punitive damages may be awarded for conduct which is done with an improper motive or with a reckless indifference to the interest of others. Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977). Cancellier v. Federated Department Stores, 672 F.2d 1312 (9th Cir. 1982). The purpose of punitive damages is to both punish wrongdoers for their misconduct and to deter them and others from committing other wrongful acts. Michael v. Cole, 122 Ariz. 450, 595 P.2d 995 (1979); Carter-Glogau Laboratories, Inc. v. Construction, Production & Maintenance Laborers' Local 383, 153 Ariz. 351, 736 P.2d 1163 (App. 1986). Punitive damages can be awarded against individuals, such as investment professionals for misrepresentations, and as an economic incentive for the employer to adequately and properly supervise its employees. See State v. Sanchez, 119 Ariz. 64, 579 P.2d 568 (App. 1978) (stating that punitive damages against a corporation serve to "encourage employers to exercise closer control over their servants"). *Id.* 119 Ariz. at 66. See also DeJonghe v. E. F. Hutton & Co., 830 P.2d 862 (Ariz. App. 1991).

Arbitration panels are empowered to order punitive damages for wrongful conduct. The very terms of the NASD Rules prevent limits on the ability of arbitrators to issue an award. Specifically, NASD Conduct Rule 3110(f)(4) states:

No agreement shall include any condition which limits or contradicts the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award. (Emphasis added).<sup>5</sup>

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<sup>5</sup> The propriety of securities arbitration panels awarding punitive damages was confirmed by the U. S. Supreme Court in Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995).

1 As the First Circuit noted in Raytheon v. Automated Business Systems, Inc., 882 F.2d 6 (1st  
2 Cir. 1989):

3  
4 Punitive damages can serve as an effective deterrent to malicious or  
5 fraudulent conduct. Where such conduct could give rise to punitive damages if  
6 proved to the court, there is no compelling reason to prohibit a party which proves  
7 the same conduct to a panel of arbitrators from recovering the same damages.  
8 Certainly, the fact that the parties agree to resolve their dispute through an expedited  
9 and less formal procedure does not mean that they should be required to surrender a  
10 legitimate claim to damages.

11 *Id.* at 12. [Emphasis added].

12 The Respondents' conduct in this case was improper and outrageous, and their actions  
13 evidenced at the very least, reckless indifference to the interests of the McKendrys. The McKendrys  
14 seek a punitive damages award of at least \$50,000, in a specific amount the Arbitrators deem  
15 appropriate.

#### 16 SIXTH CLAIM FOR RELIEF

##### 17 (Attorney's Fees)

18 A.R.S. §44-2001 of the Arizona Securities Act provides that where a person has been the  
19 victim of a securities violation, he may bring an action "to recover the consideration paid for the  
20 securities, with interest thereon, taxable court costs and reasonable attorney's fees. . . ."

21 In addition, A.R.S. §12-341.01 provides for the award of attorney's fees to the prevailing  
22 party "[i]n any contested action arising out of contract, express or implied." Inasmuch as the  
23 Arbitration Panel is to determine all of the claims and issues in this case and arising out of the  
24 parties' agreements, the Arbitration Panel is to act in the place of a court. Therefore, in order for the  
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1 parties to be afforded all rights and remedies they would otherwise have in a court proceeding, the  
2 Arbitrators should apply relevant statutory provisions such as §§ 44-2001 and 12-341.01.<sup>6</sup>

3 NASD Conduct Rule 3110(f)(4) expressly prohibits any limitation on the "ability of the  
4 arbitrators to make any award." A Federal Appellate Court decision in this jurisdiction holding that  
5 arbitrators in a commercial dispute have the authority to award attorney's fees to the prevailing party  
6 is Todd Shipyards Corporation v. Cunard Line, Ltd., 943 F.2d 1056, 1064 (9th Cir. 1991). In Todd  
7 Shipyards Corporation, the Ninth Circuit upheld an arbitration award of attorney's fees (and punitive  
8 damages) to the prevailing party stating that "it was within the power of the arbitration panel in this  
9 case to award attorney's fees." *Id.* This Panel should not hesitate in awarding attorney's fees and  
10 costs to the McKendrys under the facts and circumstances of this case.

#### 11 The Damages The Claimants Are Entitled To Recover.

12 Injured investors, such as the McKendrys, are entitled to recover not only the decline in their  
13 portfolio value, but also interest on said sum as provided under A.R.S. §44-2001 of the Arizona  
14 Securities Act, at the statutory legal rate of interest (which in Arizona is 10% pursuant to A.R.S. §  
15 44-1201).

16 Alternatively, investors may be awarded their lost opportunity damages, representing the  
17 difference between where the account ended up and where it would have been if it had been  
18 prudently and properly handled by the investment adviser/broker. Investors are also permitted to

19  
20  
21  
22  
23 <sup>6</sup> Arizona courts have confirmed arbitration awards that included an award of attorney's fees under  
24 A.R.S. §12-341.01. *See, e.g., B & M Construction, Inc. v. Mueller*, 164 Ariz. 52, 54, 790 P.2d 750 (App.  
25 1990) (affirming trial court's confirmation of arbitration award of attorney's fees). Other courts have  
26 confirmed the award of attorney's fees in arbitrations. *See, e.g., A. G. Edwards & Sons, Inc. v. Smith, et al.*,  
27 (CCH) Fed. Sec. L. Rep. ¶96,282 (D. C. Ariz. 1991) (affirming an arbitration award that included an award  
of attorney's fees); Taranow v. Brokstein, 185 Cal. Rptr. 532 (1982) (affirming the award of attorney's fees  
to the prevailing party). *See also Skurnick v. Ainsworth*, 591 So. 2d 904 (Fla. 1991) and Ainsworth v.  
Skurnick, 960 F.2d 939 (11th Cir. 1992).



1 recover the commissions paid to the investment adviser/broker. Nesbit v. McNeil, 896 F.2d 380  
2 (9th Cir. 1990); Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206 (8th Cir.  
3 1990).

4  
5 In short, the McKendrys are entitled to recover not only their out-of-pocket or trading losses,  
6 they are also entitled to and seek recovery of the greater of interest and/or their lost opportunity  
7 damages suffered as a result of the Respondents' negligent misconduct, plus a return of the  
8 commissions and fees paid to Respondents related to the transactions conducted in their account.

9  
10 . Request For Damages.

11 Based upon the foregoing facts, Stephen M. McKendry and Kari L. McKendry request an  
12 award against Respondent Merrill Lynch and IDEX, of the following:

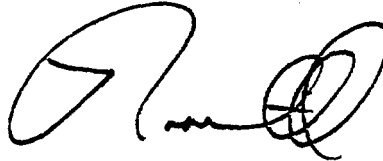
- 13 A. Compensatory damages for the losses in their investment retirement account.  
14 B. Interest and/or lost opportunity damages as of the date of the arbitration hearing.  
15 C. Recovery of the commissions and other fees charged by the Respondents on  
16 Claimants' investment.  
17 D. Recovery of Claimants' filing fees and such other costs and expenses as may be  
18 incurred in bringing this arbitration.  
19 E. Attorney's fees pursuant to A.R.S. §§ 12-341.01 and 44-2001.  
20 F. Punitive damages in an amount not less than \$50,000.  
21 G. Such other relief in favor of the Claimants as the Arbitrators deem just and  
22 appropriate under the circumstances.  
23  
24  
25  
26  
27  
28

Request For Hearing.

The McKendrys are residents of the metropolitan Phoenix, Arizona area and therefore request that the hearing in this matter be conducted in Phoenix, Arizona.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 2003.

MITCHELL LAW OFFICES  
A Professional Corporation



By \_\_\_\_\_  
Robert D. Mitchell  
James D. Hartt  
Anchor Centre One, Suite 122B  
2201 East Camelback Road  
Phoenix, Arizona 85016

Counsel for Claimants

1 VERIFICATION

2  
3 STATE OF ARIZONA )  
4 ) ss.  
5 County of Maricopa )

6 I, Kari L. McKendry, an individual, do hereby state under oath as follows:

7 I am one of the Claimants in the above-captioned matter. I have read the foregoing  
8 Statement of Claim in its entirety, know the contents thereof, and the same are true to the  
9 best of my knowledge and belief except as to those matters alleged on information and  
10 belief, and as to those I believe them to be true.

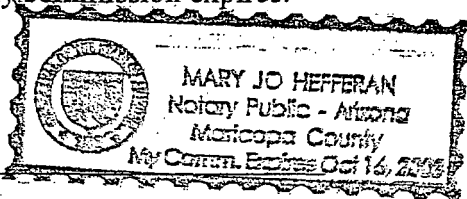
11 DATED this 17<sup>th</sup> day of March, 2003.

12  
13  
14 Kari L. McKendry  
15 Kari L. McKendry  
16

17 Subscribed and sworn to before me the undersigned notary public this 17<sup>th</sup> day of  
18 March 2003.

19  
20 Mary Jo Hefferan  
21 Notary Public  
22

23 My commission expires:



1 VERIFICATION

2  
3 STATE OF ARIZONA )  
4 County of Maricopa ) ss.

5  
6 I, Stephen M. McKendry, an individual, do hereby state under oath as follows:

7 I am one of the Claimants in the above-captioned matter. I have read the foregoing  
8 Statement of Claim in its entirety, know the contents thereof, and the same are true to the  
9 best of my knowledge and belief except as to those matters alleged on information and  
10 belief, and as to those I believe them to be true.

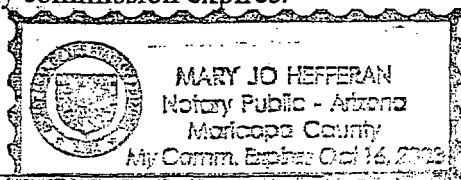
11 DATED this 17<sup>th</sup> day of March, 2003.

12  
13  
14 Stephen M. McKendry  
15 Stephen M. McKendry

16  
17 Subscribed and sworn to before me the undersigned notary public this 17<sup>th</sup> day of  
18 March 2003.

19  
20 Mary Jo Hefferan  
21 Notary Public

22  
23 My commission expires:



25  
26 mckendry-pldings-soc

**EXHIBIT 1**



P. O. Box 9015  
Clearwater, Florida 33758-9015

STATEMENT DATED 11/09/2000

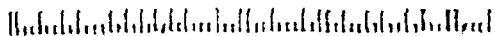
IDEX CUSTOMER SERVICE 1-888-233-4339

IDEX JCC GROWTH - T

Fund#	Account#	Investor ID No
207	99512773	204048

MERRIL LYNCH CUST  
FBO KARI L MCKENDRY IRA  
9875 N 111TH PL  
SCOTTSDALE AZ 85259-4829

TO JEFF  
KRAMER



Dear Investor (s):

The Registration for the above account has been updated with the following information.

**FORMER REGISTRATION**

**NEW REGISTRATION**

MERRIL LYNCH CUST  
FBO KARI L MCKENDRY IRA  
9875 N 111TH PL  
SCOTTSDALE AZ 85259-4829

MERRIL LYNCH CUST  
FBO KARI L MCKENDRY IRA  
101 HUDSON ST FL 8  
JERSEY CITY NJ 07302-3915

To ensure the safety of your account, IDEX will require any redemption requests within the next 10 days to be in writing with a valid signature guarantee of all account owners.

If any of this information is incorrect, please contact IDEX Customer Service at 1-888-233-4339, 8am-8pm Monday through Friday (Eastern Time).

Thank You,

THE IDEX CUSTOMER SERVICE TEAM

Called 11-16-2000

Nicole Becker @ IDEX

new account #

#



**EXHIBIT 2**

TO JEFF  
KRAMER

Steve and Kari McKendry  
9875 North 111<sup>th</sup> Place  
Scottsdale, AZ 85259

November 16, 2000

IDEX Mutual Funds  
P.O. Box 9015  
Clearwater, Florida 33758-9015

RE: Fund #207  
Account #99512773  
Investor I.D. #204046

(800) 637-4015

(201) 557-1000

Dear Sirs:

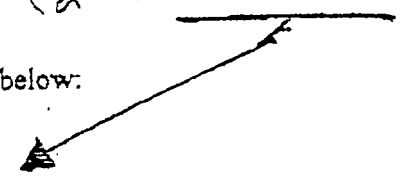
Recently the registration of the referenced account was changed as shown below:

Former Registration

Merril Lynch Cust  
FBO Kari L. McKendry IRA  
9875 North 111<sup>th</sup> Pl  
Scottsdale, AZ 85259-4829

New Registration

Merril Lynch Cust  
FBO Kari L. McKendry IRA  
101 Hudson St. Fl 8  
Jersey City, NJ 07302-3915



I have called the customer service center but the explanation given to me was insufficient. Please write me and explain why the account registration was changed.

Sincerely,

Stephen M. McKendry

Dear Post Desk  
(949) 955-6000

JAY  
BROWN

#2



**EXHIBIT 3**

TO JEFF  
KRAMER



P.O. Box 8078  
Clearwater, Florida 33758-9018  
727-298-1800  
Distributor: InterSecurities, Inc.

November 27, 2000

Steve and Kari McKendry  
9875 N 111th Place  
Scottsdale AZ 85259

NEW Acct #  
80703429

RE: IDEX JCC Growth Fund "Class T" Account Number 207-99512773

Dear Mr. and Ms. McKendry:

Thank you for your investment in the IDEX Family of Mutual Funds. On November 20, 2000, we received your inquiry regarding the address of record on the registration of the above referenced IDEX account.

Your account is registered as a custodial account under Merrill Lynch. According to *Internal Revenue Service* (IRS) regulations all custodial accounts must have the custodian's address as the address of record for the account. However, we have added your address to our records and you will be receiving a copy of all transaction notices regarding account activity.

Should you have any questions or concerns, please feel free to contact an IDEX Customer Service Representative. Our Customer Service Representatives are available at 1-888-233-IDEX (4339), Monday through Friday between the hours of 8:00 a.m. and 8:00 p.m. Eastern Time. We thank you for investing with IDEX.

Sincerely,

  
Jason Heironimus  
Correspondence Coordinator

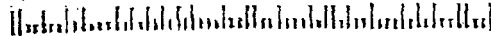
JOHN MADDRELL  
Ext 2888

#3

**EXHIBIT 4**

IDEX MUTUAL FUNDS  
P O BOX 9015  
CLEARWATER FL 33758-9015

9 TO JEFF  
KRAMER



MERRIL LYNCH CUST  
FBO. KARI L. MCKENDRY IRA  
9675 N 111TH PL  
SCOTTSDALE AZ 85259-4828

For the period 01/01/2000 through 09/30/2000  
Page 1 of 2

Investor Number: 264048

Representative: HOUSE

For Automated, Up-to-Date Information  
24 Hours a Day, Seven Days a Week



www.idxfunds.com



IDEX InTouch (888) 233-4339, option 1

Or you may call IDEX Customer Service at (888) 233-4339, option 2.  
Mon. - Fri., 8 a.m.-8 p.m. Eastern time.

FIRST CLEARING CORP  
815 N WATER ST  
MILWAUKEE WI 53202-3526

IMPORTANT - Please keep this statement for your records. This confirms all transactions year-to-date. Carefully review this statement to ensure that we properly acted on your instructions. Please notify IDEX of any error, in writing, within 90 days of the transaction or you will be deemed to have ratified the transaction as reported to you.

### INVESTMENT NEWS AND UPDATES

There's a whole world of opportunity out there! Ask your financial professional how IDEX Gabelli Global Growth and IDEX Great Companies-Global2 can add to your investment strategy.

### VALUE OF YOUR INVESTMENTS

Beginning Value as of 01/01/2000	\$75,382.83
YTD Total Purchases	\$0.00
YTD Total Withdrawals	\$0.00
Increase or (Decrease) in Value	(\$1,543.78)
Rate of Increase or (Decrease) in Value YTD	(2.05)%
Ending Value as of 09/30/2000	\$73,839.05

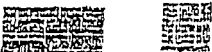
#4

### PERSONAL ALLOCATION GUIDE

Position Your Investments For Performance.

Charting your investment goals is the first step to achieving them. And like an investment roadmap, asset allocation is a tool that may help bring you closer to your desired financial destination. Achieving diversification, in many instances, is difficult for investors purchasing individual securities. That is why so many investors turn to mutual funds. Typically, investing through mutual funds is an affordable and convenient way to diversify your investment dollars. And by investing in a family of funds, such as IDEX, often you can easily allocate your investments.

Asset allocation isn't a performance guarantee. And if your goals and objectives are not clearly defined, you may find that your portfolio won't satisfy your needs. Your Financial Professional can help you identify the best allocation mix for you or call Customer Service to receive a free Asset Allocation Worksheet at 1-888-233-IDEX.





P. O. Box 9015  
Clearwater, Florida 33758-9015

ACCOUNT STATEMENT

01/01/2000 THROUGH 09/30/2000

Rep No. 7HDF  
HOUSE

MERRIL LYNCH CUST  
FBO KARI L MCKENDRY IRA

TO JEFF  
KRAMER

INVESTOR NUMBER: 204046

PAGE 2 OF 2

YOUR PORTFOLIO SUMMARY AT A GLANCE

PERSONAL ACCOUNTS

FUND NAME & SHAREHOLDER	ACCOUNT #	SHARES OWNED	09/30/2000 SHARE PRICE	ACCOUNT VALUE
IDEX JCC GROWTH - T MERRIL LYNCH CUST FBO KARI L MCKENDRY IRA	207- 99512773	1,543.781	\$47.83	\$73,839.05
PERSONAL ACCOUNTS TOTAL FOR TAX ID # 13-5674085				\$73,839.05
COMBINED TOTAL FOR ALL ACCOUNTS:				\$73,839.05

TRANSACTION SUMMARY

PERIOD 01/01/2000 THROUGH 09/30/2000

PERSONAL ACCOUNTS PORTFOLIO

TAX ID #  
13-5674085  
MERRIL LYNCH CUST  
FBO KARI L MCKENDRY IRA  
IDEX JCC GROWTH - T  
ACCOUNT #: 207 - 99512773

DATE	TRANSACTION DESCRIPTION	DOLLAR AMOUNT	÷	SHARE PRICE	=	SHARES	SHARE BALANCE
	BEGINNING BALANCE	\$75,382.83				1,543.781	
	No Transactions This Period						
	ENDING BALANCE	\$73,839.05				1,543.781	

507507



**EXHIBIT 5**

Account: **GA43271** IRA MCKEND **FA:JK HH QP=PI** Date as of: 12/03/02  
 Return Objective: Capital Appreciation Risk Profile: 1.Moderate Last Statement:  
 Name: KARI L MCKENDRY IRA

Total Portfolio: 28,609.00 | Equity: 0.00 | Money Funds: 0.00 | Credit Balance: 0.00 | Funds Available: 0.00 | Buying Power: 0.00

Trade Date Position	Settlement Date Position	Symbol	Description	Price	Value	Reinv. Ind	Exchange	Loc	Type	Sec No.	Cusip
1,673,415	1,673,415	MEIDGT	IDEX JANUS GROWTH FUND CLASS T	17.10	28,615.40		9-OTC NM/g	MFA	1-Cash	54BGB5	45168C619

Item: 1 - 1 of 1

Intraday updates for equity transactions are included on approximately a 20 minute delay. Trades do not include commissions or fees.

*F.Y.I.*

*This reflects the receipt of the Janus fund shares in your IRA. Give me a call if you have any questions.*

*Jeff*

*#5*

**UBS|PaineWebber**  
 Jeffrey S. Kramer  
 First Vice President - Investments  
 UBS PaineWebber Inc.  
 8501 N. Scottsdale Road  
 Suite 100  
 Scottsdale, AZ 85253-2740  
 480 443 5424  
 jeff.kramer@ubspw.com