

Award  
NASD Dispute Resolution

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In the Matter of the Arbitration Between:

Names of the Claimants

Russell Johnson and  
Judy Johnson

Case Number: 02-06768

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.,  
and John Wagner

Hearing Site: Richmond, Virginia

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Nature of the Dispute: Customers vs. Member and Associated Person.

REPRESENTATION OF PARTIES

Claimants, Russell Johnson and Judy Johnson, hereinafter collectively referred to as "Claimants", were represented by Kevin W. Holt, Esq., Gentry Locke Rakes & Moore, LLP, Richmond, Virginia.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), and John Wagner ("Wagner") were represented by Matthew C. Plant, Esq., Bressler, Amery & Ross, P.C., New York, New York.

CASE INFORMATION

Statement of Claim was filed on November 6, 2002.

Claimants signed the Uniform Submission Agreement on October 31, 2002.

Statement of Answer filed on January 22, 2003.

Respondent Wagner signed the Uniform Submission Agreement on December 3, 2002.

A representative of Respondent Merrill Lynch executed the Uniform Submission Agreement on January 22, 2003.

Claimants' filed a Motion for Leave to File an Amended Statement of Claim on November 6, 2003.

Respondents' filed an Opposition to Claimants' Motion for Leave to File an Amended Statement of Claim on November 21, 2003.

CASE SUMMARY

Claimant asserted the following causes of action, among others: breach of fiduciary duty, fraud/constructive fraud, violation of §§17(a) and 12(2) of the Securities Act of 1933, breach of contract, negligence, broker-dealer liability; violation of §10(b) of the 1934 Securities and Exchange Act and Rule 10(b)-5 promulgated thereunder, and violation of internal Merrill Lynch Guidelines. The causes of action relate to the purchase and sale of various stocks including

Nadaq-100, AOL, Advanced Micro Devices, EMC, Nortel, Tyco, Schlumberger Ltd., Sun Microsystems, Qwest, Nokia, Corning and AMX Tech.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: failure to state a claim upon which relief can be granted, ratification, estoppel, waiver, failure to mitigate damages, lack of loss causation, assumption of the risk, laches, and unclean hands.

#### RELIEF REQUESTED

Claimants in their Statement of Claim requested the following damages:

Compensatory Damages	\$263,812.78
Punitive Damages	\$250,000.00
Attorneys' Fees	amount unspecified
Costs	amount unspecified

Respondents requested that the case be dismissed in its entirety, that Respondent Wagner's registration records maintained by the NASD Central Registration Depository ("CRD") be expunged, and that Claimants be ordered to pay all fees and costs.

#### OTHER ISSUES CONSIDERED AND DECIDED

The Panel denied Claimants' Motion for Leave to File an Amended Statement of Claim.

Prior to the hearing, the parties fully and finally settled all claims by and between them and Respondent Wagner requested that the Panel enter an award recommending the expungement of Respondent Wagner's registration records maintained by CRD. The Panel held a hearing on August 15, 2005 solely on the issue of expungement. Claimants did not attend the hearing.

#### AWARD

Pursuant to the above, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are dismissed in their entirety;
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Wagner's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Wagner must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
3. The parties shall bear their respective costs, including attorneys' fees, except as Fees are

specifically addressed below; and

4. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

#### FEES

Pursuant to the Code, the following fees are assessed:

##### Filing Fees

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

Initial claim filing fee	= \$ 375.00
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##### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch is a party.

Member Surcharge	= \$2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$4,000.00
Total Member Fees	= \$7,000.00

##### Adjournment Fees

Adjournment granted during these periods for which fees were assessed:	= \$1,200.00
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December 10-12, 2003, adjournment by the Parties

1. The Panel has assessed \$600.00 of the adjournment fees to Claimants.
2. The Panel has assessed \$600.00 of the adjournment forum fees jointly and severally to Respondents.

##### Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four 4 hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$1,200.00	= \$1,200.00
Pre-hearing Conference: July 9, 2003 1 session	

One (1) Hearing sessions @ \$	= \$1,200.00
Hearing Date: August 15, 2005 1 session	
Total Forum Fees	= \$2,400.00

1. The Panel has assessed \$600.00 of the forum fees to Claimant.
2. The Panel has assessed \$1,800.00 of the forum fees jointly and severally to Respondents.

#### EEE SUMMARY

1. Claimants are assessed and shall pay the following fees:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 600.00
Adjournment Fee	= \$ 600.00
Retained Hearing Session Deposit	= \$ 600.00
Total Fees	= \$2,175.00
Less Payments	= \$2,175.00
Refund Owed to Claimants	= \$ 600.00
2. Respondent Merrill Lynch is assessed and shall pay the following fees:

Member Fees	= \$7,000.00
Total Fees	= \$7,000.00
Less Payments	= \$7,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00
3. Respondents Merrill Lynch and Wagner are jointly and severally assessed and shall pay the following fees:

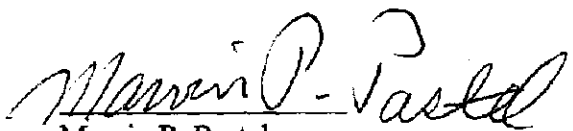
Forum Fees	= \$1,800.00
Adjournment Fees	= \$ 600.00
Total Fees	= \$1,200.00
Less Payments	= \$ 600.00
Balance Due NASD Dispute Resolution	= \$1,800.00

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

#### ARBITRATION PANEL

Marvin P. Pastel	-	Public Arbitrator, Presiding Chairperson
Carol A. Schuyler	-	Public Arbitrator, Panelist
Francis M. Hall	-	Industry Arbitrator, Panelist

Concurring Arbitrators' Signatures

  
Marvin P. Pastel  
Public Arbitrator, Presiding Chairperson

Aug 26, 2005  
Signature Date

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Carol A. Schuyler  
Public Arbitrator, Panelist

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Signature Date

\_\_\_\_\_  
Francis M. Hall  
Non-Public Arbitrator, Panelist

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

August 30, 2005  
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Marvin P. Pastel  
Public Arbitrator, Presiding Chairperson

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

Carol A. Schuyler  
Carol A. Schuyler  
Public Arbitrator, Panelist

8/29/05  
Signature Date

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Francis M. Hall  
Non-Public Arbitrator, Panelist

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

August 30 2005  
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

Marvin P. Pastel  
Public Arbitrator, Presiding Chair person

Signature Date

Carol A. Schnyder  
Public Arbitrator, Panelist

Signature Date

Francis M. Hall  
Francis M. Hall  
Non-Public Arbitrator, Panelist

Aug 25, 2005  
Signature Date

August 30, 2005  
Date of Service (For NASD Dispute Resolution office use only)