

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

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In the Matter of the Arbitration Between:

Name of the Claimants

Charles Kegans and Pamela Kegans

Case Number: 02-07371

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;  
David H. Komansky; and,  
Deepak D. Raj

Hearing Site: Dallas, Texas

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**NATURE OF DISPUTE**

Public Customer v. Member Firm and Associated Persons

**REPRESENTATION OF PARTIES**

Claimants Charles Kegans and Pamela Kegans, hereinafter referred to as "Claimants": Jakes Jordaan, Esq., of the firm of Jordaan & Riley, PLLC, located in Dallas, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and David H. Komansky ("Komansky"): Joel R. Sharp, Esq., of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

Respondent Deepak D. Raj ("Raj"): Betty Santangelo, Esq., of the firm of Schulte Roth & Zabel LLP, located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: December 6, 2002.

Claimants signed the Uniform Submission Agreement: November 18, 2002.

Statement of Answer filed by Respondent Merrill Lynch: January 31, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: February 13, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent Raj: January 31, 2003.

Respondent Raj signed the Uniform Submission Agreement: January 29, 2003.

Respondent Komansky's Objection to NASD Jurisdiction filed: January 31, 2003.

Claimants' Response to Respondent Raj's Motion to Dismiss and Brief in Support of Response filed: February 17, 2003.

Claimants' Response to Respondent Komansky's Objection to Jurisdiction filed: February 17, 2003.

Claimants' First Amendment and Supplement to Statement of Claim filed: March 14, 2003.

Amended Motion to Dismiss and Statement of Answer filed by Respondent Komansky: March 28, 2003.

Statement of Answer and Motion to Dismiss Amended Claim filed by Respondent Raj: May 28, 2003.

Claimants' Response to Respondent Komansky's Motion to Dismiss filed: May 22, 2003.

Claimants' Response to Respondent Raj's Motion to Dismiss Amended Statement of Claim filed: May 22, 2003.

Claimants' Motion for Partial Summary Judgment Against Respondent Merrill, Lynch, Pierce, Fenner & Smith Pursuant to Texas Securities Act §33A(2) filed: May 5, 2003.

Respondent Merrill Lynch's Response to Claimants' Motion for Partial Summary Judgment filed: June 17, 2003.

Claimants' Reply and Supplement to Motion for Partial Summary Judgment Against Respondent Merrill, Lynch, Pierce, Fenner & Smith Pursuant to Texas Securities Act §33A(2) filed: June 30, 2003.

Respondent Merrill Lynch's Motion for Summary Judgment filed: July 25, 2003.

Respondent Raj's Memorandum in Further Support of His Motion to Dismiss and for Summary Judgment, as well as Motion to Strike Certain Exhibits filed: July 25, 2003.

Claimants' Supplemental Response and Brief in Opposition to Respondent Merrill Lynch's Motions to Dismiss; Claimants' Response and Brief in Opposition to Respondent Merrill Lynch's Motion for Summary Judgment; Claimants' Response and Brief in Opposition to Respondent Deepak Raj's Motions to Dismiss, For Summary Judgment and to Strike Certain Exhibits; and, Claimants' Brief in Support of Claimants' Motion for Partial Summary Judgment Pursuant to Texas Securities Act §33A(2) filed: August 27, 2003.

Respondent Merrill Lynch's Motion to Strike Claimants' Affidavit filed: September 3, 2003.

Respondent Merrill Lynch's Reply to Claimants' Supplemental Response Brief filed: September 3, 2003.

Claimants' Supplemental Letter Brief filed: September 17, 2003.

Respondent Merrill Lynch's Supplemental Brief filed: September 22, 2003.

Respondent Raj's Supplemental Letter Brief filed: September 22, 2003.

Claimant's Brief Concerning Jurisdiction of an NASD Panel to Enter Dispositive Motions filed: October 15, 2003.

Respondent Raj's Supplemental Memorandum filed: October 20, 2003.

Claimants' Challenge for Cause and Motion to Reconsider filed: January 13, 2004.

Respondent Merrill Lynch's Response to Claimants' Challenge for Cause and Motion to Reconsider filed: February 3, 2004.

#### **CASE SUMMARY**

Claimants asserted the following causes of action: violation of the Texas Deceptive Trade Practices-Consumer Protection Act; negligent misrepresentation; breach of the implied

representation of fair dealing and full disclosure; breach of fiduciary duty; violation of Texas Securities Act §33A(2); violations of Texas Business and Commerce Code, §27.01, Fraud in Real Estate and Stock Transactions; violation of the NASD Business Conduct Rule 2210-Standards of Commercial Honor and Principles of Trade; violations of the NASD Business Conduct Rule 2120-Use of Manipulative, Deceptive or Other Fraudulent Devices; violation of NASD Business Conduct Rule 2310-Recommendations to Customers (Suitability); violations of NASD Business Conduct Rule 2310-2 – Fair dealings with Customers; civil conspiracy; aiding and abetting; violations of Section 10(b) of the Securities Exchange Act and Rule 10B-5; and, control person liability for the individual Respondents pursuant to Section 20(A) of the exchange Act. These causes of action related to various stock recommendations made by the Merrill Lynch research analysts that were allegedly tainted by a desire to aid Merrill Lynch's investment banking business.

Unless specifically admitted in their Answer, Respondents Merrill Lynch and Komansky denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim for which relief may be granted and their claims should be dismissed;
2. Claimants are sophisticated investors with significant resources and their allegations are an effort to avoid responsibility for their own investment decisions;
3. Claimants' assertion that Merrill Lynch's research was false or misleading is insufficient as a matter of law because Claimants have failed to specify any material misrepresentations or omissions of fact by Merrill Lynch;
4. Claimants' allegations fail to state a claim for relief under the Texas Deceptive Trade practices Act; and,
5. Claimants' claims are barred by waiver, estoppel, ratification, assumption of risk and comparative negligence, as well as Claimants' own failure to mitigate alleged damages.

Unless specifically admitted in his Answer, Respondent Raj denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim against Respondent Raj for which any relief can be granted;
2. Claimants suffered no damages by reason of the acts complained of in the Statement of Claim;
3. Respondent Raj is not liable to Claimants in any amount because, at all times relevant herein, Raj acted properly and in good faith and had no involvement with respect to Claimants' accounts;
4. Respondent Raj acted in good faith and did not directly or indirectly induce any act or acts constituting a violation of the federal securities laws;
5. Claimants' claims are barred because the risks inherent in the investments at issue were fully disclosed and/or known to Claimants and they assumed those risks. Moreover, any alleged losses incurred by Claimants were the direct result of adverse market conditions and/or the acts of the issuer of the securities at issue and cannot be attributed to Raj;

6. Claimants' claims are barred by applicable statutes of limitation and/or the doctrines of laches, estoppel, waiver and ratification because, among other things, Claimants did not timely raise objections or complaints when they received trade confirmations, account statements, and other account information;
7. Claimants' claims are barred under the doctrine of contributory negligence because they negligently contributed to their own injury;
8. Claimants' claims are barred or mitigated under the doctrine of comparative negligence because they negligently contributed to their own injury to a greater degree than Raj allegedly did;
9. Claimants' claims are barred because their alleged injuries were not caused, legally, proximately, or otherwise, by Raj or by the alleged misconduct pleaded in the Statement of Claim;
10. Claimants' claims are barred because Respondent Raj did not act with intent, scienter, or in breach of any duty of care or loyalty owed to Claimants;
11. Claimants' claims are barred because they failed to mitigate damages;
12. Claimants' claims are barred because Raj at all times conducted himself in compliance with the requirements of all applicable provisions of federal and state law;
13. Claimants' claims are barred because Claimants failed to exercise care and due diligence over the investments in their securities accounts;
14. Claimants are not entitled to, and fail to state a claim for, actual damages, exemplary damages, punitive damages, prejudgment interest, attorneys' fees and costs; and,
15. As applicable, the defenses asserted by Respondent Merrill Lynch are incorporated by reference.

### **RELIEF REQUESTED**

Claimants Charles Kegans and Pamela Kegans requested:

Compensatory Damages	\$ 225,479.86
Punitive/Treble Damages	\$ 450,959.72
Interest	\$ 53,367.71
Attorneys' Fees	\$ 75,159.95
Other Costs	As determined by the Panel
Other Monetary/Non-Monetary Relief if any:	As determined by the Panel

Respondent Merrill Lynch requested that Claimants take nothing by their claims and Respondent recover its fees and expenses.

Respondent Komansky requested that the claim be dismissed.

Respondent Raj requested that his Motion to Dismiss be granted and the Statement of Claim dismissed with prejudice as to Raj. In addition, Raj requested an award of his attorneys' fees and costs, and that all references to the Statement of Claim and the allegations asserted therein should be expunged from Respondents' CRD records.

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

Respondent Komansky did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and is bound by the determination of the Panel on all issues submitted.

On September 8, 2003, the Panel heard argument on the parties' Dispositive Motions. On October 3, 2003, the Panel requested additional briefs from the parties concerning the Panel's jurisdiction to enter a summary judgment or grant a Motion to Dismiss. After reviewing the briefs, the Panel entered an Order on October 31, 2003 that determined as follows:

1. Claimants' Motion for Partial Summary Judgment was denied;
2. Respondent Merrill Lynch's Motion for Summary Judgment is granted;
3. Respondent Komansky's Motion to Dismiss is granted; and,
4. Respondent Raj's Motion for Dismissal is granted.

On January 13, 2004, the Claimants filed a Challenge for Cause and Motion to Reconsider. Respondent Merrill Lynch filed its Response on February 3, 2004. The Director denied the Challenge on February 26, 2004. On March 23, 2004, the Panel denied the Motion to Reconsider.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the Motion hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. The Respondents' Motion having been granted, the claims against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., David H. Komansky and Deepak D. Raj are hereby dismissed;
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent David H. Komansky'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 David H. Komansky must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
3. In addition, the Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Deepak D. Raj'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 Deepak D. Raj must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
5. Any and all relief not specifically addressed herein, including punitive or treble

damages, is denied.

### **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	= \$ 300.00
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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 firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following member fees are assessed:

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 4,000.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed: None.

#### **Forum Fees and Assessments**

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

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: July 14, 2003 1 session	
September 8, 2003 1 session	
<hr/> Total Forum Fees	<hr/> = \$ 2,400.00

The Panel has assessed \$2,400.00 of the forum fees jointly and severally to Claimants Charles Kegans and Pamela Kegans.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested hearing tapes for the Motion Hearing held September 8, 2003	= \$ 30.00
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**FEE SUMMARY**

Claimants Charles Kegans and Pamela Kegans are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 2,400.00
Total Fees	= \$ 2,775.00
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 1,200.00


Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$ 7,000.00
Administrative Costs	= \$ 30.00
Total Fees	= \$ 7,030.00
Less payments	= \$ 7,030.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

**ARBITRATION PANEL**

Bill H. Brister - Public Arbitrator, Presiding Chairperson  
Stephen L. Avar - Public Arbitrator  
Raymond E. Jennison - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Bill H. Brister  
Public Arbitrator, Presiding Chairperson

April 2, 2004  
Signature Date

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Stephen L. Avar  
Public Arbitrator

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

\_\_\_\_\_  
Raymond E. Jennison  
Non-Public Arbitrator

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

4/6/04  
Date of Service (For NASD Dispute Resolution office use only)

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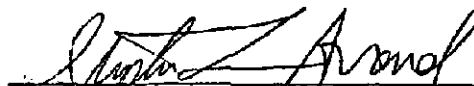
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