

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Ben B. Johnson and Gayle Y. Johnson

Case Number: 02-07632

Name of the Respondents

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

Hearing Site: Dallas, Texas

NATURE OF DISPUTE

Public Customer v. Member Firm and Associated Persons

REPRESENTATION OF PARTIES

Claimants Ben B. Johnson and Gayle Y. Johnson, 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"): Charles A. Gall, 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 18, 2002.

Claimants signed the Uniform Submission Agreement: November 13, 2002.

Statement of Answer filed by Respondent Merrill Lynch: February 19, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: March 4, 2003.

Statement of Answer and Motion to Dismiss filed by Respondent Raj: February 19, 2003.

Respondent Raj signed the Uniform Submission Agreement: February 19, 2003.

Respondent Komansky's Objection to NASD Jurisdiction filed: February 19, 2003.

Claimants' Response to Respondent Raj's Motion to Dismiss and Brief in Support of Response filed: March 13, 2003.

Claimants' Response to Respondent Komansky's Objection to Jurisdiction filed: March 13, 2003.

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

Amended Motion to Dismiss filed by Respondent Komansky: March 28, 2003.

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

Claimants' Motion for Summary Judgment filed: August 28, 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: August 29, 2003.

Respondent Merrill Lynch's Motion for Summary Judgment filed: August 29, 2003.

Respondent Merrill Lynch's Response to Claimants' Motion for Partial Summary Judgment filed: September 15, 2003.

Respondent Merrill Lynch's Motion to Strike Claimants' Affidavits filed: September 15, 2003.

Respondent Raj's Memorandum in Opposition to Claimants' Motion for Summary Judgment and in Further Support of his Dispositive Motions filed: September 15, 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: September 29, 2003.

Claimants' Reply to Merrill Lynch's Response to Claimant's Motion for Partial Summary Judgment filed: September 23, 2003.

Claimants' Supplement to Motion to Summary Judgment filed: October 6, 2003

Respondent Raj's Motion for Expungement filed: November 21, 2003.

Respondent Raj's Supplement to the Motion for Expungement filed: November 25, 2003.

Respondent Merrill Lynch's Motion in Limine filed: April 26, 2004.

Respondent Merrill Lynch's Motion to Exclude filed: April 24, 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 Ben B. Johnson and Gayle Y. Johnson requested:

Compensatory Damages	\$ 433,990.90
Punitive/Treble Damages	\$ 867,981.80
Interest	\$ 108,497.72
Attorneys' Fees	\$ 144,663.63
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 October 1, 2003, a hearing was held in Dallas, Texas on Respondent Raj's Motion To Dismiss, Respondent Komansky's Motion To Dismiss, Claimants' Motion For Partial Summary Judgment Against Respondent Merrill Lynch, Claimants' Motion For Summary Judgment, Respondent Merrill Lynch's Motion For Summary Judgment and Respondent Merrill Lynch's Motion To Compel. Following the hearing, an Order was entered granting the Motions To

Dismiss of Respondents Raj and Komansky, granting Respondent Merrill Lynch's Motion To Compel, denying Respondent Merrill Lynch's Motion For Summary Judgment, and denying Claimants' Motion For Partial Summary Judgment Against Respondent Merrill Lynch.

A hearing was held in Dallas, Texas, beginning at 9:00 A.M. (CST) on May 4, 2004. Present at the hearing were the following:

G. Maynard Green, Public Arbitrator and Chairperson
Robert Gregory, Public Arbitrator
Henry Hermann, Industry Arbitrator
Charles Gall, Counsel for Respondent, Merrill Lynch
Joel Sharp, Counsel for Respondent, Merrill Lynch
Amy Hinzmann, Legal Assistant to counsel for Respondent, Merrill Lynch
Margaret Ruckriegel, Administrative Manager of Merrill Lynch, Fort Worth

Although duly notified of the hearing, Claimants failed to appear. Respondent Merrill Lynch appeared and answered ready. Respondent Merrill Lynch's Motion In Limine and Motion To Exclude were heard and considered by the panel. After hearing the arguments and considering the Motion In Limine and the Motion To Exclude, the panel granted both the Motion In Limine and the Motion To Exclude.

Respondent Merrill Lynch then made a Motion To Dismiss and Charles Gall, after being duly sworn, testified that Respondent Merrill Lynch had expended in excess of \$80,000.00 in attorneys fees and expenses in defending against Claimants' claim. Respondent Merrill Lynch requested to be awarded its attorneys fees and expenses; however, at the conclusion of the hearing, counsel for Respondent Merrill Lynch, advised that it did not wish to have attorney fees awarded against Claimants.

AWARD

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

1. The Respondents' Motion to Dismiss having been granted, the claims against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., David H. Komansky and Deepak D. Raj are hereby dismissed with prejudice;
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	= \$ 500.00
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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	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

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 23, 2003 1 session	
October 1, 2003 1 session	
One (1) Hearing session @ \$1,200.00	= \$ 1,200.00
Hearing: May 4, 2004 1 session	
Total Forum Fees	= \$ 3,600.00

The Panel has assessed \$3,600.00 of the forum fees jointly and severally to Claimants Ben B. Johnson and Gayle Y. Johnson.

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SEE SUMMARY

Claimants Ben B. Johnson and Gayle Y. Johnson are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 3,600.00
Total Fees	= \$ 4,100.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 2,400.00

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

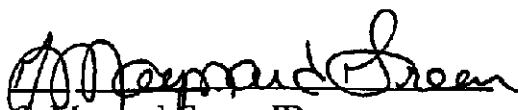
Member Fees	= \$ 8,550.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

G. Maynard Green, JD - Public Arbitrator, Presiding Chairperson
 Robert J. Gregory - Public Arbitrator
 Henry Herman - Non-Public Arbitrator

Concurring Arbitrators' Signatures


 G. Maynard Green, JD
 Public Arbitrator, Presiding Chairperson

June 3, 2004
 Signature Date

 Robert J. Gregory
 Public Arbitrator

 Signature Date

 Henry Herman
 Non-Public Arbitrator

 Signature Date

6/8/04 Law
 Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
Arbitration No. 02-07632
Award Page 7

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G. Maynard Green, JD
Public Arbitrator, Presiding Chairperson

Signature Date

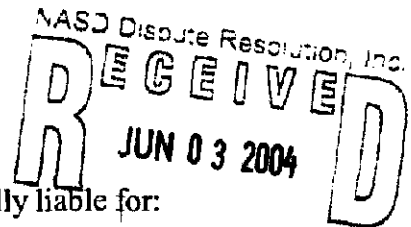
Robert J. Gregory
Public Arbitrator

8 June 2004
Signature Date

Henry Herman
Non-Public Arbitrator

Signature Date

6/8/04 *Alm*
Date of Service (For NASD Dispute Resolution office use only)



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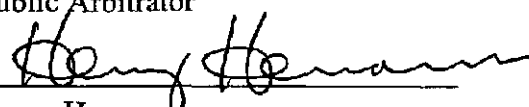
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G. Maynard Green, JD
Public Arbitrator, Presiding Chairperson

Signature Date


Robert J. Gregory
Public Arbitrator

Signature Date



Henry Herman
Non-Public Arbitrator

6-1-04
Signature Date

6/8/04 
Date of Service (For NASD Dispute Resolution office use only)