

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

Jerry F. Kennedy and Betty A. Kennedy

Case Number: 02-07724

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 Customers v. Member Firm and Associated Persons

REPRESENTATION OF PARTIES

Claimants Jerry F. Kennedy and Betty A. Kennedy, hereinafter collectively referred to as "Claimants": Jakes Jordaan, Esq. and Patricia Riley, Esq. of Jordaan & Riley, PLLC, located in Dallas, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and David H. Komansky ("Komansky") were represented by Charles A. Gall, Esq., Joel R. Sharp, Esq., Tracy Robertson, Esq. and Amy C. Hinzmann, Esq. of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

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

CASE INFORMATION

Statement of Claim filed: December 23, 2002.

Claimants signed the Uniform Submission Agreement: December 17, 2002.

Statement of Answer filed by Respondent Merrill Lynch: February 21, 2003.

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

Statement of Answer and Motion to Dismiss filed by Respondent Raj: February 21, 2003.

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

Respondent Komansky's Objection to NASD Jurisdiction filed: February 21, 2003.

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

Claimants' Response to Respondent Komansky's Objection to Jurisdiction and Request for Default Procedures filed: March 13, 2003.

Claimants' Amended Statement of Claim filed: March 14, 2004.

Respondent Raj's Answer and Motion to Dismiss the Amended Statement of Claim filed: March 28, 2003.

Amended Motion to Dismiss and Adoption of the Statement of Answer of Merrill Lynch and Raj filed by Respondent Komansky: March 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 on or about: May 8, 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 on or about: June 30, 2003.

Respondent Merrill Lynch's Motion for Summary Judgment filed: October 1, 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: October 1, 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: October 30, 2003.

Stipulation for Dismissal of Respondent Raj filed: December 15, 2003.

Claimants' Motion to Temporarily Inactivate the Case filed: July 15, 2004

Respondent Merrill Lynch's and Komansky's Response to Claimants' Motion to Temporarily Inactivate the Case filed: July 16, 2004

Claimant's Withdrawal of Claim filed on or about: August 2, 2004.

Respondent Kamansky's Supplemental Request to Expunge filed: August 2, 2004.

Respondent Raj's Supplemental Motion for Expungement filed: August 10, 2004.

CASE SUMMARY

Claimants asserted the following causes of action: violation of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"); 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 Jerry F. Kennedy and Betty A. Kennedy requested:

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|--|----------------------------|
| Compensatory Damages | \$ 99,620.02 |
| Punitive/Treble Damages (DTPA) | \$ 199,240.04 |
| Interest | \$ 24,904.00 |
| Attorneys' Fees | \$ 33,206.67 |
| 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 and that all references to the Statement of Claim and the allegations asserted therein should be expunged from Respondents' CRD records.

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 December 15, 2003, the Parties filed an executed Stipulation of Dismissal dismissing this claim against Respondent Raj.

On July 25, 2004, the Panel granted Claimants' Motion to Temporarily Inactivate the Case and canceled the hearing scheduled to begin August 9, 2004.

On or about August 2, 2004, Claimants withdrew their claims in this matter.

On or about September 28, 2004, the Panel granted Komansky's and Raj's Motion to Expunge CRD Record.

AWARD

After considering the pleadings, the motions and other documents filed in this matter, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Pursuant to the Stipulation of Dismissal and the Withdrawal of Claims filed in this matter, 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:

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|--------------------------|-------------|
| Initial claim filing fee | = \$ 300.00 |
|--------------------------|-------------|

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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following member fees are assessed:

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|-------------------------|---------------|
| Member surcharge | = \$ 1,700.00 |
| Pre-hearing process fee | = \$ 750.00 |
| Hearing process fee | = \$ 2,750.00 |

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:

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|---|---------------|
| One (1) Pre-hearing sessions with Panel @ \$1,125.00 | = \$ 1,125.00 |
| Pre-hearing conferences: September 15, 2003 1 session | |
| Total Forum Fees | = \$ 1,125.00 |

The Panel has assessed \$562.50 of the forum fees jointly and severally to Claimants Jerry F. Kennedy and Betty A. Kennedy and has assessed the remaining \$562.50 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Komansky.

SEE SUMMARY

Claimants Jerry F. Kennedy and Betty A. Kennedy are jointly and severally liable for:

| | |
|---|---------------|
| Initial Filing Fee | = \$ 300.00 |
| Forum Fees | = \$ 562.50 |
| Total Fees | = \$ 862.50 |
| Less payments | = \$ 1,425.00 |
| Balance Refunded by NASD Dispute Resolution | = \$ 562.50 |

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

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| Member Fees | = \$ 5,200.00 |
| Less payments | = \$ 5,200.00 |
| Balance Due NASD Dispute Resolution | = \$ 0.00 |

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Kormanaky are jointly and severally liable for:

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|-------------------------------------|-------------|
| Forum Fees | = \$ 562.50 |
| Less payments | = \$ 0.00 |
| Balance Due NASD Dispute Resolution | = \$ 562.50 |

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

ARBITRATION PANEL

K. Steve Kimball, CFA - Public Arbitrator, Presiding Chairperson
James A. Hayden, II - Public Arbitrator
Raymond E. Jennison - Non-Public Arbitrator

Concurring Arbitrators' Signatures

K. Steve Kimball

K. Steve Kimball, CFA
Public Arbitrator, Presiding Chairperson

Oct 5, 2004

Signature Date

James A. Hayden, II
Public Arbitrator

Signature Date

Raymond E. Jennison
Non-Public Arbitrator

Signature Date

10/7/04 Rlan

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

| | |
|-------------------------------------|---------------|
| Forum Fees | = \$ 5,200.00 |
| Less payments | = \$ 5,200.00 |
| Balance Due NASD Dispute Resolution | = \$ 0.00 |

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Komansky are jointly and severally liable for:

| | |
|-------------------------------------|-------------|
| Forum Fees | = \$ 562.50 |
| Less payments | = \$ 0.00 |
| Balance Due NASD Dispute Resolution | = \$ 562.50 |

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


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K. Steve Kimball, CFA - Public Arbitrator, Presiding Chairperson
 James A. Hayden, II - Public Arbitrator
 Raymond E. Jennison - Non-Public Arbitrator

Concurring Arbitrators' Signatures

K. Steve Kimball, CFA
 Public Arbitrator, Presiding Chairperson

Signature Date


 James A. Hayden, II
 Public Arbitrator

10/5/04
 Signature Date

Raymond E. Jennison
 Non-Public Arbitrator

Signature Date

10/7/04 
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| | |
|-------------------------------------|----------------------|
| Member Fees | = \$ 5,200.00 |
| <u>Less payments</u> | <u>= \$ 5,200.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 0.00 |

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Komansky are jointly and severally liable for:

| | |
|-------------------------------------|------------------|
| Forum Fees | = \$ 562.50 |
| <u>Less payments</u> | <u>= \$ 0.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 562.50 |

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

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Raymond E. Jennison - Non-Public Arbitrator

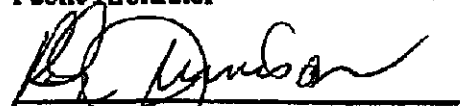
Concurring Arbitrators' Signatures

K. Steve Kimball, CFA
Public Arbitrator, Presiding Chairperson

Signature Date

James A. Hayden, II
Public Arbitrator

Signature Date



Raymond E. Jennison
Non-Public Arbitrator

10/7/04

Signature Date

10/7/04 R/V

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