

**Award  
NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of the Claimant

Josefa Higa IRA  
Josefa Higa Beneficiary of E. Higa  
Enrique and Josefa Higa Trust  
Daniel Higa and Josefa Higa

Case Number: 03-00011

Name of the Respondents

Merrill Lynch Pierce Fenner & Smith and  
Richard Arnold

Hearing Site: St. Louis, Missouri

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**NATURE OF DISPUTE**

Customer vs. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Daniel S. Peters, Esq. of the law firm Herzog, Crebs & McGhee, LLP located in St. Louis, Missouri, represented the Claimants, Josefa Higa IRA, Josefa Higa Beneficiary of E. Higa, Enrique and Josefa Higa Trust, Daniel Higa and Josefa Higa, hereinafter collectively referred to as "Claimants."

Byron E. Francis, Esq. of Armstrong Teasdale, LLP, located in St. Louis, Missouri, represented the Respondents, Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch") and Richard Arnold ("Arnold"), hereinafter collectively referred to as "Respondents."

**CASE INFORMATION**

Statement of Claim filed on January 2, 2003.

Claimant, Josefa Higa, Beneficiary of E. Higa signed the Uniform Submission Agreement on January 21, 2003.

Claimants, Daniel Higa and Josefa Higa, signed the Uniform Submission Agreement on January 22, 2003 and February 11, 2003.

Statement of Answer jointly filed by Respondents, Merrill Lynch Pierce Fenner & Smith and Richard Arnold on May 6, 2003.

Respondent, Merrill Lynch Pierce Fenner & Smith, signed the Uniform Submission Agreement on March 6, 2003.

Respondent, Richard Arnold, signed the Uniform Submission Agreement on May 2, 2003.

### **CASE SUMMARY**

Claimants asserted the following causes of action: negligence, failure to supervise, breach of fiduciary duty, churning, misrepresentations, omissions, suitability and various NASD, NYSE and SEC Rules. The causes of action relate to fixed-income funds invested in a Merrill Lynch Consults® account. Claimant, Josefa Higa, asserted that these funds were not their suitable to her investment needs, and that in order to keep funds with Merrill Lynch against Claimant's wishes to transfer funds to another investment firm, Respondents reinvested the funds so that Claimant could not withdraw without great expense.

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

1. Claimant's claims are barred by the doctrines of waiver, estoppel and ratification. Claimant was fully knowledgeable with respect to the status of her accounts every step of the way and never once raised complaints or concerns to either Arnold or Merrill Lynch. In addition, Claimant followed Arnold to his employer after sustaining the alleged losses, which she contends she sustained in her Statement of Claim. Claimant clearly and unequivocally demonstrated that she understood the transactions and the risks involved.
2. Claimant failed to mitigate her damages by her continued dealings with Respondents and otherwise.
3. Upon proper disclosure, Claimant knowingly, willingly and voluntarily assumed the risks of her investments. Claimant made her own decisions voluntarily and cannot now shift the burden of any investment losses to Respondents. Claimant's losses, if any, were caused by her own conduct.
4. At all relevant times, Respondents conducted their business in a professional manner and acted in good faith without knowledge or of participation in any alleged improper activity.
5. Because Claimant's losses were market drive and because even strict compliance with the asset allocation in the Foundation Reports would not have prevented investment losses, there is no causal connection between Respondents' conduct and Claimants' alleged damages.
6. The claims are barred by the applicable statutes of limitations.
7. All transaction upon which Claimants base their alleged claims against Respondents were conducted in accordance with all applicable Exchange an SRO rules and regulations.
8. Respondents are not liable to Claimants in any amount because, at all time relevant herein, they acted properly, in good faith and in a commercially reasonable manner with respect to Claimants' accounts.
9. Claimants' allegations of misrepresentation are insufficiently plead under the Private Securities Litigation Reform Act of 1995.

10. Imposition of punitive damages based on the instant pleadings and circumstances of this case would violate Respondents' rights under the United States and Missouri constitutions.

#### **RELIEF REQUESTED**

**Claimants requested:**

Compensatory Damages	\$300,000.00
Punitive Damages	unspecified
Interest	unspecified
Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	unspecified

Respondents, Merrill Lynch and Arnold, requested that Panel dismiss, with prejudice, Claimants' Demand for Arbitration and Statement of Claim in its entirety; order that all costs of arbitration be awarded to Respondents; order that Respondent Arnold's U-4 Form and CRD Record be expunged of any reference to this Statement of Claim; and grant Respondents such other and further relief as the arbitration Panel deems just and proper.

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

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

#### **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. Respondent, Richard Arnold, is solely liable for and shall pay Claimants, Josefa Higa IRA, Josefa Higa Beneficiary of E. Higa, Enrique and Josefa Higa Trust, Daniel Higa and Josefa Higa, the sum of \$35,000.00 as compensatory damages, plus interest at the rate of 8% per annum, accruing from May 10, 2001 until award is paid in full.
2. Parties shall bear all other costs, including attorney's fees, except as specified herein.
3. Any and all other relief not specifically addressed herein, including punitive 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

#### **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 person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch Pierce Fenner & Smith is a party to these proceedings and is assessed the following fees:

Member surcharge = \$ 1,700.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 2,750.00

Total fees = \$ 5,200.00

#### **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:

Two (2) Pre-hearing sessions with Panel @ \$1,125.00 = \$ 2,250.00

Pre-hearing conferences: September 19, 2003 1 session  
January 5, 2004 1 session

Seven (7) Hearing sessions @ \$1,125.00 = \$ 7,875.00

Hearing Dates: January 6, 2004 3 sessions  
January 7, 2004 2 sessions  
April 6, 2004 2 sessions

Total Forum Fees = \$10,125.00

1. The Panel has assessed 100% of the total forum fees in the amount of \$10,125.00 solely to Respondent, Richard Arnold.

#### **Fee Summary**

1. Claimants, Josefa Higa IRA, Josefa Higa Beneficiary of E. Higa, Enrique and Josefa Higa Trust, Daniel Higa and Josefa Higa are jointly and severally liable for:

Initial Filing Fee = \$ 300.00

Less payments = \$ 1,425.00

Refund Due from NASD Dispute Resolution = \$ 1,125.00

2. Respondent, Merrill Lynch Pierce Fenner & Smith, is solely liable for:
- |                                     |                      |
|-------------------------------------|----------------------|
| Member Fees                         | = \$ 5,200.00        |
| <u>Less payments</u>                | <u>= \$ 5,200.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 0.00            |
3. Respondent, Richard Arnold, is solely liable for:
- |                                     |                  |
|-------------------------------------|------------------|
| Forum Fees                          | = \$10,125.00    |
| <u>Less payments</u>                | <u>= \$ 0.00</u> |
| Balance Due NASD Dispute Resolution | = \$10,125.00    |

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

**ARBITRATION PANEL**

Leah M. Balk-Teitelbaum, Esq.	-	Public Arbitrator, Presiding Chairperson
Robert Gregory Bailey	-	Public Arbitrator
Kimberly Renee McBride	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

_____ Leah M. Balk-Teitelbaum, Esq. Public Arbitrator, Presiding Chairperson	<u>04/07/04</u> Signature Date
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_____ Robert Gregory Bailey Public Arbitrator	<u>04/12/04</u> Signature Date
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_____ Kimberly Renee McBride Non-Public Arbitrator	<u>04/08/04</u> Signature Date
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04/12/04  
Date of Service (For NASD Dispute Resolution office use only)

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

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

3. Respondent, Richard Arnold, is solely liable for:

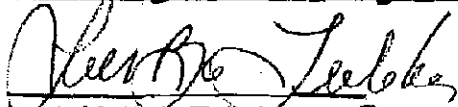
Forum Fees	= \$10,125.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$10,125.00

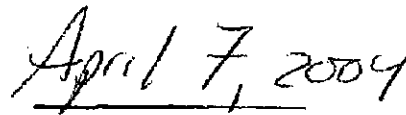
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Robert Gregory Bailey	-	Public Arbitrator
Kimberly Renee McBride	-	Non-Public Arbitrator

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Public Arbitrator, Presiding Chairperson

  
Signature Date

Robert Gregory Bailey  
Public Arbitrator

Signature Date

Kimberly Renee McBride  
Non-Public Arbitrator

Signature Date

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

NASD Dispute Resolution  
Arbitration No. 03-00011  
Award Page 5

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

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Forum Fees	= \$10,125.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$10,125.00

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Leah M. Balk-Tettelbaum, Esq.  
Public Arbitrator, Presiding Chairperson

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

  
\_\_\_\_\_  
Robert Gregory Bailey  
Public Arbitrator

April 12, 2004  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Kimberly Renee McBride  
Non-Public Arbitrator

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Signature Date

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Robert Gregory Bailey  
Public Arbitrator

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Signature Date

  
\_\_\_\_\_  
Kimberly Renee McBride  
Non-Public Arbitrator

4/8/04  
\_\_\_\_\_  
Signature Date

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