

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimants

John Ted and Cynthia K. Gilmore

Case Number: 03-01610

Name of the Respondents

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

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Public Customer v. Member Firm and Associated Persons

REPRESENTATION OF PARTIES

Claimants John Ted and Cynthia K. Gilmore, 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.

Respondent Andrew J. Melnick ("Melnick"): Donald A. Corbett, Esq., of the firm of Carter Ledyard & Milburn LLP, located in New York, New York.

CASE INFORMATION

Statement of Claim filed: March 6, 2003.

Both Claimants signed the Uniform Submission Agreement: February 20, 2003.

Statement of Answer filed by Respondent Merrill Lynch: May 7, 2003.

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

Respondent Komansky's Motion to Dismiss filed: May 7, 2003.

Respondent Komansky did not file a signed Uniform Submission Agreement.

Statement of Answer and Motion to Dismiss filed by Respondent Raj: May 7, 2003.
Respondent Raj signed the Uniform Submission Agreement: April 21, 2003.

Claimants' Motion for Partial Summary Judgment Against Respondent Merrill Lynch Pursuant to Texas Securities Act §33A(2) filed: May 8, 2003.

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

Motion to Dismiss and Statement of Answer filed by Respondent Melnick: October 4, 2003
Respondent Melnick did not file a signed Uniform Submission Agreement.

Respondent Merrill Lynch's Response to Claimants' Motion for Partial Summary Judgment filed: November 5, 2003.

Respondent Merrill Lynch's Motion for Summary Judgment filed: November 14, 2003.

Respondent Melnick's Supplemental Memorandum in Support of Motion to Dismiss filed: November 21, 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: November 21, 2003.

Respondent Raj's Letter in Further Support of His Motion to Dismiss and for Summary Judgment filed: November 26, 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: December 9, 2003.

Claimants' Response to Respondent Merrill, Lynch, Pierce, Fenner & Smith's Supplemental Memorandum in Support of Motion for Summary Judgment and Response to Claimants' Motion for Summary Judgment and Request for NASD Investigation filed: December 9, 2003.

Stipulation of Dismissal of Respondent Andrew J. Melnick filed: December 17, 2003.

Stipulation of Dismissal of Respondent Deepak Raj filed: December 18, 2003.

Respondent Merrill Lynch's Reply to Claimants' Supplemental Response and Brief filed:

February 2, 2004.

Claimants' Supplemental Facts and Authorities filed: February 4, 2004.

Claimants' Second Supplemental Facts and Authorities filed: February 12, 2004.

Claimants' Third Supplemental Facts and Authorities filed: February 15, 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.

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

1. Claimants fail to state a claim upon which relief can be granted;
2. Claimants suffered no damages by reason of the acts complained of in the Statement of Claim;
3. Melnick is not liable to Claimants in any amount because, at all times relevant herein, Melnick acted properly and in good faith;
4. Pursuant to the terms of the customer and other agreements executed by Claimants, all substantive claims raised by Claimants with respect to their

- accounts are to be determined under New York law;
5. Claimants failed to mitigate their damages, if any;
 6. Claimants directed, approved and/or authorized each and every transaction for their accounts and/or ratified, accepted, acquiesced in, and confirmed in all respects such transactions. Consequently, their claims are barred by the equitable doctrines of estoppel, laches, ratification, and waiver;
 7. All risks inherent in the investments at issue were fully disclosed and/or known to and assumed by claimants. 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 Melnick;
 8. At all relevant times, Melnick maintained an adequate and reasonable system of supervision and control over employees, acted in good faith, and did not, directly or indirectly, induce any act or acts constituting a violation or cause of action. Thus, Melnick is not subject to liability as a "control person" or under the theory of *respondeat superior*;
 9. Claimants are not entitled to an award of attorneys' fees, punitive damages, interest, or the cost of this proceeding;
 10. Claimants' allegations are barred by the governing statutes of limitations; and,
 11. As applicable, the defenses asserted by the other Respondents are incorporated by reference.

RELIEF REQUESTED

Claimants John Ted and Cynthia K. Gilmore requested:

Compensatory Damages	\$ 1,291,557.94
Treble Damages (Statutory DTPA)	\$ 2,583,115.88
Punitive Damages	As determined by the Panel
Attorneys' Fees	\$ 430,519.31
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.

Respondent Melnick requested an award in his favor dismissing the Statement of Claim with prejudice, and awarding Melnick such other and further relief as may seem just and proper. In addition, Melnick requested that the Panel recommend that all references to the Statement of Claim and Claimants' allegations be expunged from Melnick's CRD records.

OTHER ISSUES CONSIDERED AND DECIDED

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

In his Motion to Dismiss, Respondent Komansky objected to the jurisdiction of the NASD, claiming he had not been registered since December, 1998. In addition, subject to the decision on the Motion to Dismiss, Komansky adopted and incorporated the Answers of Merrill Lynch and Raj.

On or about December 12, 2003, Claimants and Respondent Raj entered into a Stipulation of Dismissal. Pursuant to the Stipulation, the action was dismissed with prejudice against Respondent Deepak Raj.

On or about December 12, 2003, Claimants and Respondent Melnick entered into a Stipulation of Dismissal. Pursuant to the Stipulation, the action was dismissed with prejudice against Respondent Andrew J. Melnick.

On February 6, 2004, the Panel held an in-person pre-hearing conference to hear argument on Claimants' Motion for Partial Summary Judgment, Respondent Merrill Lynch's Motion for Summary Judgment and Respondent Komansky's Motion to Dismiss. After hearing the arguments, reviewing the pleadings and all post-hearing submissions, the Panel determined as follows:

1. The Motion by John Ted Gilmore and Cynthia K. Gilmore, Claimants, for Partial Summary Judgment is hereby denied;
2. The Motion for Summary Judgment filed by Merrill Lynch, Pierce, Fenner & Smith, Inc. is hereby, granted;
3. The Motion by David H. Komansky for dismissal of the claim against him is hereby granted; and
4. All administrative costs and forum fees and assessments be, and they are hereby, assessed against Claimants, John Ted Gilmore and Cynthia K. Gilmore.

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. Pursuant to the Panel's decision, the claims asserted against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Komansky by Claimants John Ted and Cynthia K. Gilmore are hereby dismissed with prejudice;
2. Pursuant to the parties' Stipulation of Dismissal, the claims against Respondents Deepak D. Raj and Andrew J. Melnick are dismissed with prejudice;
3. The parties shall bear their own costs of arbitration, including any attorneys' fees,

- except for those sums specifically enumerated herein; and
4. Any and all relief not specifically addressed herein, including punitive and 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	= \$ 600.00
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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, 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: November 5, 2003 1 session	
February 6, 2004 1 session	
<hr/> Total Forum Fees	<hr/> = \$ 2,400.00

The Panel has assessed \$2,400.00 of the forum fees to Claimants John Ted and Cynthia K. Gilmore.

EEE SUMMARY

Claimants John Ted and Cynthia K. Gilmore are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 2,400.00
<hr/> Total Fees	<hr/> = \$ 3,000.00

Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 1,200.00

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

Philip C. Crouse -Public Arbitrator, Presiding Chairperson
John Laurence Martin -Public Arbitrator
Kurt L. Smith -Non-Public Arbitrator

Concurring Arbitrators' Signatures

Philip C. Crouse
Public Arbitrator, Presiding Chairperson

Signature Date

John Laurence Martin
Public Arbitrator

Signature Date

Kurt L. Smith
Non-Public Arbitrator

Signature Date

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

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Less payments	- \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 1,200.00

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

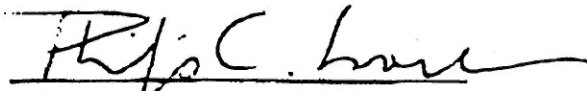
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Philip C. Crouse
Public Arbitrator, Presiding Chairperson

2-23-04
Signature Date

John Laurence Martin
Public Arbitrator

Signature Date

Kurt L. Smith
Non-Public Arbitrator

Signature Date

2/25/04 nlm
Date of Service (For NASD Dispute Resolution office use only)

PCC
2-23-04

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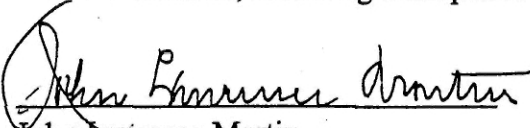
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Public Arbitrator, Presiding Chairperson

Signature Date


John Laurence Martin
Public Arbitrator

24 February 2004
Signature Date

Kurt L. Smith
Non-Public Arbitrator

Signature Date

2/25/04 
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
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Signature Date

John Laurence Martin
Public Arbitrator

Signature Date

Kurt L. Smith
Non-Public Arbitrator

Signature Date

2/25/04 *Wan*
Date of Service (For NASD Dispute Resolution office use only)