

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

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In the Matter of the Arbitration Between:

Names of the Claimants

David N. Dolton  
Karen B. Dolton

Case Number 03-01988

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
James J. King  
William E. Fraley, III

Hearing Site: Washington, DC

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Nature of the Dispute: Customers vs. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimants, David N. Dolton and Karen B. Dolton, hereinafter collectively referred to as "Claimants", were represented by William S. Burroughs, Jr., Esq., Attorney at Law, Orange Park, Florida.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), James J. King ("King"), and William E. Fraley, III ("Fraley"), hereinafter collectively referred to as "Respondents", were represented by Ira L. Oring, Esq. and Alex M. Allman, Esq., Fedder and Garten, P.A., Baltimore, Maryland.

**CASE INFORMATION**

Statement of Claim filed on March 13, 2003.

Claimants signed the Uniform Submission Agreement on February 28, 2003.

Joint Statement of Answer filed by Respondents on June 3, 2003.

Respondent King signed the Uniform Submission Agreement on August 14, 2003.

Respondent Fraley signed the Uniform Submission Agreement on August 18, 2003.

**CASE SUMMARY**

Claimants alleged that Respondents Merrill Lynch, King, and Fraley:

1. defrauded them in violation of the Securities Exchange Act, Virginia Securities Act, and D.C. Securities Act;
2. defrauded them in violation of the D.C. Consumer Protection Act;
3. committed actual and constructive fraud under common law;
4. negligently breached their duty to the Claimants, in violation of the standards and practices of the securities industry;
5. breached both express and implied contractual obligations, and;
6. breached their fiduciary duty.

The causes of action relate to the alleged failure of the Respondents to assist the Claimants in diversifying their portfolio by recommending the sale of technology stocks which Claimants had acquired prior to opening their accounts at Merrill Lynch, and the purchase of various unspecified technology stocks in Claimants' "Consult" accounts.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses, among others: the Statement of Claim is barred by the doctrines of waiver, estoppel, ratification, and laches; sole or contributory negligence; statute of limitations; assumption of the risk; and the Statement of Claim fails to set forth a cause of action upon which relief can be granted.

#### RELIEF REQUESTED

Claimants in their Statement of Claim requested actual damages in the amount of \$304,759.09, interest at 6% *per annum* from November 1, 2000 to July 27, 2001 on the entire amount invested with Merrill Lynch, punitive damages in the amount of \$715,958.18, costs, attorneys' fees, and interest on the entire award at the Virginia judgment rate of 9% *per annum*.

Respondents in their Statement of Answer requested that the Statement of Claim be dismissed in its entirety, that all references to this arbitration be expunged from the registration records of Respondents King and Fraley as maintained in the NASD Central Registration Depository ("CRD"), and that Respondents be awarded costs and attorneys' fees.

#### OTHER ISSUES CONSIDERED AND DECIDED

Respondent Merrill Lynch 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 Arbitration Panel (the "Panel") on all issues submitted.

At the hearing Claimants withdrew their claim that Respondents had violated the Virginia Consumer Protection Act.

The crux of the Doltons' claims is that Respondents King and Fraley failed to diversify Claimants' investment holdings, resulting in losses during 2000 and 2001. In essence, Claimants' claims against the individual Respondents revolve around the suitability of various investments and also that the individual Respondents were unresponsive to Claimants' desire to diversify their portfolio. The claim against Merrill Lynch appears to focus on an alleged failure to supervise.

The Panel finds no evidence to support claims by Claimants against Respondent Merrill Lynch.

With regards to Claimants' claims against King and Fraley, the testimony of the Claimants and the individual Respondents was flatly contradictory. Although Claimants corroborated each other's testimony and King and Fraley generally corroborated each other, there was no corroboration of any testimony by a disinterested witness. Moreover, the Panel notes the remarkable absence of

documentary evidence to corroborate either side's version of the central events of their 2000-2001 relationship. Counsel for both parties correctly acknowledged that the testimony of the Claimants and the individual Respondents could not be reconciled.

Without reaching any conclusions regarding the credibility of the testimony of any of the witnesses, the Panel finds that Claimants had ample contemporaneous evidence regarding the specific investments in their portfolio during the period when they maintained their non-discretionary accounts with Respondents. However, Claimants failed to take appropriate and clear action to direct a change in their holdings. In addition, even if Claimants were dissatisfied with the performance of King and Fraley, there is no evidence that they brought their alleged dissatisfaction to the attention of Merrill Lynch managers. The Panel concludes that Claimants ratified the actions of the Respondents, and their claims therefore fail.

The parties have 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, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. All claims for compensatory damages are denied in their entirety;
2. All claims for punitive damages and attorneys' fees are denied in their entirety;
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Fraley'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 Fraley must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
4. Respondent King's request for expungement is denied;
5. The parties shall bear their respective costs, including attorneys' fees, except as Fees are specifically addressed below; and
6. Any and all relief not specifically addressed herein is denied in its entirety.

#### 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

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch is a party.

Member surcharge = \$ 2,800.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 5,000.00

Total Member Fees = \$ 8,550.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

May 12-14, 2004 adjournment by Claimants = \$1,200.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the 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: January 20, 2004 1 session  
April 14, 2004 1 session

Seven (7) Hearing sessions @ \$ 1,200.00 = \$ 8,400.00

Hearing Dates: October 18, 2004 2 sessions  
October 19, 2004 2 sessions  
October 20, 2004 3 sessions

Total Forum Fees = \$ 10,800.00

1. The Panel has assessed \$5,400.00 of the forum fees jointly and severally to Claimants.
2. The Panel has assessed \$5,400.00 of the forum fees jointly and severally to Respondents.

FEE SUMMARY

1. Claimants are jointly and severally assessed and shall pay the following fees:

Initial Filing Fee = \$ 500.00

Adjournment Fee = \$ 1,200.00

Forum Fees = \$ 5,400.00

Total Fees = \$ 7,100.00

Less payments = \$ 1,700.00

Balance Due NASD Dispute Resolution = \$ 5,400.00

2. Respondent Merrill Lynch is assessed and shall pay the following fees:

Member Fees = \$ 8,550.00

Total Fees = \$ 8,550.00

Less payments = \$ 8,550.00

Balance Due NASD Dispute Resolution = \$ 00.00

4. Respondents are jointly and severally assessed and shall pay the following fees:

Forum Fees = \$ 5,400.00

Total Fees = \$ 5,400.00

Less payments = \$ 00.00

Balance Due NASD Dispute Resolution = \$ 5,400.00

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

ARBITRATION PANEL

Paul Greenberg, Esq.

- Public Arbitrator, Presiding Chairperson

James R. Stirn

- Public Arbitrator, Panelist

Joan M. Confoy

- Non-Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

\_\_\_\_\_  
Paul Greenberg, Esq  
Public Arbitrator, Presiding Chairperson

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Signature Date

\_\_\_\_\_  
James R. Stirn  
Public Arbitrator, Panelist

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

\_\_\_\_\_  
Joan M. Confoy  
Non-Public Arbitrator, Panelist

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Signature Date

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

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Concurring Arbitrators' Signatures



Paul Greenberg, Esq  
Public Arbitrator, Presiding Chairperson

11/11/04  
Signature Date

James R. Stirn  
Public Arbitrator, Panelist

Signature Date

Joan M. Confoy  
Non-Public Arbitrator, Panelist

Signature Date

11/15/04  
Date of Service (For NASD Dispute Resolution office use only)

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NASD DISPUTE RESOLUTION

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Concurring Arbitrators' Signatures

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Paul Greenberg, Esq  
Public Arbitrator, Presiding Chairperson

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Signature Date:

  
James R. Stirn  
Public Arbitrator, Panelist

November 11, 2004  
Signature Date

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Joan M. Confoy  
Non-Public Arbitrator, Panelist

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Signature Date

11/15/04  
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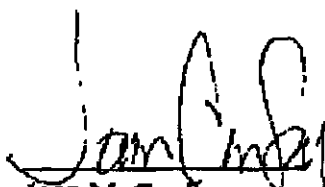
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Paul Greenberg, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date:

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Public Arbitrator, Panelist

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Non-Public Arbitrator, Panelist

  
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