

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

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In the Matter of the Arbitration Between:

Names of the Claimants

L. A. Murray, Jr.  
Murray Family Trust Account  
MAD Investments, Inc. #2

Case Number: 03-02864

Names of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Robert Ewing, IV  
Randy Kirby

Hearing Site: New Orleans, Louisiana

Name of the Third Party Respondent

Michael Murray

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Nature of the Dispute: Customer vs. Member and Associated Person vs. Customer.

**REPRESENTATION OF PARTIES**

For L. A. Murray, Jr., Murray Family Trust Account and MAD Investments, Inc. #2, hereinafter collectively referred to as "Claimants": Samuel David Abraham, Esq., Law Offices of Samuel David Abraham, Lafayette, Louisiana.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), Robert Ewing, IV ("Ewing") and Randy Kirby ("Kirby"), hereinafter collectively referred to as "Respondents": Meredith A. Cunningham, Esq. and George C. Freeman, III, Esq., Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., New Orleans, Louisiana.

For Michael Murray, hereinafter referred to as "Third Party Respondent": Samuel David Abraham, Esq., Law Offices of Samuel David Abraham, Lafayette, Louisiana.

**CASE INFORMATION**

Statement of Claim filed on or about: April 21, 2003.

Claimants signed the Uniform Submission Agreements: April 15, 2003.

Statement of Answer filed by Respondents on or about: July 1, 2003.

Third Party Claim against Michael Murray filed by Respondent MLPFS on or about: July 1, 2003.

Respondent MLPFS signed the Uniform Submission Agreement: June 2, 2003.

Respondent Ewing signed the Uniform Submission Agreement: June 26, 2003.

Respondent Kirby signed the Uniform Submission Agreement: June 26, 2003.

Answer of Michael Murray to Third Party Claim filed on or about: July 24, 2003.

Third Party Respondent Michael Murray did not file an executed Uniform Submission Agreement.

Motion to Supplement Statement of Claim filed on or about: April 20, 2004.

Respondents' Objections to Motion to Amend Statement of Claim filed on or about: May 10, 2004.

Motion to Supplement Statement of Claim filed by Claimants on or about: July 15, 2004.

Respondents' Objections to Claimants' Motion to Amend Statement of Claim filed on or about: July 22, 2004.

Reply Brief to Respondents' Opposition to Claimants' Motion to Supplement Statement of Claim filed by Claimants on or about: July 30, 2004.

Motion to Dismiss filed by Respondents on or about: August 2, 2004.

Motion to Dismiss Claimants' Second Supplemental Statement of Claim filed by Respondents on or about: August 27, 2004.

Claimants' Opposition to Respondents' Motion to Dismiss filed on or about: September 8, 2004.

Respondents' Reply Memorandum in Support of Motion to Dismiss filed on or about: September 20, 2004.

Claimants' Motion to Dismiss filed on or about: October 28, 2004.

Respondents' Motion for Expungement and to Dismiss All Claims with Prejudice filed on or about: November 3, 2004.

### **CASE SUMMARY**

Claimants asserted the following causes of action: unsuitability; breach of fiduciary duty; research report fraud; nondisclosure; and, failure to supervise. The causes of action relate to Respondents' liquidation of the bonds in Claimants' portfolio and Respondents' purchase of OTC stocks, which include, but are not limited to, Ariba, AMCC, ICGE, Motorola, Tyco, as well as Merrill Lynch Focus 20 and Munder Power annuity funds.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In addition, Respondent MLPFS asserted a claim for indemnification in its Third Party Claim.

Unless specifically admitted in his Answer, Third Party Respondent denied the allegations made in the Third Party Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested an unspecified amount of compensatory damages, plus the gains made and lost, as well as interest thereon from July 2000 to the present; or alternatively, well-managed portfolio damages; return of all fees, commission and/or charges imposed upon or charged against their retirement funds by Respondent MLPFS from July 2000 to the present; costs; fees; attorneys' fees; punitive damages in an amount deemed appropriate by the Panel; and, damages for severe emotional distress.

Respondents requested that the Statement of Claim be denied in all respects, that all fees and costs be assessed against Claimants and that the Respondents be awarded such other relief as is deemed just and proper. Further, Respondents Ewing and Kirby requested that all references to the allegations in this matter and this proceeding be expunged from their respective registration records maintained by the NASD Central Registration Depository ("CRD"). In addition,

Respondent MLPFS requested in its Third Party Claim that Third Party Respondent be ordered to indemnify Respondent MLPFS for any damage award entered against Respondent MLPFS; that all forum fees and costs be assessed against Third Party Respondent; and, that they be awarded such other relief as is deemed just and proper.

Third Party Respondent requested that Respondents take nothing from this claim; that all costs, attorneys' fees and expenses be assessed against Respondents; and that they be awarded such other relief that this Panel deemed just and proper.

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

Third Party Respondent did not file with NASD Dispute Resolution ("NASD") a properly executed Uniform Submission Agreement and is not required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code"). However, Third Party Respondent voluntarily submitted to the jurisdiction of NASD, answered the third party claim and is therefore bound by the determinations of the Panel on all issues submitted.

Claimants filed with NASD a Motion to Supplement Statement of Claim wherein Claimants requested that the Statement of Claim be amended to add the allegations of research report fraud and nondisclosure. Respondents filed with NASD their Objections to Claimants' Motion to Amend Statement of Claim. On or about May 27, 2004, the Panel issued an Order granting Claimants' Motion to Supplement Statement of Claim.

Claimants' filed with NASD a Motion to Supplement Statement of Claim, wherein Claimants requested the Statement of Claim be amended to add MAD Investments, Inc. #2 and the Murray Family Trust Account as Claimants, in this matter. Respondents filed with NASD their Objections to Claimants' Motion to Amend Statement of Claim. On or about August 5, 2004, the Panel issued an Order granting Claimants' Motion to Supplement Statement of Claim.

On or about September 27, 2004, the Panel issued an Order, which dismissed all claims related to Claimant MAD Investments Account #2. The Panel further dismissed all claims related to the unsuitability of the Merrill Lynch annuity.

On or about November 9, 2004, the Panel issued an Order granting Claimants' Motion to Voluntarily Dismiss and Respondents' Motion to Dismiss All Claims with Prejudice. The Panel further granted Respondents' Motion for Expungement of the instant proceeding from the records of Respondents Ewing and Kirby.

### **AWARD**

After considering the pleadings, the motions to dismiss, motion for expungement, and the record in this matter, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Claimants' claims are dismissed, with prejudice.

Respondent MLPFS's Third Party Claim is dismissed, with prejudice.

The Panel recommends the expungement of all references to the above captioned arbitration from Respondents Ewing and Kirby's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondents Ewing and Kirby must obtain confirmation from a court of competent jurisdiction before the NASD CRD will execute the expungement directive.

Any and all relief not specifically addressed herein, including Claimants' request for attorneys' fees and punitive damages, are 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	= \$ 250.00
Third Party 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 firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondent MLPFS is a member firm and a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$2,200.00</u>
Total Members Fees	= \$4,450.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No adjournment fees were incurred in this matter.

#### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

No three-day cancellation fees were incurred in this matter.

#### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

No injunctive relief fees were incurred in this matter.

**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:

Three (3) Pre-hearing sessions with the Panel @ \$1000.00/session	= \$3,000.00
Pre-hearing conferences: December 3, 2003	1 session
July 14, 2004	1 session
September 24, 2004	1 session

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Total Forum Fees	= \$3,000.00
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The Panel has assessed the forum fees of \$1,000.00 to Claimants, jointly and severally.  
The Panel has assessed the forum fees of \$1,000.00 to Respondents, jointly and severally.  
The Panel has assessed the forum fees of \$1,000.00 to Third Party Respondent.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

**Fee Summary**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 250.00
Forum Fees	= \$1,000.00
Total Fees	= \$1,250.00
Less payments	= \$1,250.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent MLPFS is solely liable for:

Third Party Claim Filing Fee	= \$ 500.00
Member Fees	= \$4,450.00
Total Fees	= \$4,950.00
Less payments	= \$4,450.00
Balance Due NASD Dispute Resolution	= \$ 500.00

Respondents are jointly and severally liable for:

Forum Fees	= \$1,000.00
Total Fees	= \$1,000.00
Less payments	= \$1,000.00
Balance Due NASD Dispute Resolution	= \$1,000.00

Third Party Respondent is solely liable for:

Forum Fees	= \$1,000.00
Total Fees	= \$1,000.00
Less payments	= \$1,000.00
Balance Due NASD Dispute Resolution	= \$1,000.00

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

**ARBITRATION PANEL**

Simeon B. Reimonenq, Jr., Esq.	-	Public Arbitrator, Presiding Chairperson
Diane B. Elkins	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Simeon B. Reimonenq, Jr. Esq.  
Public Arbitrator, Presiding Chairperson

November 15, 2004  
Signature Date

/s/  
Diane B. Elkins  
Public Arbitrator

November 16, 2004  
Signature Date

/s/  
Charles A. Bosworth, III  
Non-Public Arbitrator

November 16, 2004  
Signature Date

November 19, 2004  
Date of Service (For NASD Dispute Resolution office use only)

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Third Party Respondent is solely liable for:

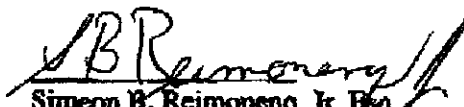
<u>Forum Fees</u>	= \$1,000.00
<u>Total Fees</u>	= \$1,000.00
<u>Less payments</u>	= \$1,000.00
<u>Balance Due NASD Dispute Resolution</u>	= \$1,000.00

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Simeon B. Reimoneng, Jr., Esq.	-	Public Arbitrator Presiding Chairperson
Diane B. Elkins	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Simeon B. Reimoneng, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

11/15/04  
Signature Date

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Diane B. Elkins  
Public Arbitrator

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

\_\_\_\_\_  
Charles A. Bosworth, III  
Non-Public Arbitrator

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

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

Third Party Respondent is solely liable for:

<u>Forum Fees</u>	= \$1,000.00
<u>Total Fees</u>	= \$1,000.00
<u>Less payments</u>	= \$1,000.00
<u>Balance Due NASD Dispute Resolution</u>	= \$1,000.00

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Diane B. Elkins	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Simeon B. Reimoneng, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

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Diane B. Elkins  
Public Arbitrator

11/16/04  
Signature Date

Charles A. Bosworth, III  
Non-Public Arbitrator

Signature Date

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

Third Party Respondent is solely liable for:

<u>Forum Fees</u>	<u>= \$1,000.00</u>
<u>Total Fees</u>	<u>= \$1,000.00</u>
<u>Less payments</u>	<u>= \$1,000.00</u>
<u>Balance Due NASD Dispute Resolution</u>	<u>= \$1,000.00</u>

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

**ARBITRATION PANEL**

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Diane B. Elkins	-	Public Arbitrator
Charles A. Bosworth, III	-	Non-Public Arbitrator


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Simeon B. Reimonenq, Jr. Esq.  
Public Arbitrator, Presiding Chairperson

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