

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

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In the Matter of the Arbitration Between:

Michael and Geraldine Clemente, Kristen Clemente, and Matthew Clemente (Claimants) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., Kevin Nohilly, and Gustav Fingado, IV (Respondents)

Case Number: 04-00576

Hearing Site: Newark, New Jersey

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

**REPRESENTATION OF PARTIES**

Claimants Michael and Geraldine Clemente, Joint Account ("M. and G. Clemente"), Michael and Geraldine Clemente, custodians for Kristen Clemente ("Kristen"), Michael and Geraldine Clemente, custodians for Matthew Clemente ("Matthew"), hereinafter collectively referred to as "Claimants": Michael S. Kasanoff, Esq., Law Office of Michael Kasanoff, Red Bank, New Jersey.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Kevin Nohilly, ("Nohilly"), Gustav Fingado, IV ("Fingado") hereinafter collectively referred to as "Respondents": G. Jeffrey Boujoukos, Esq., and Erica Smith-Klocek, Esq., Morgan Louis & Bockius, Philadelphia, Pennsylvania.

**CASE INFORMATION**

Statement of Claim filed on or about: January 29, 2004.

Amended Statement of Claim filed on or about: March 11, 2005.

M. and G. Clemente signed the Uniform Submission Agreement: January 26, 2004.

Kristen signed the Uniform Submission Agreement: January 26, 2004.

Matthew signed the Uniform Submission Agreement: January 26, 2004.

Joint Statement of Answer filed by Respondents on or about: April 16, 2004.

Joint Answer to the Amended Statement of Claim filed on or about: April 11, 2005.

Merrill Lynch did not sign the Uniform Submission Agreement.

Nohilly did not sign the Uniform Submission Agreement.

Fingado did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimants asserted the following causes of action in the Statement of Claim and Amended Statement of Claim: breach of fiduciary duty; misrepresentation; omission of facts; manipulation; suitability; breach of contract; failure to execute; and, failure to supervise. The causes of action relate to the failure to follow a stop-loss order for an unspecified mutual fund and shares of common stock.

Unless specifically admitted in their Answer to the Statement of Claim and Amended Statement of Claim, Respondents denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$4,000,000.00, punitive damages, \$12,000,000.00 in treble damages, interest, costs, attorneys' fee, and all other relief that may be awarded by the Panel.

Respondents requested dismissal of the Statement of Claim and Amended Statement of Claim in their entirety.

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

Respondents Merrill Lynch, Nohilly, and Fingado did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

On or about May 2, 2006, Claimants withdrew with prejudice the Kristen Clemente and Matthew Clemente claims.

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

### **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. M. and G. Clemente's claims are dismissed in their entirety.
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Kevin Nohilly'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 Kevin Nohilly must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Gustav Fingado's, IV, 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 Gustav Fingado, IV, must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

4. Any and all 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 = \$ 600.00

#### **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.

Member surcharge = \$ 3,750.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 5,500.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

May 3, 4, 6, 2005, adjournment by Claimants = \$1,200.00

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. 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 a single arbitrator @ \$450.00 per session = \$ 900.00

Pre-hearing conferences: February 18, 2005 1 session  
February 25, 2005 1 session

Four (4) Pre-hearing sessions with Panel @ \$1,200.00 per session = \$ 4,800.00

Pre-hearing conferences: July 16, 2004 1 session  
March 29, 2005 1 session  
April 29, 2005 1 session  
June 12, 2006 1 session

Twenty-Seven (27) Hearing sessions with Panel @ \$1,200.00 per session = \$32,400.00

Hearing Dates May 2, 2006 2 sessions  
May 3, 2006 2 sessions  
May 4, 2006 2 sessions  
May 9, 2006 2 sessions

May 10, 2006	2 sessions
May 15, 2006	2 sessions
May 22, 2006	2 sessions
May 25, 2006	2 sessions
June 21, 2006	1 session
June 22, 2006	2 sessions
July 18, 2006	2 sessions
July 19, 2006	2 sessions
July 20, 2006	2 sessions
July 26, 2006	2 sessions

**Total Forum Fees** = \$38,100.00

1. The Panel has assessed \$19,650.00 of the forum fees, jointly and severally, to the Claimants.
2. The Panel has assessed \$18,450.00 of the forum fees, jointly and severally, to the Respondents.

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$19,650.00
Total Fees	= \$21,450.00
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$19,650.00

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

Member Fees	= \$10,000.00
Total Fees	= \$10,000.00
Less payments	= \$10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents are jointly and severally liable for:

Forum Fees	= \$18,450.00
Total Fees	= \$18,450.00
Less payments	= \$ 5,500.00
Balance Due NASD Dispute Resolution	= \$12,950.00

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

**ARBITRATION PANEL**

Cheryl H. Agris, PhD	-	Public Arbitrator, Presiding Chairperson
Daniel A. Pinkus, Esq.	-	Public Arbitrator
Robert A. Cohen	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Cheryl H. Agris  
Cheryl H. Agris, PhD  
Public Arbitrator, Presiding Chairperson

8/7/06  
Signature Date

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Daniel A. Pinkus, Esq.  
Public Arbitrator

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Signature Date

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Robert A. Cohen  
Non-Public Arbitrator

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Signature Date

August 7, 2006

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Date of Service (For NASD Dispute Resolution use only)

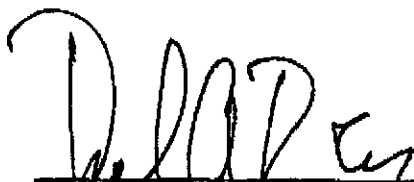
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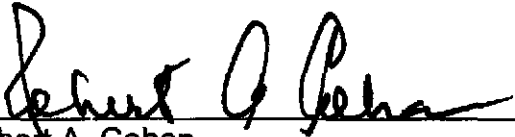
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