

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

In the Matter of the Arbitration Between: :  
Robert W. and Clarie F. Jentsch :  
Claimants : MODIFIED  
vs. : AWARD  
Johnston Lemon & Co., Inc. : Case #90-01742  
David D. Fitzgerald :  
Lazard Freres & Co. :  
Respondents :  
:

## REPRESENTATION

For Claimants: Robert W. and Claire F. Jentsch appeared pro se. Claire F. Jentsch was not present at the hearing.

For Respondent: Johnston Lemon & Co., Inc. was represented by Donald E. Clem.

For Respondent: David D. Fitzgerald appeared pro se.

For Respondent: Lazard Freres & Co. was represented by Steven R. Neuwirth, Esq. of the law firm of Wachtell, Lipton, Rosen & Katz.

### CASE INFORMATION

Statement of Claim filed: June 19, 1990.

Claimant's Submission Agreement signed on: June 7, 1990.

Statement of Answer filed by Respondent, Johnston Lemon & Co., Inc. on: August 14, 1990. Respondent Johnston Lemon & Co., Inc. Submission Agreement signed on: August 3, 1990.

Statement of Answer filed by Respondent, David D. Fitzgerald, on: August 14, 1990. Respondent, David D. Fitzgerald's Submission Agreement signed on: February 8, 1991.

Statement of Answer filed by Respondent Lazard Freres & Co., on: August 28, 1990. Respondent Lazard Freres & Co.'s Submission Agreement signed on: August 28, 1990.

## HEARING SESSIONS

Hearing Date/Sessions: July 19, 1991, 2 sessions.  
Hearing Location: Washington, DC.

CASE SUMMARY

On June 4, 1990 the Claimants filed a Statement of Claim with the NASD Arbitration Department concerning the purchase of 300 shares of Nicholas Applegate Growth Equity Fund ("GEF"), a closed end, new issue mutual fund, which Claimants made on April 10, 1987 through Respondent David D. Fitzgerald ("Fitzgerald"), an account representative for Respondent Johnston Lemon & Co., Inc. ("JLC"). Respondent JLC and Respondent Lazard Freres & Co. ("LFC") served as underwriters of the stock along with several other investment houses, including Prudential-Bache Capital Funding, the firm that served as the "book manager" for the new issue. Claimants purchased their shares of GEF from the shares allocated to Respondent JLC. Claimants paid \$10 per share for GEF, the same price stated in the preliminary prospectus and final prospectus for the stock. On April 10, 1987, the same day Claimants purchased their shares of GEF, the stock began public trading on the New York Stock Exchange. Trading in the shares was heavy on April 10 as well as throughout April. On April 10, the stock opened at \$9.75 and closed unchanged for the day. A few days later Claimants called Respondent Fitzgerald to inquire about the falling price of the stock, and Fitzgerald allegedly told the Claimants that Respondent LFC had "dumped" stock on opening day, causing the decline in price. Between April 10, and the October 1987 crash, the price of GEF fluctuated in the \$8-9 range. Following the crash, the stock fell sharply and Claimants sold their 300 shares on December 22, 1987 at \$5.50 per share. According to Claimants, their damages resulted from misleading statements made by Respondents Fitzgerald and JLC, misleading material in the preliminary prospectus, and the alleged dumping of stock by Respondent LFC on opening day of trading.

Respondent Fitzgerald denied making any misleading statements or providing any misleading materials to the Claimants. Respondent Fitzgerald alleged that the Claimants purchased GEF as a long term investment and that their losses resulted when they acted in a short term manner by selling their shares of GEF after holding the stock for less than a year. At the time of the arbitration hearing, GEF was selling for more than \$12 per share. Respondent Fitzgerald acknowledged that there was heavy trading on opening day of trading for GEF, and asserted that hedge traders may have accounted for the heavy trading and downward pressure on the price of the stock.

Respondents JLC and LFC categorically denied any wrong-doing. Respondent LFC alleged that it traded no shares for its own

account during initial trading of GEF. On April 10, Respondent LFC alleges that it sold all of its allotted shares to customers of the firm, at \$10 per share. None of these shares were traded through the New York Stock Exchange. Additionally, Respondent LFC notes that Claimants complaints are untimely. In accordance with the Supreme Court's recent decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 59 LW 4688 (decided June 20, 1991), the statute of limitations/repose for security fraud cases is one year from discovery of the fraud, and, in any event, no later than three years from the occurrence of the asserted fraud. In this case, Respondent LFC asserts that the alleged fraud occurred on or about April 1987. The Claimants filed their demand for arbitration during June 1990, more than three years after the alleged fraud, as well as three years after the Claimants allegedly learned of the fraud from Respondent Fitzgerald. On this set of facts, and under applicable NASD Rules of Arbitration, Respondent LFC concludes that any claim by the Claimants is time barred. Respondent LFC also argued that the Claimants action was totally meritless and warrants the award of appropriate fees and costs against the Claimants.

#### RELIEF REQUESTED

Claimant requested damages of \$1,423.00, plus reasonable interest from December 22, 1987 to the present.

Respondent JLC requested that the Statement of Claim be denied and dismissed.

Respondent Fitzgerald requested that the Statement of Claim be denied and dismissed.

Respondent LFC requested that the Statement of Claim be denied and dismissed, plus costs and disbursements of the action and such other and further relief as may be deemed just and proper.

#### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The claims by the Claimants against all Respondents be and hereby are dismissed in all respects.
2. The Respondent LFC request for costs is denied.

3. The parties shall each bear their respective costs, including attorney's fees.

FORUM FEES

Pursuant to Section 43 of the Code of Arbitration Procedure, the following forum fees are assessed:

2 Sessions X \$25.00 = \$50.00 minus hearing session deposit of \$25.00 = net \$25.00 due to be assessed as follows:

The Respondent JLC shall pay to the NASD, Inc. the sum of \$12.50 to represent forum fees and the Respondent Fitzgerald shall pay to the NASD, Inc. the sum of \$12.50 to represent forum fees.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING ARBITRATOR SIGNATURE

Name

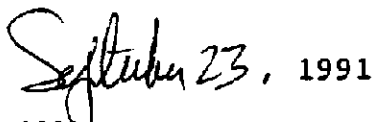
Public/Industry



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Stephen E. Crable, Esq.

Public Arbitrator

Date of Decision:



Dated by the NASD, October 8, 1991

### REPORT OF ARBITRATORS

The allegedly fraudulent actions which Claimants challenged in this arbitration occurred on or about April 1987. Claimants filed their demand for arbitration during June 1990. Based on these facts, any claim which the Claimants might have had appears to be time-barred by the Supreme Court's decision in Lampf, supra. However, even assuming arguendo that Claimants' action is timely, their claims are without merit. There is no persuasive evidence that any of Respondents misled or misrepresented any material fact to the Claimants. Moreover, there is no evidence that Respondent JLC or LFC "dumped" their stock on opening day. To the contrary, the record established that Respondents sold stock to their customers at the same price paid by Respondents from the shares allotted to Respondents from the book managing underwriter. There was no showing that Respondents sold any of these shares on the New York Stock Exchange or traded any shares of GEF on their own account. Accordingly, the Claimants claims are denied.