

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Names of Claimants

Raymond W. & Flora L. Johnson

92-01922

Names of Respondents

Merrill Lynch, Pierce Fenner & Smith Inc  
Dexter Johnston

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REPRESENTATION

Claimants, Raymond and Flora Johnson were represented by Daniel D. Maynard, Esq. of Johnston, Maynard, Grant & Parker, Phoenix, Arizona.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Dexter Johnston were represented by F. Pendleton Gaines, III, Esq. of Fennemore Craig, Phoenix, Arizona.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on June 8, 1992.

Claimants, Raymond and Flora Johnson's Submission Agreement was signed on June 3, 1992.

The Joint Statement of Answer was filed with the NASD by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Dexter Johnston on July 15, 1992.

Respondents, Dexter Johnston and Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement was signed on July 9, 1992 and July 9, 1992 by Dexter Johnston and Steven R. Joseph respectively.

HEARING INFORMATION

The hearing was held in Scottsdale, Arizona on March 16, 1993 and lasted a total of two (2) hearing sessions.

### CASE SUMMARY

Claimants. Raymond and Flora Johnson ("the Johnsons") alleged that Mr. Johnson was a disabled veteran on a limited income of social security and disability insurance payments who opened accounts with Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") in May of 1987. The Johnsons' first account executive at Merrill Lynch was Michael Tarranto ("Tarranto"). The Johnsons alleged that they had very little investment experience and relied solely on Tarranto to set up their account to provide non-taxable income with a high degree of safety, security and liquidity. In late July of 1988, Tarranto was replaced with Respondent, Dexter Johnston ("Johnston") who also was advised of Mr. Johnson's circumstances. The Statement of Claim alleged that Johnston began to trade the accounts to benefit only Merrill Lynch and Johnston in the form of excessive commissions which practice is commonly called churning. The Statement of Claim also alleged that the significant fees and commissions charged on the transactions were not disclosed on the trade confirmation sheets. The specific transactions complained of were purchases of Equitable Capital Partners L.P. 88, Washington Mutual Investors Fund, Putnam Diversified, Arvida/JMB Partners II L.P., World Income Fund, JMB Hawaii, U.S. Thrift Partners, L.P. 88, and American Capital Fund.

The Statement of Claim alleged violations of A.R.S. Section 44-1991, breach of fiduciary duty, conversion, constructive fraud, violations of A.R.S. Section 13-2301(D)(4), breach of contract, constructive trust, negligence and also supported a claim for punitive damages.

Respondents, Merrill Lynch and Johnston denied the allegations of the Statement of Claim and asserted that Johnston advised the Johnsons to eliminate the debit balance incurred in their CMA account as a consequence of trading covered call options on long securities positions. Merrill Lynch and Johnston asserted that all trades in the account were specifically discussed and expressly authorized by Mr. Johnson and were designed to achieve the investment objectives of Johnson. In addition, Merrill Lynch and Johnston alleged that the commissions charged to the account were clearly, plainly and adequately disclosed on the confirmation slips and/or prospectuses applicable to the investments and there was no violation of the suitability standards, unauthorized trades in their account or any other act or omission committed by Merrill Lynch or Johnston to cause damages to the Johnsons. Lastly, Merrill Lynch and Johnston asserted that the claim was barred by laches, estoppel, waiver, ratification and acquiescence.

### RELIEF REQUESTED

The Johnsons requested damages in an amount to be determined in arbitration, but no less than \$100,000.00, treble damages pursuant to A.R.S. , punitive damages, costs, attorney's fees incurred pursuant to A.R.S. Section 12-341.01 and 13-2314(A) and for all other relief as the arbitrators deem just and proper.

Merrill Lynch and Johnston requested that the claim be dismissed in its entirety and that they be awarded their attorney's fees, costs and such other sanctions as are available against the Johnsons and their counsel, so that they and others situated will be deterred from bringing false, frivolous and malicious actions of the type reflected in their "Statement of Claim."

#### **OTHER ISSUES CONSIDERED & DECIDED**

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

#### **AWARD**

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

1. The claims asserted against Merrill Lynch and Johnston by the Johnsons shall be and are hereby denied and dismissed in their entirety; and,
2. Other than Forum Fees which are addressed below, the parties shall each bear their own costs, expenses and attorneys' fees incurred in this matter.

#### **FORUM FEES**

Pursuant to Section 43c of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the \$200.00 non-refundable claim filing fee and the \$750.00 initial hearing session deposit previously deposited with the NASD by the Johnsons. Merrill Lynch is assessed additional Forum Fees in the amount of \$750.00. Forum Fees were calculated on the basis of \$750.00 per session for two (2) hearing sessions.

Additional Forum Fees assessed to the parties are payable to the NASD.

Concurring Arbitrators' Signatures  
Name

/S/ Warren C. Kotzmann  
Warren C. Kotzmann, Esq.  
Public Arbitrator  
Chairperson

April 5, 1993  
Dated

/S/ Jay Alan Gatlin  
Jay Alan Gatlin  
Public Arbitrator  
Panelist

April 29, 1993  
Dated

/S/ William E. Hallinan  
William E. Hallinan  
Industry Arbitrator  
Panelist

April 5, 1993  
Dated

Date Award Served on the Parties by the NASD: May 4, 1993