

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Daniel and Emily Onak

95-01162

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on March 6, 1995, Claimants Daniel and Emily Onak, through their representative, Paul N. Young, C.E.O., of Securities Arbitration Group, in Marina Del Rey, California, Alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., breached its fiduciary duty to Claimants, misrepresented and omitted material facts, gave improper recommendations, churned, and failed to supervise the account. Claimants further alleged that on November 23, 1993, they sold, at the recommendation of Respondent, 10,000 shares of CIFRA ADR. Claimants contended that on December 20, 1993, they called Respondent to ask why they had recommended that Claimants sell CIFRA ADR. Claimants further contended that Respondent's reply to this inquiry was that the recommendation had come from analyst reports. Claimants alleged that they requested a copy of the aforementioned analyst report, which indicated a buy recommendation for CIFRA ADR. Claimants further alleged that the sole purpose of Respondent's recommendation was to produce commission (a.k.a. churning). Claimants alleged that Respondent's Branch Manager, Mr. John Bentley, had the opportunity and obligation to question the sale in question, and his failure to do so constitutes failure to supervise. As a result of the above Claimants alleged that they have suffered a loss for which, Respondent should be held liable.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., through its in-house counsel, Christopher D. Cavuoti, Esq., maintained that the November 30, 1993 report which Claimants refer to notes that for the intermediate term, Respondent held a "neutral" rating. Respondent further maintained that Claimants realized a 185% increase in value from the 1991 purchase date to the 1993 sale date in

question. Respondent contended that a long term buy recommendation as stated in the research report does not preclude a client from selling an investment. Respondent further contended that they did not advise Claimants that Merrill Lynch, Pierce, Fenner & Smith, Inc.'s research department's position on CIFRA ADR was "sell". Respondent contended that Claimants' statements with regards to the role of Mr. John Bentley and his duties and responsibilities therein, are merely speculation and contain no factual basis, and accordingly, it should not be held liable.

### **RELIEF REQUESTED**

Claimants Daniel and Emily Onak, requested \$10,000.00 in actual damages.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., requested that the claims of the Claimants be dismissed in their entirety and that the arbitrator assess the costs of this proceeding against Claimants.

### **AWARD**

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Brantly Harris, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimants on February 25, 1995 and by the Respondent on May 12, 1995.

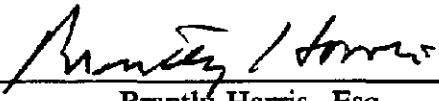
And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of the Claimants Daniel and Emily Onak, against Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., are dismissed in their entirety.
2. The parties shall bear their respective costs.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimants Daniel and Emily Onak, shall be retained by the NASD, Inc.

Page Three  
Award 95-01162

**AFFIRMATION**

I, **BRANTLY HARRIS, ESQ.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my award.

  
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Brantly Harris, Esq.

DATE OF DECISION: August 21, 1995