

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Richard O. Kraemer, Claimant v. Merrill Lynch, Pierce, Fenner and Smith, Inc., Jerry Frigon, and  
Keith Virnoche, Respondents

Case Number: 00-05606

Hearing Site: San Francisco, California

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**REPRESENTATION OF PARTIES**

For Claimant:

David W. Studley, Esq.  
Law Offices of David W. Studley  
San Andreas, California

For Respondents:

Philip A. McLeod, Esq.  
Julie A. Kole, Esq.  
Keesal, Young & Logan  
San Francisco, California

**CASE INFORMATION**

Statement of Claim filed: December 19, 2000

Claimant's Uniform Submission Agreement signed: December 18, 2000

Joint Statement of Answer filed by Respondents: March 12, 2001

Respondent Merrill Lynch, Pierce, Fenner and Smith, Inc.'s Uniform Submission Agreement signed:  
March 8, 2001

Respondent Jerry Frigon's Uniform Submission Agreement signed: March 8, 2001

Respondent Keith Virnoche's Uniform Submission Agreement signed: March 8, 2001

### **CASE SUMMARY**

Claimant alleged violations of the anti-fraud provisions of the state and federal securities laws, common law fraud, breach of fiduciary duty, anticipatory breach of contract, vicarious liability and control person liability regarding investments in Tencor Instruments, Inc. (n/k/a KLA Tencor) and an options strategy known as a "European Straddle."

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim.

### **RELIEF REQUESTED**

Claimant requested rescission of the Tencor investment or compensatory damages of \$250,000.00, an accounting of shares, and reimbursement of costs, including attorneys' fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, and reimbursement of arbitration costs.

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

Respondent moved to dismiss all federal and state securities claims on the grounds of statute of limitations. Claimant did not oppose the motion, and the panel granted the dismissal of those claims.

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

### **AWARD**

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

1. Claimant's claims are denied in their entirety.
2. The parties shall bear their respective costs, including attorney's fees.
3. All other relief not expressly granted is denied.
4. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondents Jerry Frigon's and Keith Virnoche's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondents Jerry Frigon and Keith Virnoche must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Dispute Resolution, Inc. received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 300.00

#### Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events which gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner and Smith, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	<u>= \$ 2,500.00</u>
<b>Total Member Fees</b>	<b>= \$ 4,600.00</b>

#### Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the panel @ \$1,125.00/session = \$ 1,125.00  
Pre-hearing conferences: July 27, 2001 1 session

Six (6) Hearing sessions @ \$1,125.00/session = \$ 6,750.00  
Hearings: March 19, 2002 2 sessions  
March 20, 2002 2 sessions  
March 21, 2002 2 sessions

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**Total Forum Fees** = **\$ 7,875.00**

1. The Panel assessed \$3,937.50 of the forum fees to Claimant, Richard O. Kraemer.
2. The Panel assessed \$3,937.50 of the forum fees jointly and severally to Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc., Jerry Frigon and Keith Virmoche.

### Fee Summary

1. Claimant, Richard O. Kraemer, is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$ 3,937.50</u>
Total Fees	= \$ 4,237.50
<u>Less payments</u>	<u>= \$( 1,425.00)</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 2,812.50

2. Respondent, Merrill Lynch, Pierce, Fenner, and Smith, Inc., is charged with the following fees and costs:

<u>Member Fees</u>	<u>= \$ 4,600.00</u>
Total Fees	= \$ 4,600.00
<u>Less payments</u>	<u>= \$(4,600.00)</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

3. Respondents, Merrill Lynch, Pierce, Fenner and Smith, Inc., Jerry Frigon and Keith Virmoche, are charged jointly and severally with the following fees and costs:

<u>Forum Fees</u>	<u>= \$ 3,937.50</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 3,937.50

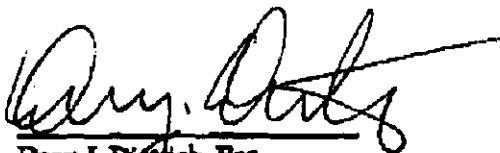
All balances are payable to NASD Dispute Resolution, Inc. and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Dean J. Dietrich, Esq.  
Peter H. Daly  
William T. Smales, Jr.

Public Arbitrator, Presiding Chair  
Public Arbitrator  
Non-Public Arbitrator

**Concurring Arbitrators' Signatures**



Dean J. Dietrich, Esq.  
Chair, Public Arbitrator

April 15, 2002

Signature Date

Peter H. Daly  
Public Arbitrator

Signature Date

William T. Smales, Jr.  
Non-Public Arbitrator

Signature Date

4/16/02  
Date of Service

NASD Dispute Resolution, Inc.  
Arbitration No. 00-05606  
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**ARBITRATION PANEL**

<b>Dennis J. Dietrich, Esq.</b>	-	<b>Public Arbitrator, Presiding Chair</b>
<b>Peter H. Daly</b>	-	<b>Public Arbitrator</b>
<b>William T. Smalen, Jr.</b>	-	<b>Non-Public Arbitrator</b>

**Consenting Arbitrators' Signatures**

**Dennis J. Dietrich, Esq.**  
**Chair, Public Arbitrator**

**Signature Date**

  
**Peter H. Daly**  
**Public Arbitrator**

**4/14/02**  
**Signature Date**

**William T. Smalen, Jr.**  
**Non-Public Arbitrator**

**Signature Date**

**4/16/02**  
**Date of Service**

NASD Dispute Resolution, Inc.  
Arbitration No. 00-05606  
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**ARBITRATION PANEL**

*Dean J. Dietrich, Esq.*  
*Peter H. Daly*  
*William T. Smales, Jr.*

*Public Arbitrator, Presiding Chair*  
*Public Arbitrator*  
*Non-Public Arbitrator*

**Concurring Arbitrators' Signatures**

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*Dean J. Dietrich, Esq.*  
Chair, Public Arbitrator

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Signature Date

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*Peter H. Daly*  
Public Arbitrator

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Signature Date

  
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*William T. Smales, Jr.*  
Non-Public Arbitrator

  
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Signature Date

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Date of Service