

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

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In the Matter of the Arbitration Between:

Peter M. Brown, Claimant v. Erika Komarck and Merrill Lynch, Pierce, Fenner & Smith,  
Incorporated, Respondents

Case Number: 02-07382

Hearing Site: Los Angeles, California

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Nature of the Dispute: Customer v. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimant:

Jonathan Schwartz, Esq.  
Law Offices of Jonathan Schwartz  
Marina Del Rey, California

For Respondents:

Kent J. Schmidt, Esq.  
Dorsey & Whitney LLP  
Irvine, California

Curt Roy Hiline, Esq.  
Dorsey & Whitney LLP  
Seattle, Washington

**CASE INFORMATION**

Statement of Claim filed: December 3, 2002

Claimant's Uniform Submission Agreement signed: November 25, 2002

Initial Joint Statement of Answer filed by Respondents: April 14, 2003

Amended Joint Statement of Answer filed by Respondents: December 16, 2003

Respondent Erika Komarck's Uniform Submission Agreement signed: April 12, 2003

Respondent Merrill Lynch Pierce Fenner & Smith, Incorporated's Uniform Submission  
Agreement signed: April 14, 2003

### **CASE SUMMARY**

Claimant alleged breach of contract, breach of fiduciary duty, misrepresentation, non-disclosure, unsuitability, negligence, and failure to supervise. Claimant's allegations concerned purchases of Optio Software shares and other unspecified securities.

Respondents' Initial and Amended Joint Statements of Answer denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested \$208,760.00 in compensatory damages, interest at the legal rate, and costs, including attorney's fees.

Respondents' Initial and Amended Joint Statements of Answer requested dismissal of the Claimant's Statement of Claim in its entirety, and costs, including attorney's fees. Respondents also requested that all references to this arbitration be stricken from Respondent Erika Komarck's registration record maintained by the Central Registration Depository.

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

On January 31, 2003 Claimant and Claimant's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waiver of the Claimant shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

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

**AWARD**

After considering the pleadings, and the Parties' request for this Stipulated Award, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant and Respondents have entered into a confidential settlement agreement.
2. Claimant's claims are dismissed with prejudice.
3. The Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Erika Komarck's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Erika Komarck must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
4. All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution 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 that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,750.00</u>
<b>Total Member Fees</b>	<b>= \$5,200.00</b>

#### **Three-Day Cancellation Fees**

Three-day cancellation fees apply when a hearing on the merits is postponed or settled within three business days before the start of the first scheduled hearing session. The following three-day cancellation fees are assessed:

Cancellation of March 21 – 25, 2005 hearing dates: = \$ 300.00

1. The Panel assessed \$150.00 of the three-day cancellation fee to Claimant Peter M. Brown.
2. The Panel assessed \$150.00 of the three-day cancellation fee jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Erika Komarck.

#### **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 or the parties and the Panel. The following fees are assessed:

Five (5) Pre-hearing conference sessions with the Panel @ \$1,125.00/session	= \$5,625.00
Pre-hearing conferences:	
January 28, 2004	1 session
March 29, 2004	1 session

	June 28, 2004	1 session	
	December 08, 2004	1 session	
	March 17, 2005	1 session	
<b>Total Forum Fees</b>			<b>= \$5,625.00</b>

1. The Panel assessed \$ 2,812.50 of the forum fees to Claimant Peter M. Brown.
2. The Panel assessed \$ 2,812.50 of the forum fees jointly and severally to Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Erika Komarck.

**Fee Summary**

1. Claimant Peter M. Brown is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Three -Day Cancellation Fee	= \$ 150.00
<u>Forum Fees</u>	<u>= \$ 2,812.50</u>
Total Fees	= \$ 3,262.50
<u>Less payments</u>	<u>= \$(1,425.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 1,837.50</b>
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Incorporated is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
<u>Less payments</u>	<u>= \$(5,200.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>
3. Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated and Erika Komark are charged jointly and severally with the following fees and costs:

Three-Day Cancellation Fee	= \$ 150.00
<u>Forum Fees</u>	<u>= \$ 2,812.50</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,962.50</b>

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

**ARBITRATION PANEL**

<i>Glen W. Hanne</i>	-	<i>Public, Presiding Chair</i>
<i>Frank E. Caplan</i>	-	<i>Public Arbitrator</i>
<i>Debra Brothers Self</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**

  
Glen W. Hanne  
Chair, Public Arbitrator

8-4-05  
Signature Date

\_\_\_\_\_  
Frank E. Caplan  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Debra Brothers Self  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

August 15, 2005  
Date of Service

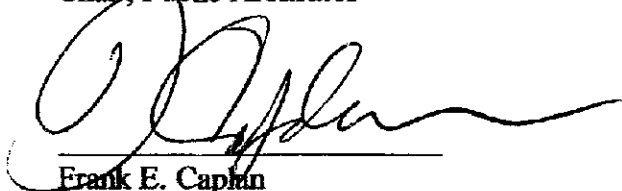
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*8/8/05*  
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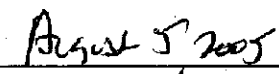
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Non-Public Arbitrator



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