

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

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In the Matter of the Arbitration Between:

Name of the Claimants  
Vicki Montgomery

Case Number: 03-04002

Name of the Respondents  
Merrill Lynch, Pierce, Fenner & Smith, Inc.;  
David H. Komansky; Deepak D. Raj; and  
Andrew Melnick

Hearing Site: Dallas, Texas

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**NATURE OF DISPUTE**

Public Customer v. Member Firm and Associated Persons

**REPRESENTATION OF PARTIES**

Claimants Vicki Montgomery, hereinafter referred to as "Claimants": Jakes Jordaan, Esq., of the firm of Jordaan & Riley, PLLC, located in Dallas, Texas.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and David H. Komansky ("Komansky"): Joel R. Sharp, Esq. and Amy C. Hinzmann, Esq. of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

Respondent Deepak D. Raj ("Raj"): Karyn A. Thwaites, Esq., of the firm of Schulte Roth & Zabel LLP, located in New York, New York.

Respondent Andrew Melnick ("Melnick"): Erin K. Koenen, Esq., of the firm of Carter Ledyard & Milburn LLP, located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: June 3, 2003.

Claimants signed the Uniform Submission Agreement: April 30, 2003.

Statement of Answer filed by Respondent Merrill Lynch: July 30, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: June 23, 2003.

Statement of Answer, Motion to Dismiss and Motion to Strike filed by Respondent Raj: July 30, 2003.

Respondent Raj signed the Uniform Submission Agreement: August 3, 2003

Respondent Melnick's Motion to Dismiss and Statement of Answer filed: July 30, 2003.  
Respondent Melnick signed the Uniform Submission Agreement: July 23, 2003.

Respondent Melnick's Amended Motion to Dismiss and Statement of Answer filed: October 2, 2003.

Respondent Merrill Lynch's Motion for Summary Judgment filed: March 29, 2004.

Stipulation of Dismissal for Respondent Raj filed: December 12, 2003.  
Stipulation of Dismissal for Respondent Melnick filed: December 17, 2003.

Respondent Raj's Motion for Expungement filed: November 21, 2003.  
Respondent Raj's Supplement to the Motion for Expungement filed: April 19, 2004.

Respondent Melnick's Motion for Expungement filed: April 2, 2004.

#### **CASE SUMMARY**

Claimants asserted the following causes of action: violation of the Texas Deceptive Trade Practices-Consumer Protection Act; negligent misrepresentation; breach of the implied representation of fair dealing and full disclosure; breach of fiduciary duty; violation of Texas Securities Act §33A(2); violations of Texas Business and Commerce Code, §27.01, Fraud in Real Estate and Stock Transactions; violation of the NASD Business Conduct Rule 2210-Standards of Commercial Honor and Principles of Trade; violations of the NASD Business Conduct Rule 2120-Use of Manipulative, Deceptive or Other Fraudulent Devices; violation of NASD Business Conduct Rule 2310-Recommendations to Customers (Suitability); violations of NASD Business Conduct Rule 2310-2 – Fair dealings with Customers; civil conspiracy; aiding and abetting; violations of Section 10(b) of the Securities Exchange Act and Rule 10B-5; and, control person liability for the individual Respondents pursuant to Section 20(A) of the exchange Act. These causes of action related to various stock recommendations made by the Merrill Lynch research analysts that were allegedly tainted by a desire to aid Merrill Lynch's investment banking business.

Unless specifically admitted in their Answer, Respondents Merrill Lynch and Komansky denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim for which relief may be granted and their claims should be dismissed;
2. Claimants are sophisticated investors with significant resources and their allegations are an effort to avoid responsibility for their own investment decisions;
3. Claimants' assertion that Merrill Lynch's research was false or misleading is insufficient as a matter of law because Claimants have failed to specify any material misrepresentations or omissions of fact by Merrill Lynch;
4. Claimants' allegations fail to state a claim for relief under the Texas Deceptive Trade practices Act; and,

5. Claimants' claims are barred by waiver, estoppel, ratification, assumption of risk and comparative negligence, as well as Claimants' own failure to mitigate alleged damages.

Unless specifically admitted in his Answer, Respondent Raj denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim against Respondent Raj for which any relief can be granted;
2. Claimants suffered no damages by reason of the acts complained of in the Statement of Claim;
3. Respondent Raj is not liable to Claimants in any amount because, at all times relevant herein, Raj acted properly and in good faith and had no involvement with respect to Claimants' accounts;
4. Respondent Raj acted in good faith and did not directly or indirectly induce any act or acts constituting a violation of the federal securities laws;
5. Claimants' claims are barred because the risks inherent in the investments at issue were fully disclosed and/or known to Claimants and they assumed those risks. Moreover, any alleged losses incurred by Claimants were the direct result of adverse market conditions and/or the acts of the issuer of the securities at issue and cannot be attributed to Raj;
6. Claimants' claims are barred by applicable statutes of limitation and/or the doctrines of laches, estoppel, waiver and ratification because, among other things, Claimants did not timely raise objections or complaints when they received trade confirmations, account statements, and other account information;
7. Claimants' claims are barred under the doctrine of contributory negligence because they negligently contributed to their own injury;
8. Claimants' claims are barred or mitigated under the doctrine of comparative negligence because they negligently contributed to their own injury to a greater degree than Raj allegedly did;
9. Claimants' claims are barred because their alleged injuries were not caused, legally, proximately, or otherwise, by Raj or by the alleged misconduct pleaded in the Statement of Claim;
10. Claimants' claims are barred because Respondent Raj did not act with intent, scienter, or in breach of any duty of care or loyalty owed to Claimants;
11. Claimants' claims are barred because they failed to mitigate damages;
12. Claimants' claims are barred because Raj at all times conducted himself in compliance with the requirements of all applicable provisions of federal and state law;
13. Claimants' claims are barred because Claimants failed to exercise care and due diligence over the investments in their securities accounts;
14. Claimants are not entitled to, and fail to state a claim for, actual damages, exemplary damages, punitive damages, prejudgment interest, attorneys' fees and costs; and,
15. As applicable, the defenses asserted by Respondent Merrill Lynch are incorporated by reference.

Unless specifically admitted in his Answer, Respondent Melnick denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimant failed to state a claim upon which relief can be granted;
2. Claimant suffered no damages by reason of the acts complained of in the Statement of Claim;
3. Melnick is not liable to Claimant in any amount because, at all times relevant herein, Melnick acted properly and in good faith;
4. Pursuant to the terms of the customer and other agreements executed by claimant, all substantive claims raised by claimant with respect to her accounts are to be determined under New York law;
5. Claimant failed to mitigate her damages, if any;
6. Claimant directed, approved and/or authorized each and every transaction for her accounts and/or ratified, accepted, acquiesced in, and confirmed in all respects such transactions. Consequently, her claims are barred by the equitable doctrines of estoppel, laches, ratification and waiver;
7. All risks inherent in the investments at issue were fully disclosed and/or known to and assumed by Claimant. Moreover, any alleged losses incurred by claimant were the direct result of adverse market conditions and/or the acts of the issuer of the securities at issue and cannot be attributed to Melnick;
8. At all relevant times, Melnick maintained an adequate and reasonable system of supervision and control over employees, acted in good faith, and did not, directly or indirectly, induce any act or acts constituting a violation or cause of action. Thus, Melnick is not subject to liability as a "control person" or under the theory of respondeat superior;
9. Claimant is not entitled to an award of attorneys' fees, punitive damages, interest, or the cost of this proceeding;
10. Claimant's allegations are barred by the governing statutes of limitations; and
11. As applicable, the defenses asserted by the other Respondents are incorporated by reference.

**RELIEF REQUESTED**

Claimants Vicki Montgomery requested:

Compensatory Damages	\$ 356,187.18
Punitive/Treble Damages	\$ 712,374.36
Interest	Unspecified
Attorneys' Fees	\$ 118,729.06
Other Costs	As determined by the Panel
Other Monetary/Non-Monetary Relief if any:	As determined by the Panel

Respondent Merrill Lynch requested that Claimants take nothing by their claims and Respondent recover its fees and expenses.

Respondent Komansky requested that the claim be dismissed.

Respondent Raj requested that his Motion to Dismiss be granted and the Statement of Claim dismissed with prejudice as to Raj. In addition, Raj requested an award of his attorneys' fees and costs, and that all references to the Statement of Claim and the allegations asserted therein should be expunged from Respondents' CRD records.

Respondent Melnick requested an award in his favor dismissing the Statement of Claim with prejudice, that all references to this claim be expunged from his CRD records, and awarding Melnick such other and further relief as seemed just and proper.

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

Respondent Komansky did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and is bound by the determination of the Panel on all issues submitted.

On April 30, 2004, hearing was held on the following motions:

1. Respondent Merrill Lynch's Motion for Summary Judgment;
2. Respondent Melnick's Motion for Expungement; and
3. Respondent Raj's Motion and Supplemental Motion for Expungement.

In addition, Respondent Komansky orally requested dismissal of the proceeding and expungement at the hearing. After reviewing the Motions and responses, hearing the argument of counsel and examining the exhibits, the Panel granted the above Motions.

### **AWARD**

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

1. The Respondent Merrill Lynch's Motion for Summary Judgment and Respondent Komansky's Motion to Dismiss having been granted, the claims against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and David H. Komansky are hereby dismissed with prejudice;
2. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent David H. Komansky's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent David H. Komansky must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
3. Pursuant to the Stipulations of Dismissal, the claims against Respondents Raj and Melnick are dismissed with prejudice;
4. In addition, the Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Deepak D. Raj's registration records

maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Deepak D. Raj must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;

5. In addition, the Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Andrew Joseph Melnick's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Melnick must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
6. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
7. Any and all relief not specifically addressed herein, including punitive or treble damages, is denied.

#### **FEES**

Pursuant to the Code, the following fees are assessed:

##### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 500.00
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##### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party and the following member fees are assessed:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

##### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed: None.

##### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences:     January 13, 2004     1 session	
April 30, 2004     1 session	
<hr/> Total Forum Fees	<hr/> = \$ 2,400.00

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The Panel has assessed \$2,400.00 of the forum fees to Claimants Vicki Montgomery.

### FEE SUMMARY

Claimants Vicki Montgomery is solely liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 2,400.00
Total Fees	= \$ 2,900.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution	= \$ 1,200.00

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$ 8,550.00
Less payments	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

### ARBITRATION PANEL

Michael P. Geary - Public Arbitrator, Presiding Chairperson  
 Anthony E. Krug - Public Arbitrator  
 Timothy L. Andrews- Non-Public Arbitrator

Consenting Arbitrators' Signatures

Michael P. Geary  
 Public Arbitrator, Presiding Chairperson

JUN 6 7, 2004  
 Signature Date

Anthony E. Krug  
 Public Arbitrator

Signature Date

Timothy L. Andrews  
 Non-Public Arbitrator

Signature Date

6/9/04/mca Date of Service (For NASD Dispute Resolution office use only)

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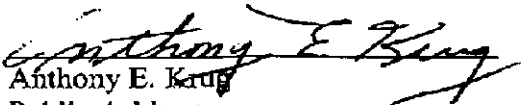
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Anthony E. Krug - Public Arbitrator  
Timothy L. Andrews- Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Michael P. Geary  
Public Arbitrator, Presiding Chairperson

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

  
Anthony E. Krug  
Public Arbitrator

6-8-2004  
Signature Date

\_\_\_\_\_  
Timothy L. Andrews  
Non-Public Arbitrator

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

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Anthony E. Krug - Public Arbitrator

Timothy L. Andrews - Non-Public Arbitrator

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Michael P. Geary  
Public Arbitrator, Presiding Chairperson

Signature Date

Anthony E. Krug  
Public Arbitrator

Signature Date

Timothy L. Andrews  
Non-Public Arbitrator

Signature Date

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