

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

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In the Matter of the Arbitration Between:

Name of the Claimants

Carla J. Lopez; Joseph C. Miles;  
Donald J. Kreft, Jr.; and,  
John Boggan

Case Number: 02-04422

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.; and,  
Donald C. Korkow

Hearing Site: Dallas, Texas

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**NATURE OF DISPUTE**

Public Customers v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

Claimants Carla J. Lopez ("Lopez"); Joseph C. Miles ("Miles"); Donald J. Kreft, Jr. ("Kreft"); and, John Boggan ("Boggan"), hereinafter collectively referred to as "Claimants": Jeffrey A. Feldman, Esq., located in San Francisco, California.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Donald C. Korkow (Korkow"), hereinafter collectively referred to as "Respondents": Susan L. Masetti, Esq., of the firm of Orrick, Herrington & Sutcliffe, LLP, located in Menlo Park, California.

**CASE INFORMATION**

Statement of Claim filed: January 29, 2002.

Claimant Carla J. Lopez signed the Uniform Submission Agreement: July 22, 2002.

Claimants Miles, Kreft and Boggan did not file a signed Uniform Submission Agreement.

Statement of Answer filed by Respondents: June 12, 2003.

Counterclaim filed by Respondent/Counter-Claimant Merrill Lynch on: June 12, 2003.

Respondent/Counter-Claimant Merrill Lynch signed the Uniform Submission Agreement: February 6, 2003.

Respondent Donald C. Korkow signed the Uniform Submission Agreement: September 3, 2002.

Respondents' Motion to Sever Claimants' Claims filed: October 2, 2002.

Respondents' Motion to Dismiss or, in the alternative, Motion for a More Definite Statement of Claim filed: October 2, 2002.

Claimants' Opposition to Respondents' Motion to Dismiss and Motion to Sever filed: December

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17, 2002.

Respondents' Opposition to Claimants' Motion to Preclude Respondents from Asserting Facts and Defenses in this Proceeding filed: December 18, 2002.

Counter-Respondent Lopez's Motion to Dismiss Counterclaim filed on or about: June 23, 2003.  
Merrill Lynch's Opposition to Counter-Respondent Lopez's Motion to Dismiss Counterclaim filed: July 10, 2003.

#### **CASE SUMMARY**

Claimants asserted the following causes of action: violation of federal and state securities laws; violations of the Texas deceptive Trade Practices Act; Negligence/gross negligence/breach of industry standards; breach of contract; breach of fiduciary duty; common law fraud; misrepresentation and omissions; *respondeat superior*; and failure to supervise. The Claimants' causes of action related to the handling of the shares of stock each Claimant received as part of an employee stock option plan with AllegianceTelecom. Claimants alleged that Respondents advised them to exercise their options and to hold the stock without diversifying the account, while placing the stock into a margin account to pay the exercise costs and taxes, without explaining the risks of such a strategy. Claimants further alleged that Korkow's advice was calculated to benefit Merrill Lynch and himself, and that Claimants lost all their wealth and owed additional sums to the IRS as a result.

Unless specifically admitted in its Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimants fail to state a claim upon which relief can be granted;
2. Claimants suffered no damages by reason of the acts of the Respondents;
3. Respondents are not liable to Claimants in any amount because, at all times relevant herein, Respondents acted properly and in good faith with respect to Claimant's accounts;
4. Claimants consented, approved and ratified the actions of which they now complain and have waived or are barred from asserting any claims upon which they now seek relief;
5. Some or all of Claimants' claims are barred by the applicable statute of limitations;
6. Claimants failed to mitigate their damages, if any, by refusing to sell their AllegianceTelecom and/or other holdings, even as they continued to decline in value over several months;
7. Respondents' conduct was not unreasonable or outrageous;
8. Claimants knowingly assumed the risk of all actions which they now complain and seek to recover damages on;
9. All risks inherent in the investments and strategies at issue were fully disclosed and/or known to Claimants. Moreover, any losses incurred by Claimants were the direct result of adverse economic or market conditions and/or the acts of the issuers of the securities in questions and cannot be attributed to Respondents; and,

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10. Claimants have unreasonably delayed in bringing this arbitration to the prejudice of Respondents, and therefore their Statement of Claim and each of its causes of action are barred by the doctrine of laches.

Merrill Lynch asserted a counterclaim against Lopez, alleging that Lopez failed to pay a debit balance in her account in violation of her account agreement.

#### **RELIEF REQUESTED**

Claimants requested:

Compensatory Damages	Collective amount not less than \$3,000,000.00
Punitive and Treble Damages	As appropriate
Interest	Pre-judgment and post-judgment at the maximum rate allowed by law
Attorneys' Fees	For breach of contract and violation of the deceptive trade practices act
Other Costs	Including expert witness fees
Other Monetary/Non-Monetary Relief if any:	As appropriate.

Respondents requested an award dismissing Claimants' claims against them with prejudice, and directing Claimants to pay Respondents the reasonable costs and fees incurred in defending this proceeding. In addition, Respondents requested that all reference of this matter be expunged from the registration record of Korkow maintained by the NASD Central Registration Depository.

Furthermore, Merrill Lynch requested that Lopez pay the following damages on their counterclaim:

Compensatory Damages	\$ 21,507.81
Interest	Per account agreement
Attorneys' Fees	Per account agreement
Other Costs	Per account agreement
Other Monetary/Non-Monetary Relief if any:	Per account agreement.

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

Claimants Miles, Krefl and Boggan did not file with NASD Dispute Resolution, a properly executed submission to arbitration, but are required to submit to arbitration pursuant to the parties' agreement and Claimants' demand for arbitration made pursuant to Rule 10301 and, having prosecuted the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

On May 9, 2003, the Panel, after reviewing the parties' Motions and responses filed in this arbitration, made the following determinations:

1. Claimants' Motion to Preclude Respondents from Asserting Facts and Defenses in this Proceeding was denied;

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2. Respondents' Motion to Sever Claimants' Claims was denied; and,
3. Respondents' Motion to Dismiss or, in the alternative, Motion for a More Definite Statement of Claim was denied.

Counter-Respondent Lopez's Motion to Dismiss Counterclaim was denied by the Panel.

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, 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. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Donald C. Korkow are jointly and severally liable for and shall pay to the Claimants the following compensatory damages:

To Carla J. Lopez	\$1,665,000.00
To Joseph C. Miles	\$ 651,000.00
To Donald J. Kreft, Jr.	\$1,791,000.00
To John Boggan	\$1,884,000.00

2. In addition, Respondent Donald C. Korkow is solely liable for and shall pay to each of the Claimants the following compensatory damages:

To Carla J. Lopez	\$ 100,000.00
To Joseph C. Miles	\$ 100,000.00
To Donald J. Kreft, Jr.	\$ 100,000.00
To John Boggan	\$ 100,000.00

3. Interest shall accrue on the above compensatory damages awarded at the rate of 10% per annum from February 3, 2004 until the above amounts are paid in full by Respondents;
4. Claimant/Counter-Respondent Carla J. Lopez is liable for and shall pay to the Respondent/Counter-Claimant Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$21,507.81 as compensatory damages on the Counterclaim, plus interest at the rate of 10% per annum accruing from February 3, 2004 until the sum is paid in full;
5. The parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerated herein; and,
6. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

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### **Filing Fees**

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

Initial claim filing fee	= \$ 500.00
Counter claim filing fee	= \$ 750.00

### **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 person at the time of the events giving rise to the dispute. Accordingly, 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: April 16, 2003 1 session	
May 8, 2003 1 session	
Twenty-One (21) Hearing sessions @ \$1,200.00	= \$ 25,200.00
Hearing Dates: January 20, 2004 2 sessions	
January 21, 2004 2 sessions	
January 22, 2004 2 sessions	
January 23, 2004 2 sessions	
January 26, 2004 2 sessions	
January 27, 2004 2 sessions	
January 28, 2004 2 sessions	
January 29, 2004 2 sessions	
January 30, 2004 2 sessions	
February 2, 2004 2 sessions	
February 3, 2004 1 session	
<b>Total Forum Fees</b>	<b>= \$ 27,600.00</b>

The Panel has assessed \$27,600.00 of the forum fees to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

FROM : KIMBALL CONSULTANTS

FAX NO. [REDACTED]

Feb. 05 2004 09:42AM P10/10

02/04/2004 17:35 FAX

NASD

008/003

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**SEE SUMMARY**

Claimant Carla J. Lopez, Joseph C. Miles, Donald J. Kreft, Jr. and John Boggan are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Less payments	= \$ 8,300.00
<b>Balance Refunded by NASD Dispute Resolution</b>	<b>= \$ 7,800.00</b>

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

Filing Fee	= \$ 750.00
Member Fees	= \$ 8,550.00
Exam Fees	= \$27,600.00
<b>Total Fees</b>	<b>= \$36,900.00</b>
Less payments	= \$21,350.00
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$15,550.00</b>

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

**ARBITRATION PANEL**

K. Steve Kimball, CFA - Public Arbitrator, Presiding Chairperson  
Ronald Luther Johnson - Public Arbitrator  
Kurt L. Smith - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

K. Steve Kimball  
K. Steve Kimball, CFA  
Public Arbitrator, Presiding Chairperson

2/5/04  
Signature Date

\_\_\_\_\_  
Ronald Luther Johnson  
Public Arbitrator

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

\_\_\_\_\_  
Kurt L. Smith  
Non-Public Arbitrator

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

2/5/04 MGC Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

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**FEE SUMMARY**

Claimant Carla J. Lopez, Joseph C. Miles, Donald J. Kraft, Jr. and John Boggan are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
<u>Less payments</u>	<u>= \$ 8,300.00</u>
Balance Refunded by NASD Dispute Resolution	= \$ 7,800.00

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

Filing Fee	= \$ 750.00
Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$27,600.00</u>
Total Fees	= \$36,900.00
<u>Less payments</u>	<u>= \$21,350.00</u>
Balance Due NASD Dispute Resolution	= \$15,550.00

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Ronald Luther Johnson - Public Arbitrator

Kurt L. Smith - Non-Public Arbitrator

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K. Steve Kimball, CFA  
Public Arbitrator, Presiding Chairperson



Signature Date


FEBRUARY 5, 2004

Ronald Luther Johnson  
Public Arbitrator

Signature Date

Kurt L. Smith  
Non-Public Arbitrator

Signature Date

2/5/04 

Date of Service (For NASD Dispute Resolution office use only)

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**FEE SUMMARY**

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Initial Filing Fee	= \$ 500.00
Less payments	= \$ 8,300.00
Balance Refunded by NASD Dispute Resolution	= \$ 7,800.00

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

Filing Fee	= \$ 750.00
Member Fees	= \$ 8,550.00
Forum Fees	= \$27,600.00
Total Fees	= \$36,900.00
Less payments	= \$21,350.00
Balance Due NASD Dispute Resolution	= \$15,550.00

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K. Steve Kimball, CFA  
Public Arbitrator, Presiding Chairperson

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Signature Date

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Public Arbitrator

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