

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

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In the Matter of the Arbitration Between:

Name of the Claimants

Case Number: 03-01265

Robert L. Holstein, individually and as beneficiary of the Robert L. Holstein MD SC Employees Profit Sharing Plan & Trust U/A 07/11/85 and joint tenant of the Robert and Judith L. Holstein joint account; Judith L. Holstein, individually and as beneficiary of the Judith L. Holstein, IRA and joint tenant of the Robert and Judith L. Holstein joint account

Name of the Respondents

Hearing Site: Chicago, Illinois

Merrill Lynch Pierce Fenner & Smith, Inc., and David R. Berger

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**NATURE OF THE DISPUTE**

Customers v. Member Firm and Associated Person

**REPRESENTATION OF PARTIES**

John A. Dienner, Esq., of the firm Dienner Kubasiak Fylstra Reizen & Rotunno, located in Chicago, Illinois, represented Claimants Robert L. Holstein, individually and as beneficiary of the Robert L. Holstein MD SC Employees Profit Sharing Plan & Trust U/A 07/11/85 and joint tenant of the Robert and Judith L. Holstein joint account; Judith L. Holstein, individually and as beneficiary of the Judith L. Holstein, IRA and joint tenant of the Robert and Judith L. Holstein joint account, hereinafter referred to as "Claimants."

Peter E. Cooper, Esq., of the firm Lawrence Kamin Saunders & Uhlenhop, LLC, located in Chicago, Illinois, represented Respondents Merrill Lynch Pierce Fenner & Smith, Inc., and David R. Berger, hereinafter collectively referred to as "Respondents."

**CASE INFORMATION**

Claimants filed the Statement of Claim on or about February 21, 2003. Robert L. Holstein signed the Uniform Submission Agreement on February 13, 2003 and Judith L. Holstein signed it on February 14, 2003.

Respondents filed a Joint Statement of Answer on August 6, 2003. Respondent Merrill Lynch signed the Uniform Submission Agreement on August 11, 2003.

### **CASE SUMMARY**

Claimants Holstein asserted the following causes of action: manipulative and deceptive practices in violation of Section 10(b), Rule 10b-5 of the Securities and Exchange Act; violation of the Illinois Consumer Fraud and Deceptive Practices Act; common law fraud; negligent supervision; and common law negligence.

The causes of action relate to investments in technology stocks such as Sun Microsystems and Intel.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: claims are barred by the applicable statutes of limitation; Claimants failed to mitigate; lack of basis in fact or law warranting the imposition of attorney's fees; ratification; Respondent Merrill Lynch acted in good faith and, accordingly, cannot be held liable as a control person of Respondent Berger; estoppel; waiver; and assumption of risk.

### **RELIEF REQUESTED**

Claimant Holstein requested compensatory damages in the amount of \$800,000.00, interest, attorney's fees, costs, and any such relief the Panel deems just and equitable.

Respondents requested denial and dismissal of claims, attorneys fees, costs; NASD costs; expungement of Respondent Berger's CRD record, and such further relief the Panel believes is proper.

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

Respondent Berger 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, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

### **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. Any and all claims asserted by Robert L. Holstein, individually and as beneficiary of the Robert L. Holstein MD SC Employees Profit Sharing Plan & Trust U/A 07/11/85 and joint tenant of the Robert and Judith L. Holstein joint account; Judith L. Holstein, individually and as beneficiary of the Judith L. Holstein, IRA and joint tenant of the Robert and Judith L. Holstein joint account against Merrill Lynch Pierce Fenner & Smith, Inc., and David R. Berger are denied in their entirety.
2. Merrill Lynch Pierce Fenner & Smith and David R. Berger shall pay Robert L.

Holstein, individually and as beneficiary of the Robert L. Holstein MD SC Employees Profit Sharing Plan & Trust U/A 07/11/85 and joint tenant of the Robert and Judith L. Holstein joint account; Judith L. Holstein, individually and as beneficiary of the Judith L. Holstein, IRA and joint tenant of the Robert and Judith L. Holstein joint account the sum of \$375.00 as reimbursement of the non-refundable NASD filing fee.

3. Except as specified herein, the parties shall bear their own costs, including attorney's fees.
4. Any and all relief not specifically addressed herein, including punitive 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	= \$ 375.00
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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 person at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, as a party, is assessed the following fees:

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 4,000.00
Total	= \$ 7,000.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

Merrill Lynch requested adjournment of the hearing dates of September 28-29, 2004	
	= \$ 1,200.00

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

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

Two (2) Pre-hearing sessions with Panel at \$1,200.00		= \$ 2,400.00
Pre-hearing conferences:	April 26, 2004	1 session
	December 1, 2004	1 session

Six (6) Hearing sessions at \$1,200.00		= \$ 7,200.00
Hearing Dates:	January 31, 2005	2 sessions
	February 1, 2005	2 sessions
	February 4, 2005	2 sessions
Total Forum Fees		= \$ 9,600.00

The Panel assessed \$4,800.00 of the forum fees Merrill Lynch Pierce Fenner & Smith, Inc., and assessed \$4,800.00 of the forum fees to David R. Berger.

### **FEE SUMMARY**

Claimants, Robert L. Holstein and Judith L. Holstein, are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00
Total Fees	= \$ 375.00
Less payments	= \$ 1,575.00
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

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

Member Fees	= \$ 7,000.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$ 4,800.00
Total Fees	= \$ 13,000.00
Less payments	= \$ 7,000.00
Balance Due NASD Dispute Resolution	= \$ 6,000.00

Respondent David R. Berger is solely liable for:

Forum Fee	= \$ 4,800.00
Total Fees	= \$ 4,800.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 4,800.00

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

### **ARBITRATION PANEL**

John W. Jerak, Esq.	-	Public Arbitrator, Presiding Chairperson
David M. Zimberoff, Esq.	-	Public Arbitrator
Daniel Baruch Lidawer, CPA	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/ John W. Jerak

2/17/05

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John W. Jerak, Esq.  
Public Arbitrator, Presiding Chairperson

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Signature Date

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David M. Zimmeroff, Esq.  
Public Arbitrator

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

/s/ Daniel B. Lidawer

2/17/05


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Daniel Baruch Lidawer, CPA  
Non-Public Arbitrator

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

2/28/05

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

**Concurring Arbitrators' Signatures**

  
John W. Jerak, Esq.  
Public Arbitrator, Presiding Chairperson

2-17-05  
Signature Date

David M. Zimberoff, Esq.  
Public Arbitrator

Signature Date

Daniel Baruch Lidawer, CPA  
Non-Public Arbitrator

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