

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Names of Claimants

Douglas Carleton and Denise Carleton

and

Case Number: 03-02166  
Hearing Site: Southfield, Michigan

Names of Respondents

Merrill Lynch Pierce Fenner and Smith, Inc.  
and David Robert Zoellner, Sr.

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**NATURE OF DISPUTE**

Customers v. Member and Associated Person

**REPRESENTATION OF PARTIES**

Douglas Carleton and Denise Carleton ("Claimants") was represented by Anthony V. Trogan Esq., and Lysa Postula-Stein, Esq., West Bloomfield, Michigan.

Merrill Lynch Pierce Fenner and Smith, Inc. ("MLPFS") and David Robert Zoellner, Sr. ("Zoellner"), hereinafter referred to as "Respondents," were represented by Dennis K. Egan, Esq., Butzel Long, Bloomfield Hills, Michigan.

**CASE INFORMATION**

The Statement of Claim was filed on or about March 25, 2003. The Submission Agreement of Claimant Douglas Carleton and Denise Carleton was signed on or about March 11, 2003.

Statement of Answer was filed jointly by Respondent MLPFS and Zoellner on or about March 23, 2003. The Submission Agreement of Respondent MLPFS was signed on or about March 15, 2003. The Submission Agreement of Respondent Zoellner was signed on or about July 15, 2003.

**CASE SUMMARY**

Claimants asserted the following legal theories: breach of contract, common law fraud, conspiracy, promissory estoppel, negligence, malpractice, breach of fiduciary duty, breach of Michigan securities law, and violation of Michigan Consumer's Protection Law. The causes of action relate to Claimants' allegations concerning the purchase and sale of various unspecified high tech speculative securities, misrepresentation of risk, and unauthorized trading.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted defenses including the following: Claimants were not

conservative investors, Respondents did not manage Claimants' accounts, at the time Claimants made their investment decisions with Zoellner, they were not aging retirees having to rely on this capital, Claimants knew and understood what these investments were at the time they made them, and Claimants' losses were caused by market conditions.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of \$90,000.00 as out-of-pocket losses, plus interest, costs, attorney fees, punitive and exemplary damages, and rescission.

Respondents requested that the claims asserted against them be dismissed in their entirety, that forum fees be assessed against Claimants, and that Respondent Zoellner's CRD record be expunged of all references to this claim.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Dispute Resolution ("NASD").

### **AWARD**

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

- 1.) Respondents, Merrill Lynch Pierce Fenner and Smith, Inc., and David Robert Zoellner, Sr., are jointly and severally liable for and shall pay to Claimant, Douglas Carleton and Denise Carleton, the sum of \$90,000.00 in compensatory damages;
- 2.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 3.) Any relief not specifically enumerated, including punitive/exemplary damages, expungement, and attorney fees, is hereby denied with prejudice.

### 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 = \$225.00

#### 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. In this matter, the member firm is Merrill Lynch Pierce Fenner and Smith, Inc.

Member surcharge = \$1,100.00  
Pre-hearing process fee = \$ 750.00  
Hearing process fee = \$1,700.00

#### Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing 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:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00  
Pre-hearing conference: February 27, 2004 1 session

One (1) Pre-hearing session with Panel x \$750.00 = \$ 750.00  
Pre-hearing conference: September 18, 2003 1 session

Four (4) Hearing sessions x \$750.00 = \$3,000.00  
Hearing Dates: March 30, 2004 2 sessions  
March 31, 2004 2 sessions

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Total Forum Fees = \$4,200.00

The Arbitration Panel has assessed \$2,100.00 of the forum fees jointly and severally to Douglas Carleton and Denise Carleton.

The Arbitration Panel has assessed \$2,100 of the forum fees jointly and severally to Merrill Lynch Pierce Fenner and Smith, Inc. and David Robert Zoellner, Sr.

### Fee Summary

Claimants, Douglas Carleton and Denise Carleton, are jointly and severally liable for:

Initial Filing Fee	= \$ 225.00
Forum Fees	= \$2,100.00
Total Fees	= \$2,325.00
Less payments	= \$ 975.00
Balance Due NASD Dispute Resolution	= \$1,350.00

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

Member Fees	= \$3,550.00
Total Fees	= \$3,550.00
Less payments	= \$3,550.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents, Merrill Lynch Pierce Fenner and Smith, Inc. and David Robert Zoellner, Sr., are jointly and severally liable for:

Forum Fees	= \$2,100.00
Total Fees	= \$2,100.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$2,100.00

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

### ARBITRATION PANEL

Harvey Frank – Public Arbitrator, Presiding Chair  
Jerome D. Sobczak - Public Arbitrator  
Sharon L. Paul - Non-Public Arbitrator

Concurring Arbitrators:

/s/ Harvey Frank  
Harvey Frank  
Public Arbitrator, Presiding Chair

04/09/04  
Signature Date

/s/ Jerome D. Sobczak  
Jerome D. Sobczak  
Public Arbitrator

04/08/04  
Signature Date

/s/ Sharon L. Paul  
Sharon L. Paul  
Non-Public Arbitrator

04/12/04  
Signature Date

04/13/04  
Date of Service (For NASD office use only)

## Fee Summary

**Claimants, Douglas Carleton and Denise Carleton, are jointly and severally liable for:**

Initial Filing Fee	= \$ 225.00
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<b>Total Fees</b>	<b>= \$2,325.00</b>
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**Respondent, Merrill Lynch Pierce Fenner and Smith, Inc., is liable for:**

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Jerome D. Sobczak - Public Arbitrator  
Sharon L. Paul - Non-Public Arbitrator

**Concurring Arbitrators:**

Harvey Frank  
Harvey Frank  
Public Arbitrator, Presiding Chair

4-9-04  
Signature Date

**Jerome D. Sobczak**  
Public Arbitrator

**Signature Date**

**Sharon L. Paul**  
**Non-Public Arbitrator**

**Signature Date**

**Date of Service (For NASD office use only)**

NASD Dispute Resolution  
 Arbitration No. 03-02188  
 Award Page 4 of 4

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4/12/04  
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Concurring Arbitrators:

Harvey Frank  
Public Arbitrator, Presiding Chair

Jerome D. Sobczak  
Jerome D. Sobczak  
Public Arbitrator

Signature Date

4-08-04  
Signature Date

Sharon L. Paul  
Non-Public Arbitrator

Signature Date

Date of Service (For NASD office use only)