

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

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In the Matter of the Arbitration Between:

Lorraine Storms and Kevin Storms JTEN (Claimants) v. Merit Capital Associates, Inc.,  
Russell William Newton, Bruce Charles Ryan, Robert Fitzpatrick, and Craig Stulberger  
(Respondents)

Case Number: 03-03194

Hearing Site: New York, New York

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Nature of the Dispute: Customers v. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimants Lorraine Storms and Kevin Storms JTEN ("L. and K. Storms") hereinafter collectively referred to as "Claimants": Brian M. Greenman, Esq., New York, NY.

Respondents Merit Capital Associates, Inc. ("Merit Capital"), Russell William Newton ("Newton"), Bruce Charles Ryan ("Ryan"), Robert Fitzpatrick ("Fitzpatrick"): Richard Slavin, Esq. Cohen and Wolf, P.C., Bridgeport, CT. Previously represented by: Robert Fitzpatrick, Esq., Trumbull, CT.

Respondent Craig Stulberger ("Stulberger") did not enter an appearance in this matter.

Merit Capital, Newton, Ryan, Fitzpatrick, and Stulberger are hereinafter collectively referred to as "Respondents".

**CASE INFORMATION**

Statement of Claim filed on or about: April 30, 2003.

Claimants signed the Uniform Submission Agreement: April 28, 2003.

Joint Statement of Answer filed by Respondents Merit Capital, Newton, Ryan, and Fitzpatrick on or about: June 25, 2003.

Respondent Merit Capital signed the Uniform Submission Agreement: July 25, 2003.

Respondent Newton signed the Uniform Submission Agreement: July 25, 2003.

Respondent Ryan signed the Uniform Submission Agreement: July 25, 2003.

Respondent Fitzpatrick signed the Uniform Submission Agreement: July 16, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of contract; common law fraud; breach of fiduciary duty; breach of duty of good faith and fair dealing; negligence;

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rule violations; failure to supervise; respondeat superior; churning; and control person liability. Claimants' claim involved common stock.

Unless specifically admitted in their Answer, Respondents Merit Capital, Newton, Ryan, and Fitzpatrick denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$458,896.00; interest commencing May 1, 2000; punitive damages in accordance with *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 115 S. Ct. 1212 (1995), *Mulder v. Donaldson Lufkin & Jenrette*, 224 A.D. 2d 125, 648 N.Y.S. 2d 535 (App. Div., 1<sup>st</sup> Dept 1996), and *Olde Discount Corp. v. Dartley*, 218 N.Y.L. 114, p. 26 Col 6 (Dec 12, 1997); plus costs and attorneys' fees.

Respondents Merit Capital, Newton, Ryan, and Fitzpatrick requested that Claimants' claims be denied in their entirety and that Claimants be assigned the full costs of this arbitration.

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

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Respondent Stulberger has been properly served with the Statement of Claim and received due notice of the hearing and that arbitration of the matter would proceed without said Respondent present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

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

Respondent Stulberger did not appear. The Panel has determined, after examining the evidence, that all reasonable and adequate efforts were made to effectuate service. Therefore, Respondent Stulberger is in default.

At the close of Claimants' case, both Claimants and Respondents Merit Capital, Newton, Ryan, and Fitzpatrick made substantive motions for directed verdict. The Panel denied the motions in a written decision on June 9, 2004.

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.

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### AWARD

After considering the pleadings, and 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 claims of Claimants against Respondents Newton and Ryan are dismissed in their entirety.
2. Respondents Merit Capital and Stulberger are jointly and severally liable for and shall pay to Claimants compensatory damages in the amount of \$90,575.00.
3. Respondents Merit Capital, Stulberger and Fitzpatrick are jointly and severally liable for and shall pay to Claimants compensatory damages in the amount of \$41,425.00.
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	= \$300.00
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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, Merit Capital Associates, Inc. is a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

#### 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:

One (1) Pre-hearing session with Panel @ \$1,125.00	= \$ 1,125.00
Pre-hearing conference:      October 8, 2003      1 session	
Thirteen (13) Hearing sessions @ \$1,125.00	= \$14,625.00

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Hearing Dates:	January 13, 2004	2 sessions
	January 14, 2004	2 sessions
	March 3, 2004	1 session
	March 4, 2004	2 sessions
	March 5, 2004	2 sessions
	June 7, 2004	2 sessions
	June 14, 2004	2 sessions
Total Forum Fees		= \$15,750.00

1. The Panel has assessed \$7,875.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$7,875.00 of the forum fees jointly and severally against Respondents.

Fee Summary

1. Claimants are jointly and severally liable for:
 

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	= <u>\$7,875.00</u>
Total Fees	= \$8,175.00
<u>Less payments</u>	= <u>\$1,450.00</u>
Balance Due NASD Dispute Resolution	= \$6,725.00
2. Respondent Merit Capital is solely liable for:
 

<u>Member Fees</u>	= <u>\$5,200.00</u>
Total Fees	= \$5,200.00
<u>Less payments</u>	= <u>\$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$5,200.00
3. Respondents are jointly and severally liable for:
 

<u>Forum Fees</u>	= <u>\$7,875.00</u>
Total Fees	= \$7,875.00
<u>Less payments</u>	= <u>\$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$7,875.00

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

Deborah Sherman, Esq.	-	Public Arbitrator, Presiding Chairperson
James W. Geiger	-	Public Arbitrator
John J. Phelan, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument in which is my award.



Deborah Sherman, Esq.  
Public Arbitrator, Presiding Chairperson

7/12/04  
Signature Date

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James W. Geiger  
Public Arbitrator

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

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John J. Phelan, Esq.  
Non-Public Arbitrator

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Signature Date

July 7, 2004  
Date of Service (For NASD Dispute Resolution use only)

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**ARBITRATION PANEL**

Deborah Sherman, Esq.  
James W. Geiger  
John J. Phelan, Esq.

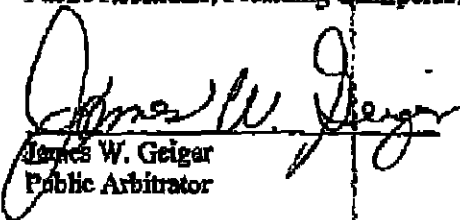
Public Arbitrator, Presiding Chairperson  
Public Arbitrator  
Non-Public Arbitrator

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Deborah Sherman, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

  
James W. Geiger  
Public Arbitrator

  
Signature Date

John J. Phelan, Esq.  
Non-Public Arbitrator

Signature Date

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Deborah Sherman, Esq.  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
James W. Geiger  
Public Arbitrator

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

  
\_\_\_\_\_  
John J. Phelan, Esq.  
Non-Public Arbitrator

July 2, 2004  
\_\_\_\_\_  
Signature Date

July 7, 2004  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)