

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

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In the Matter of the Arbitration Between:

James O. Harte and Pamela D. Harte (Claimants) v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Robert D. Traitz (Respondents)

Case Number: 03-04417

Hearing Site: New York, New York

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

**REPRESENTATION OF PARTIES**

Claimants James O. Harte ("J. Harte") and Pamela D. Harte ("P. Harte") hereinafter collectively referred to as "Claimants": Peter L. Kaufman, Esq., previously Wm. Jemison Mims, Esq., Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A., Pensacola, FL.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Robert D. Traitz ("Traitz") hereinafter collectively referred to as "Respondents": S. Lawrence Polk, Esq., Sutherland Asbill & Brennan, LLP, Atlanta, GA.

**CASE INFORMATION**

Statement of Claim filed on or about: June 16, 2003.

Claimants signed the Uniform Submission Agreement: January 11, 2003.

Joint Statement of Answer filed by Respondents on or about: October 10, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: August 27, 2003.

Respondent Traitz signed the Uniform Submission Agreement: September 17, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty; fraud; negligent misrepresentation; negligence; violation of Blue Sky Laws; and violations of Section 10(b) of the Exchange Act and Rule 10B-5 promulgated thereunder. Claimants' claim involved various common stocks.

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

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$38,599.42; punitive damages; interest; costs; attorneys' fees; and such other damages the Panel deems appropriate.

Respondents requested that the Panel reject Claimants' Statement of Claim in its entirety and order that forum fees be borne by Claimants.

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

Claimant P. Harte did not appear at the hearings in this matter.

### **AWARD**

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

1. Claimants' claims are denied in their entirety.
2. Any and all relief not specifically addressed herein, including punitive damages, is denied.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Robert D. Traitz'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 Traitz must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.

### **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	= \$175.00
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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, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$ 875.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,000.00

**Forum Fees and Assessments**

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

Two (2) Pre-hearing sessions with the sole arbitrator @ \$450.00 = \$ 900.00

Pre-hearing conferences:      January 20, 2004      1 session  
   June 15, 2004      1 session

Six (6) Hearing sessions @ \$450.00 = \$2,700.00

Hearing Dates:      July 27, 2004      2 sessions  
   July 28, 2004      2 sessions  
   July 29, 2004      2 sessions

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Total Forum Fees = \$3,600.00

1. The Arbitrator has assessed \$2,400.00 of the forum fees jointly and severally against Claimants.
2. The Arbitrator has assessed \$1,200.00 of the forum fees jointly and severally against Respondents.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested photocopying = \$15.00

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 175.00
Forum Fees	= \$2,400.00
Administrative Costs	= \$ 15.00
Total Fees	= \$2,590.00
<u>Less payments</u>	<u>= \$1,450.00</u>
Balance Due NASD Dispute Resolution	= \$1,140.00

2. Respondent Merrill Lynch is solely liable for:

<u>Member Fees</u>	= \$2,625.00
<u>Total Fees</u>	= \$2,625.00
<u>Less payments</u>	= \$2,625.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

3. Respondents are jointly and severally liable for:

<u>Forum Fees</u>	= \$1,200.00
<u>Total Fees</u>	= \$1,200.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$1,200.00

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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**ARBITRATOR**

Arnold O. Flicker, Esq.

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Sole Public Arbitrator

**Arbitrator's Signature**

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 is which is my award.

Arnold O. Flicker, Esq.  
Arnold O. Flicker, Esq.  
Sole Public Arbitrator

August 17, 2004  
Signature Date

August 17, 2004  
Date of Service (For NASD Dispute Resolution use only)