

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Sarah & David Berens  
David L. Berens, M.D., P.C. Pension Plan

91-03524

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
Michael C. Fitch

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REPRESENTATION

For Claimant: James I. Myers, Esq. of Renaldo, Myers, Regan & Palumbo, P.C.

For Respondent: Carolyn Nussbaum, Esq. of Nixon, Hargrave, Devans & Doyle.

CASE INFORMATION

Statement of Claim filed: November 7, 1991.

Claimant's Submission Agreement signed on: October 20, 1991.

Joint Statement of Answer filed by Respondents, Merrill Lynch, Pierce, Fenner & Smith and Michael C. Fitch on: January 20, 1992.

Respondent, Merrill Lynch, Pierce, Fenner & Smith's Submission Agreement signed on: January 16, 1992.

Respondent, Michael C. Fitch's Submission Agreement signed on January 16, 1992.

### HEARING INFORMATION

Hearing Dates/Sessions:     December 8, 1992 - 2 Sessions.  
                                     December 10, 1992 - 2 Sessions.  
                                     January 26, 1993 - 2 Sessions.  
                                     January 27, 1993 - 2 Sessions.  
                                     January 29, 1993 - 2 Sessions.  
                                     March 2, 1993 - 2 Sessions.

Hearing Location:             Hyatt Regency - Buffalo, NY.

### CASE SUMMARY

Claimants allege that Respondents, Merrill Lynch Pierce Fenner & Smith and Michael C. Fitch ("Respondents") knew that the Claimants desired conservative investments for their pension plans and were adverse to high risk or speculation in the account. Claimants allege that Respondent, Michael C. Fitch ("Fitch") had constructive control over the accounts and that he traded excessively in their accounts for the sole purpose of generating commissions. Claimants alleged that Respondents failed to disclose the high risk and speculative manner in which the accounts were being managed. Claimants allege that the investments recommended to them by Fitch were not suitable, given their stated investment objectives. Claimants allege that the commissions and other fees charged by the Respondents were unjustifiably high.

Respondents maintain that Fitch had been Claimants' representative for many years and that Claimants did not express any dissatisfaction with the manner in which their accounts were handled. Respondents deny that the investments made in the Claimants' accounts were speculative investments and maintain that the transactions were in accordance with Claimants' investment objectives and needs. Respondents maintain that Claimants were fully informed about all the investments and that they made all their own decisions regarding specific investments and transactions. Respondents maintain that they managed the risk in Claimants' accounts so that after the market decline in 1987, the losses suffered by the Claimants were far less than the overall decline. Respondents deny the Claimants' allegations of churning.

### RELIEF REQUESTED

Claimants requested damages in the amount of \$500,000 which includes punitive damages, reasonable attorney's fees, interest, costs and disbursements.

Respondents stated that all Claimants' accounts have realized gains and the relief requested by them appears to have been inserted without any substantiation or regard of fact. Respondents stated that the request for punitive damages is unauthorized and beyond the power of the arbitrators and that the request for attorney's fees is not proper and should be denied.

**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 originals remain on file with the 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) Respondent, Merrill Lynch, Pierce, Fenner & Smith, is hereby severally liable and shall pay to the Claimants the amount of \$130,098.00 (ONE HUNDRED THIRTY THOUSAND NINETY EIGHT DOLLARS AND NO CENTS). This amount shall bear interest at the legal rate from the date of the award until paid, if not paid within thirty days of receipt.
- 2) Respondents, Merrill Lynch, Pierce, Fenner & Smith and Michael C. Fitch are hereby jointly and severally liable and shall pay to the Claimants the amount of \$65,068.00 (SIXTY FIVE THOUSAND SIXTY EIGHT DOLLARS AND NO CENTS). This amount shall bear interest at the legal rate from the date of the award until paid, if not paid within thirty days of receipt.
- 3) The Claim for punitive damages is hereby denied.
- 4) The parties shall bear their respective costs of this action, including attorney's fees.

**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

\$200.00	Non-refundable filing fee
\$9,000.00	Hearing Session fees (12 sessions x \$750.00)

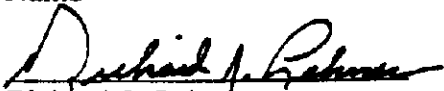
- 1) Total forum fees in the amount of \$9,200.00 are hereby assessed equally against the Claimants and Respondents.

- 2) Accordingly, Claimants are hereby assessed one half of the forum fees in the amount of \$4,600.00. Claimants are entitled to offset this amount with the \$1,000.00 previously deposited with the NASD. Claimants are directed to pay the balance of \$3,600.00 to the NASD, Inc.
- 3) Respondents are jointly and severally assessed one-half of the forum fees in the amount of \$4,600.00. Respondents are directed to pay this amount to the NASD, Inc.

Concurring Arbitrator's Signature

Name

Public Chairperson

  
Richard J. Lehner

Date of Decision: April 29, 1993

STATE OF NEW YORK ss.:

COUNTY OF ERIE

On this 23rd day of April 19 93, before me personally appeared Richard J. Lehner to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Patricia A. Lehner

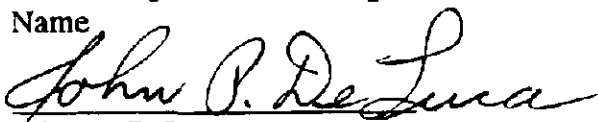
**PATRICIA A. LEHNER**  
Notary Public, State of New York  
Qualified in Erie County  
Commission Expires February 22, 1995

- 2) Accordingly, Claimants are hereby assessed one half of the forum fees in the amount of \$4,600.00. Claimants are entitled to offset this amount with the \$1,000.00 previously deposited with the NASD. Claimants are directed to pay the balance of \$3,600.00 to the NASD, Inc.
- 3) Respondents are jointly and severally assessed one-half of the forum fees in the amount of \$4,600.00. Respondents are directed to pay this amount to the NASD, Inc.

Concurring Arbitrator's Signature

Name

Public Arbitrator

  
John P. DeLuca

Date of Decision: April 29, 1993

STATE OF New York ss.:

COUNTY OF Erie

On this 23rd day of April 1993, before me personally appeared John P. DeLuca to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Pauline S. Skoney

PAULINE S. SKONEY  
NOTARY PUBLIC, STATE OF NEW YORK  
QUALIFIED IN ERIE COUNTY  
My Commission Expires Oct. 29, 1994

- 2) Accordingly, Claimants are hereby assessed one half of the forum fees in the amount of \$4,600.00. Claimants are entitled to offset this amount with the \$1,000.00 previously deposited with the NASD. Claimants are directed to pay the balance of \$3,600.00 to the NASD, Inc.
- 3) Respondents are jointly and severally assessed one-half of the forum fees in the amount of \$4,600.00. Respondents are directed to pay this amount to the NASD, Inc.

Concurring Arbitrator's Signature  
Name

Richard C. Scalfani  
Richard Scalfani

Industry Arbitrator

Date of Decision: April 29, 1993



STATE OF New York ss.:

COUNTY OF ERIE

On this 21st day of April 1993, before me personally appeared Richard Scalfani to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Jan M. Saffire

JAN M. SAFFIRE  
Notary Public, State of New York  
Qualified in Erie County  
Commission Expires April 30, 1995