

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

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In the Matter of the Arbitration Between:

Gary DelPiano, (Claimant) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Thomas Bishop, (Respondents)

Case Number: 01-03431

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Gary DelPiano, hereinafter referred to as "Claimant": Mitchell H. Cobert, Esq., a sole practitioner, Morristown, NJ. Claimant originally appeared *pro se*.

Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill") and Thomas Bishop ("Bishop"), hereinafter collectively referred to as "Respondents": Timothy P. Burke, Esq., Bingham McCutchen LLP (formerly Bingham Dana LLP), Boston, MA. Previously represented by: Marianne Bretton-Granatoor, Esq., Director and Senior Counsel, Merrill Lynch, Pierce, Fenner & Smith, Inc., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: June 26, 2001.

Reply to Answer filed by Claimant on or about: December 26, 2001.

Claimant signed the Uniform Submission Agreement.

Joint Statement of Answer filed by Respondents on or about: December 3, 2001.

Merrill signed the Uniform Submission Agreement.

Bishop signed the Uniform Submission Agreement: December 31, 2001.

**CASE SUMMARY**

Claimant asserted the following causes of action: negligence; unsuitability; fraud; and breach of duty. Claimant's claim involved the stocks of Internet Capital Group and Infonet Services Corp.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant fails to state a claim upon which relief may be granted; Claimant suffered no damages by reason of the acts complained of in the Statement of Claim; Respondents are not liable to Claimant in any amount because, at all times relevant herein, Respondents acted properly and in good faith with respect to Claimant's accounts; pursuant to the terms of Claimant's Customer Agreement, all substantive claims raised by Claimant are to be determined under New York law; all transactions recommended to Claimant were suitable for and in accordance with Claimant's stated investment objectives and financial condition; Claimant failed to mitigate his damages, if any; to the extent Claimant purports to seek damages with respect to any transactions, conduct, or alleged wrongs which occurred more than six years prior to the filing of the Statement of Claim, such claims are barred by the applicable statutes of limitation and/or the eligibility requirement set forth in Section 10304 of the NASD Code of Arbitration Procedure; Claimant directed, approved, and/or authorized each and every transaction for his account that is complained of in the Statement of Claim and/or ratified, accepted, acquiesced, and confirmed in all respects such transactions; Claimant's claims are barred by the equitable doctrines of estoppel, laches, ratification, and waiver; Claimant failed to exercise due diligence, was reckless, and/or was negligent in the supervision of his financial affairs, particularly the operation of the Merrill account at issue; all risks inherent in the investments at issue were fully disclosed to Claimant; any alleged losses that may have been incurred by Claimant were the direct result of adverse market conditions and/or the acts of the issuer of the securities at issue and cannot be attributed to Respondents; to the extent the Statement of Claim seeks damages for an alleged breach of fiduciary duty allegedly owed by a Merrill financial consultant to Claimant, Claimant fails to state a claim for relief; an alleged violation of the rules of any self-regulatory agency does not give rise to a private right of action; at all relevant times, Merrill maintained an adequate and reasonable system of supervision and control over its employees, at all times acted in good faith, and did not at any time, directly or indirectly, induce any act or acts constituting a violation or cause of action; and Claimant is not entitled to, nor is the Panel empowered to grant, an Award of attorneys' fees, punitive damages, interest, or the costs of this proceeding.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$461,000.00, plus two years of accrued interest totaling \$52,000.00, and punitive damages in the amount of \$448,000.00.

Respondents requested that the Panel issue an Award:

- a. Dismissing the Statement of Claim in its entirety;
- b. Directing that the registration file of Bishop be expunged of any reference to this claim; and
- c. Granting Respondents such other, further, and different relief as the Panel may deem appropriate.

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

During the hearings in this matter, Respondents made a Motion to Dismiss. After due consideration, the Panel denied said Motion.

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.

### **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. Claimant's claims are hereby dismissed in their entirety.
2. The Panel recommends the expungement of all reference to the above-captioned arbitration from Respondent Bishop'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 Bishop must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
3. All other requests for relief are hereby 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

### **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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00

### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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 x \$1,200.00	= \$1,200.00
Pre-hearing conference: May 14, 2002	1 session
Six (6) Hearing sessions x \$1,200.00	= \$7,200.00
Hearing Dates: November 5, 2002	2 sessions
November 6, 2002	2 sessions
November 7, 2002	2 sessions
Total Forum Fees	= \$8,400.00

1. The Panel has assessed \$4,200.00 of the forum fees against Claimant.
2. The Panel has assessed \$4,200.00 of the forum fees against Merrill.

### **Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$ 4,200.00
Total Fees	= \$ 4,575.00
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 3,000.00

2. Merrill is solely liable for:

Member Fees	= \$ 6,100.00
Forum Fees	= \$ 4,200.00
<u>Total Fees</u>	<u>= \$10,300.00</u>
<u>Less payments</u>	<u>= \$ 6,100.00</u>
Balance Due NASD Dispute Resolution	= \$ 4,200.00

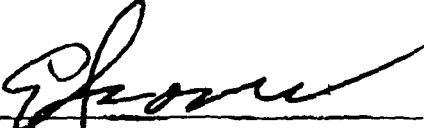
All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Evan Janovic	-	Public Arbitrator, Presiding Chair
Christine Moore, Esq.	-	Public Arbitrator
Joseph Rudolph Guarino, Jr.	-	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 which is my award.

  
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Evan Janovic  
Public Arbitrator, Presiding Chair

  
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Signature Date

\_\_\_\_\_  
Christine Moore, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Joseph Rudolph Guarino, Jr.  
Non-Public Arbitrator

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Signature Date

December 4, 2002  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

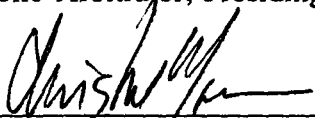
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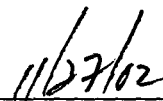


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Christine Moore, Esq.  
Public Arbitrator

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Signature Date



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Signature Date

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Joseph Rudolph Guarino, Jr.  
Non-Public Arbitrator

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Signature Date

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December 4, 2002

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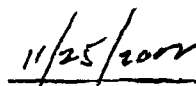
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Joseph Rudolph Guarino, Jr.  
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