

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Frank D. Araco and Gary J. Giordano, (Claimants) vs. Continental Broker-Dealer Corp., James R. Pimonte, and Thomas Francis, (Respondents)

Case Number: 01-01127

Hearing Site: New York, New York.

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**REPRESENTATION OF PARTIES**

Claimants, Frank D. Araco ("Araco") and Gary J. Giordano ("Giordano"), hereinafter collectively referred to as "Claimants": G. Martin Meyers, Esq., Denville, NJ.

Respondent, Continental Broker-Dealer Corp. ("Continental") and James R. Pimonte ("Pimonte"), hereinafter collectively referred to as "Respondents": Dominick Bianco, Chief Compliance Officer, Continental Broker-Dealer Corp., Carle Place, NY 11414. Previously represented by: Liam O'Brien, Esq., Theodore A. Krebsbach & Associates, P.C., New York, NY.

Respondent, Thomas Francis, did not appear at the hearing, and was dismissed as an improper party by the Panel at the conclusion of Claimant's case.

**CASE INFORMATION**

Statement of Claim filed on or about: March 6, 2001.

Reply to Respondents' Motion to Dismiss filed by Claimants on or about: August 14, 2001.

Claimant Araco signed the Uniform Submission Agreement: February 22, 2001.

Claimant Giordano signed the Uniform Submission Agreement: March 3, 2001.

Statement of Answer and Motion to Dismiss filed by Respondents on or about: May 23, 2001.

Respondents did not sign the Uniform Submission Agreements.

### **CASE SUMMARY**

Claimants asserted the following causes of action: loss of lifetime savings and retirement funds through purchase of highly speculative stock options that were inconsistent with Claimants' expressed conservative trading objectives; churning; misrepresentation of material fact; violation of NASD Rules of Conduct and Interpretive Materials, including Section 2310 (Recommendations to Customers) and IM-23 10-2 (Fair Dealing with Customers); violation of the Securities Act of 1933 and regulations thereunder; common law fraud; breach of fiduciary duty and failure to supervise.

Unless specifically admitted in their Answer and Motion to Dismiss, Respondents denied the allegations made in the Statement of Claim and asserted the following defenses: failure to state a claim upon which relief may be granted; claim barred by applicable statutes of limitations, estoppel, waiver, ratification, and laches; Respondents acted in good faith and in compliance with all applicable rules and regulations; Claimants did not reasonably rely on any wrongful action or inaction by Respondents; Respondents did not have discretionary authority over the account; Claimants controlled the account and account activity was consistent with Claimants' objectives; Respondents were not the fiduciary agent of the Claimants; Respondents adequately supervised Claimants' account; Respondents did not make any misrepresentations or omissions of material fact; Claimants failed to mitigate damages; allegations relating to compensatory damages fail to state sufficient facts to state a claim for recovery of damages; and Respondent Francis is an improper party since he did not manage Claimants' accounts.

### **RELIEF REQUESTED**

Claimants requested:

1. Unspecified compensatory damages; and
3. Punitive damages as the panel deems appropriate.

Respondents requested:

1. Dismissal of Claimants' claims in their entirety; and
2. All disbursements and costs assessed against Claimants.

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

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators ("Panel") determined that Respondent Francis 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 ("Code").

Respondents Continental, Pimonte and Francis did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim and/or appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

At the outset of the hearing, Respondents moved to dismiss Respondent Francis as an improper party. Panel denied motion initially, granting Respondent permission to renew the motion at the end of Claimants' case. Respondent renewed the motion at close of Claimants' case and the Panel granted the motion.

Claimant made a Motion to Reopen its case in chief for the limited purpose of including subpoenaed documents from the telephone company. The Panel allowed and granted Respondents the same.

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 pleading, 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. Respondents Continental and Pimonte be and are hereby jointly and severally liable for and shall pay to Claimant Araco the sum of \$60,000.00 as compensatory damages, plus interest of \$6,150.00, calculated at the rate of 5% annum and accruing from the date Claimant Araco transferred funds to brokerage account to April 31, 2002. The total amount due Claimant Araco is \$66,150.00.
2. Respondents Continental and Pimonte be and are hereby jointly and severally liable for and shall pay to Claimant Giordano the sum of \$159,500.00 as compensatory damages, plus interest of \$16,348.00, calculated at the rate of 5% annum and accruing from the date Claimant Giordano transferred the funds to brokerage account to April 31, 2002. The total amount due Claimant Giordano is \$175,848.00.
3. Claimants' request for punitive damages is denied; and
4. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 250.00
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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 persons at the time of the events giving rise to the dispute. In this matter, Continental Broker-Dealer Corp., is a party.

Member surcharge	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,000.00

**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:

Two (2) Pre-hearing sessions with Panel x \$ 1,000.00	= \$ 2,000
Pre-hearing conferences:      October 3, 2001	1 session
January 23, 2002	1 session
Five (5) Hearing sessions x \$ 1,000.00	= \$ 5,000
Hearing Dates:                      April 8, 2002	2 sessions
April 9, 2002	2 sessions
April 23, 2002	1 session
Total Forum Fees	= \$ 7,000

The Panel has assessed the entire amount of the forum fees jointly and severally against Respondents.

**Fee Summary**

1. Claimants Araco and Giordano be and hereby are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 250.00
<u>Total Fees</u>	= \$ 250.00
<u>Less payments</u>	= \$ 1,250.00
Refund Due Claimants	= \$ 1,000.00

2. Respondents Continental and Pimonte be and hereby are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 7,000.00
<u>Total Fees</u>	= \$ 7,000.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 7,000.00

3. Respondent Continental be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 3,800.00
<u>Total Fees</u>	= \$ 3,800.00
<u>Less payments</u>	= \$ 3,800.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00


All balances are due and payable to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Karimu F. Hill-Harvey, Esq.	-	Public Arbitrator, Presiding Chair
Bernard Herman	-	Public Arbitrator
Leonard M. Bakal, Esq.	-	Industry 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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Karimu F. Hill-Harvey, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Bernard Herman  
Public Arbitrator

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

\_\_\_\_\_  
Leonard M. Bakal, Esq.  
Industry Arbitrator

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

\_\_\_\_\_  
May 31, 2002  
Date of Service (For NASD office use only)

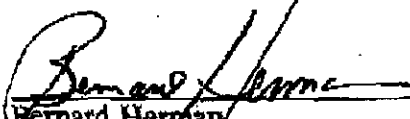
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Leonard M. Bakal, Esq.	-	Industry Arbitrator

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Karimu F. Hill-Harvey, Esq.  
Public Arbitrator, Presiding Chair

  
Bernard Herman  
Public Arbitrator

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Signature Date

  
Signature Date

Leonard M. Bakal, Esq.  
Industry Arbitrator

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May 31, 2002  
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Karimu F. Hill-Harvey, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

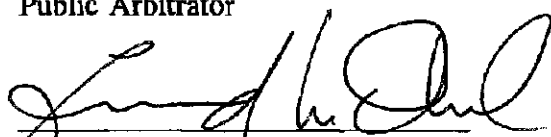
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Bernard Herman  
Public Arbitrator

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Signature Date

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Leonard M. Bakal, Esq.  
Industry Arbitrator

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May 13, 2002  
Signature Date

May 31, 2002  
Date of Service (For NASD office use only)