

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

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In the Matter of the Arbitration Between:

Name of the Claimant

Stuart D. Small, M.D., individually and on  
behalf of the Stuart D. Small Roth IRA

Case Number: 03-00190

Name of the Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.;  
Citigroup Global Markets, Inc., formerly known as  
Salomon Smith Barney, Inc.;  
Russell E. Cooper;  
David N. Bower; and,  
Henry M. Blodget

Hearing Site: Dallas, Texas

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**NATURE OF DISPUTE**

Public Customer v. Member Firms and Associated Persons

**REPRESENTATION OF PARTIES**

Claimant Stuart D. Small, individually and on behalf of the Stuart D. Small Roth IRA, hereinafter referred to as "Claimant": Marc H. Richman, Esq. and Jon A. Haslett, Esq., of The Law Offices of Marc H. Richman, located in Dallas, Texas.

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"): Charles A. Gall, Esq. and Joel A. Sharp, Esq., of the firm of Jenkins & Gilchrist, located in Dallas, Texas.

Respondents Citigroup Global Markets, Inc., formerly known as Salomon Smith Barney, Inc., ("Citigroup"), Russell E. Cooper ("Cooper") and David N. Bower ("Bower"), hereinafter collectively referred to as "Citigroup Respondents": Thomas D. Cordell, Esq., of the firm of Haynes & Boone, LLP, located in Houston, Texas.

Respondent Henry M. Blodget ("Blodget"): Joseph D. Edmondson, Jr., Esq., of the firm of Foley & Lardner, located in Washington, DC.

**CASE INFORMATION**

Statement of Claim filed: January 9, 2003

Claimant signed the Uniform Submission Agreement: January 6, 2003.

First Amended Statement of Claim filed: June 6, 2003.

Second Amended Statement of Claim filed: September 17, 2003.

Motion for Leave to File Second Amended Statement of Claim filed: October 10, 2003.

Motion for Leave to File Third Amended Statement of Claim filed: December 22, 2003.

Third Amended Statement of Claim filed: December 22, 2003.

Respondent Merrill Lynch's Opposition to Motion for Leave to Amend and Response to Claimant's Objection to Respondent's Motion to Dismiss filed: January 8, 2004.

Citigroup Respondents' Opposition to Motion for Leave to Amend and Response to Claimant's Objection to Respondent's Motion to Dismiss filed: January 9, 2004.

Respondent Blodget's Opposition to Motion for Leave to Amend and Response to Claimant's Objection to Respondent's Motion to Dismiss filed: January 13, 2004.

Statement of Answer filed by Respondent Merrill Lynch: March 12, 2003.

Respondent Merrill Lynch signed the Uniform Submission Agreement: March 17, 2003.

Joint Statement of Answer and Affirmative Defenses filed by the Citigroup Respondents on: April 4, 2003.

Joint Statement of Answer and Affirmative Defenses to Claimant's First Amended Statement of Claim filed by the Citigroup Respondents on: June 23, 2003.

Respondent Citigroup signed the Uniform Submission Agreement: March 27, 2003.

Respondent Cooper signed the Uniform Submission Agreement: March 27, 2003.

Respondent Bower signed the Uniform Submission Agreement: March 27, 2003.

Statement of Answer filed by Respondent Blodget: March 13, 2003.

Respondent Blodget signed the Uniform Submission Agreement: June 7, 2003.

Respondent Merrill Lynch's Motion to Dismiss filed: November 21, 2003.

Citibank Respondents' Motion to Dismiss filed: November 21, 2003.

Respondent Blodget's Motion to Dismiss and Memorandum in Support Motion filed: November 21, 2003.

Claimant's Objection to Respondents' Motion to Dismiss filed: December 22, 2003.

Claimant's Response to Merrill Lynch's Motion to Dismiss filed: December 22, 2003.

Claimant's Response to Citibank Respondents' Motion to Dismiss filed: December 22, 2003.

#### CASE SUMMARY

Claimant asserted the following causes of action: fraud by sellers in violation of the Texas Securities Act; fraud by aiders in violation of the Texas Securities Act; violations of the Texas Deceptive Trade Practices Act; fraud in stock transaction in violation of TEX. BUS. & COM. CODE §27.01; common law fraud; negligent misrepresentation; gross negligence; negligence; civil conspiracy; and fraud by control persons in violation of the Texas Securities Act. These causes of action related to recommendation, purchase and subsequent decline in value of several stocks in a number of corporations, including Go2Net, InfoSpace, Inc., World Access, Inc., Data return Corp. and divine, inc.

Unless specifically admitted in its Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim, alleging that Claimant was not a client, and therefore, it was not responsible for Claimant's actions. In addition, Merrill Lynch asserted the following defenses, among others:

1. The Statement of Claim fails to state claim upon which relief can be granted;
2. Claimant's allegations fail to claim for relief under the Texas Deceptive Trade Practices Act;
3. Claimant's allegations fail to state a claim under both §27.01 of the Texas Business and Commerce Code and the Texas Securities Act;
4. Claimant's claims are barred by waiver, estoppel, ratification, assumption of risk and comparative negligence, as well as Claimant's own failure to mitigate his alleged damages; and,
5. Claimant assumed the risks of his investments when he decided to invest in securities.

Unless specifically admitted in their Answer, the Citigroup Respondents denied the allegations made in the Statement of Claim and asserted the following defenses:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. Claimant's claims are barred by the applicable statutes of limitations;
3. Claimant's claims are barred by the doctrines of waiver, ratification and estoppel;
4. Claimant's damages, if any, were not proximately caused by any action by any Citigroup Respondent;
5. Claimant's alleged damages are speculative and not legally cognizable;
6. To the extent Claimant suffered any damages alleged in the Statement of Claim, Claimant failed to take reasonable steps to mitigate or avoid those damages;
7. Claimant is not entitled to recover attorneys' fees and/or punitive damages under applicable law;
8. The Citigroup Respondents acted in good faith and without malice or reckless indifference to Claimant;
9. Claimant's damages, if any, must be determined by the out-of-pocket loss rule;
10. The Citigroup Respondents' actions comported with all applicable laws, rules and industry standards in effect at the time;
11. Claimant's damages, if any, were caused by the intervening acts of third parties or by the acts of the Claimant himself;
12. Claimant's claims under Texas law would be barred by choice of law provision in the agreements executed by the Claimant;
13. Claimant received monthly statements and confirmation slips that apprised him of the status of his investments and their margin. Claimant failed to timely notify Citigroup of any complaints he had with the account and is barred because of this failure;
14. The Respondents are not liable under the Texas Securities Act;
15. The Texas Deceptive Trade Practices Act is inapplicable to this case;
16. Claimant cannot prove that he relied on any statement of the Citigroup

Respondents in any action; and,

17. Claimant cannot prove each of the elements of his claims.

Unless specifically admitted in his Answer, Respondent Blodget denied the allegations made in the Statement of Claim and asserted the following defenses:

1. Claimant's claims are barred because the risks inherent in the investments at issue were fully disclosed or known to Claimant and he assumed the risks;
2. Claimant's claims are barred under the doctrine of contributory negligence because he negligently contributed to his own injury;
3. Claimant's claims are barred or mitigated under the doctrine of comparative negligence because he negligently contributed to his own injury to a greater degree than Blodget allegedly did;
4. Claimant's claims are barred because his alleged injuries were not caused, legally, proximately, or otherwise, by Blodget;
5. Claimant's claims are barred because there was no privity between Claimant and Blodget;
6. Claimant's claims are barred because Blodget did not act with intent, scienter, or in breach of any duty of care or loyalty;
7. Claimant's claims are barred because he failed to mitigate damages;
8. Claimant's claims are barred by the applicable statute of limitations and by the defenses of estoppel, waiver, ratification and laches;
9. Claimant's claims are barred because Blodget at all times conducted himself in compliance with the requirements of all applicable provisions of federal and state law;
10. Claimant fails to state a claim upon which relief can be granted; and,
11. Blodget incorporates by reference the defenses asserted by Merrill Lynch.

### **RELIEF REQUESTED**

Claimant requested:

Compensatory Damages	\$2,021,628.00
Exemplary Damages	\$5,000,000 pursuant to the Texas Securities Act and Chapters 27 and 41 of the Texas Civil Practices & Remedies Code
Treble Damages	Pursuant to TEX. BUS. & COM. CODE § 17.50(b)(1)
Interest	Pre- and post-judgment interest as provided by law
Attorneys' Fees	Pursuant to the Texas Securities Act; TEX. BUS. & COM. CODE §17.50(d); TEX. CIV. PRAC. & REM. CODE §§ 38.00(7) AND (8);

TEX.BUS. & COM. CODE §  
27.01(e); and any other mechanism  
in law and equity

Other Monetary/Non-Monetary Relief if any: In law or equity, including  
rescission.

Respondent Merrill Lynch requested that Claimant take nothing by his claims and that Respondent recover its fees and expenses.

Citigroup Respondents requested that the Claims be dismissed in their entirety, that the Panel order that the claim be stricken from the CRD of Respondents Cooper and Bower, and that the Citigroup Respondents recover all costs for the defense of this action.

Respondent Blodgett requested that the Statement of Claim be dismissed with prejudice, that he be awarded his attorneys' fees and costs and that all references to the Statement of Claim be expunged from his CRD record.

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

Upon review of the file and the representations made on behalf of the Claimant, the undersigned arbitrators determined that Respondent Blodgett was 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").

On January 15, 2004, the Panel heard arguments on the Respondents' Motions to Dismiss. After review of the pleadings and consideration of the arguments, the Panel denied the Motions filed by the Citigroup Respondents, Merrill Lynch and Blodgett. The Panel granted Claimant's Motion for Leave to Amend.

On March 2, 2004, NASD Dispute Resolution was advised that Claimant and the Citigroup Respondents had reached a settlement in this matter and that these Respondents would not be present at the hearing. Based upon this settlement, no determination was made as to any of the claims asserted by the Claimant against the Citigroup Respondents.

At the close of the Claimant's case on March 4, 2004, Respondents presented a Motion to Dismiss. The Panel determined that they would hear arguments regarding the Motion the morning of March 5, 2004. After considering the arguments, pleading, evidence and the post-hearing submissions, the undersigned Arbitrators have determined that the Motion should be granted and the case dismissed.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the arguments of counsel, and the hearing submissions filed between the scheduled hearings, the undersigned Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted by Claimant Stuart D. Small, individually and on behalf of the Stuart D. Small Roth IRA, against Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Henry M. Blodget are hereby dismissed with prejudice and denied in their entirety;
2. The Parties shall bear their own costs of arbitration, including any attorneys' fees, except for those sums specifically enumerate herein; and,
3. Any and all relief not specifically addressed herein, including punitive and/or treble 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	= \$ 600.00
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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 firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Citigroup Global Markets, Inc. are each a party to this arbitration and the following member fees are assessed against each member firm:

Member surcharge	= \$ 3,750.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,500.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed: None.

#### **Forum Fees and Assessments**

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
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Pre-hearing conference:	November 11, 2003	1 session	
Two (2) Pre-hearing sessions with Panel @ \$1,200.00			= \$ 2,400.00
Pre-hearing conferences:	October 17, 2003	1 session	
	January 15, 2004	1 session	
Six (6) Hearing sessions @ \$1,200.00			= \$ 7,200.00
Hearing Dates:	March 3, 2004	2 sessions	
	March 4, 2004	3 sessions	
	March 5, 2004	1 session	
Total Forum Fees			= \$10,050.00

The Panel has assessed \$10,050.00 of the forum fees to Claimant Stuart D. Small, individually and on behalf of the Stuart D. Small Roth IRA

**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.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested copies of tapes = \$ 30.00

**FEE SUMMARY**

Claimant Stuart D. Small, individually and on behalf of the Stuart D. Small Roth IRA, is solely liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$10,050.00
Total Fees	= \$10,650.00
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 8,850.00

Respondent Citigroup Global Markets, Inc., formerly known as Salomon Smith Barney, Inc., is solely liable for:

Member Fees	= \$10,000.00
Less payments	= \$10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for:

Member Fees	= \$10,000.00
Administrative Costs	= \$ 30.00

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Total Fees	= \$10,030.00
Less payments	= \$15,500.00
Balance Refunded by NASD Dispute Resolution	= \$ 5,470.00

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

**ARBITRATION PANEL**

K. Steve Kimball, CFA - Public Arbitrator, Presiding Chairperson  
Charles P. Aberg, Esq. - Public Arbitrator  
Fred R. Deaton, Jr. - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

K. Steve Kimball

K. Steve Kimball, CFA  
Public Arbitrator, Presiding Chairperson

3/24/04  
Signature Date

\_\_\_\_\_  
Fred R. Deaton, Jr.  
Non-Public Arbitrator

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

**Dissenting Arbitrator's Signature**

I dissent from the majority arbitrators' decision.

\_\_\_\_\_  
Charles P. Aberg, Esq.  
Public Arbitrator

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

3/24/04  
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution  
Arbitration No. 03-00190  
Award Page 8

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Public Arbitrator, Presiding Chairperson

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Signature Date

Fred R. Deaton Jr.  
Fred R. Deaton, Jr.  
Non-Public Arbitrator

3/24/2004  
Signature Date

**Dissenting Arbitrator's Signature**

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Charles P. Aberg, Esq.  
Public Arbitrator

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Signature Date

3/24/04 [Signature]  
Date of Service (For NASD Dispute Resolution office use only)

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K. Steve Kimball, CFA  
Public Arbitrator, Presiding Chairperson

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Signature Date

\_\_\_\_\_  
Fred R. Deaton, Jr.  
Non-Public Arbitrator

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

**Dissenting Arbitrator's Signature**

I dissent from the majority arbitrators' decision.

Charles P. Aberg  
Charles P. Aberg, Esq.  
Public Arbitrator

3/25/04  
Signature Date

3/24/04  
Date of Service (For NASD Dispute Resolution office use only)