

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Jacob Palterovich

95-03622

Name of Respondents

Biltmore Securities, Inc.  
Howard Gostfrand  
Thomas Pronesti

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**REPRESENTATION**

For claimant Jacob Palterovich ("claimant") appeared Dan Brecher, Esq. of the Law Offices of Dan Brecher located in New York, New York.

For respondents Biltmore Securities, Inc. ("Biltmore"), Howard Gostfrand ("Gostfrand") and Thomas Pronesti ("Pronesti") appeared Hartley T. Bernstein, Esq. of Bernstein & Wasserman, LLP located in New York, New York.

**CASE INFORMATION**

Statement of Claim was filed on July 26, 1995. Claimant's Submission Agreement was signed on July 20, 1995.

Joint Statement of Answer was filed by Biltmore, Gostfrand and Pronesti on: October 6, 1995. Gostfrand's Submission Agreement was signed on August 22, 1995. Pronesti's Submission Agreement was signed on August 22, 1995. Biltmore did not file an executed Submission Agreement.

**HEARING INFORMATION**

Pre-Hearing Conference:	March 25, 1996	-	One Arbitrator
	April 17, 1996	-	Full Panel
Hearing Dates/Sessions:	July 24, 1996	-	Two Sessions
	July 25, 1996	-	Two Sessions
	September 30, 1996	-	Two Sessions

October 1, 1996	-	Two Sessions
October 2, 1996	-	One Session

The hearing conducted on July 24, 1996 was held at the City Midday Club located at 140 Broadway located in New York, New York. The hearing conducted on July 25, 1996 was held at the Downtown Association located at 60 Pine Street located in New York, New York. The hearings conducted on September 30, 1996, October 1, 1996 and October 2, 1996 were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.

### CASE SUMMARY

Claimant alleged that, in October 1994, after receiving a "cold call", he opened a cash account with Gostfrand at Biltmore. Claimant further alleged that speculative securities were purchased for his account which were unsuitable considering his financial circumstances, investment objectives, limited experience and personal circumstances. Claimant asserted that respondents made fraudulent representations concerning Telecom Argn. & France, Harmony Holding Corp., United Leisure Corp, United Restaurants Inc., United Restaurants Warrants and Dualstar Tech Corp. Claimant further asserted that respondents sold him unsuitable securities, charged excessive commissions, markups and markdowns on transactions in his account, made unauthorized transactions and refused to permit him to sell shares in violation of Section I of the NASD Rules of Fair Practice.

Claimant asserted that Gostfrand effected transactions without telling him the true facts regarding such transactions and without authority. Claimant also asserted that respondents failed to follow instructions and failed to sell securities as he requested. Claimant maintained that all trades in his account in 1994 - 1995 were without his informed consent. Claimant also maintained that Gostfrand and Biltmore were never given discretionary authority and, therefore, the trades constitute a material breach of his customer agreement with respondents and a violation of Section 15 of the NASD Rules of Fair Practice.

Claimant also alleged that Biltmore and Pronesti failed to supervise and control Gostfrand; that respondents were negligent; that respondents churned his account; that respondents violated Section 18 of the NASD Rules of Fair Practice; and that respondents knowingly and intentionally misrepresented the quality of the securities purchased, the commissions charged and the reputation of the firm.

Respondents denied all allegations of wrongdoing contained in the Statement of Claim. Respondents maintained that claimant was apprised of all of the risks of his investments; that respondents did not charge excessive markups or markdowns; that respondents did not churn claimant's account; and that the panel is not authorized to award attorney's fees.

As affirmative defenses, respondents maintained that claimant authorized and directed each and every transaction; that respondents did not violate any applicable law or rule; that respondents made no misrepresentation or omission to claimant; that respondents did not act negligently in handling claimant's account; that respondents did not breach any fiduciary duty owed to

claimant; that each and every transaction for claimant's account was suitable given claimant's financial status and stated investment objectives; that Biltmore properly supervised its account executives with regard to claimant's account; that respondents did not breach any agreement with claimant; and that respondents did not "churn" claimant's account.

### **RELIEF REQUESTED**

Claimant requested an award of: \$112,551.00 for his out-of-pocket loss; \$19,065.73 in interest from December 5, 1994 through October 23, 1996, plus interest at 9% thereafter until paid; \$34,475.00 in churning commissions; expert witness fees and expenses of \$6,004.51; and \$83,045.00 in attorneys' fees calculated as one third the total amount that should be awarded against the respondents or, in the alternative, attorneys' fees in the amount of \$45,509.52.

Respondents requested that the panel dismiss claimant's claims in their entirety.

### **OTHER ISSUES CONSIDERED & DECIDED**

The panel made the following rulings concerning respondent Biltmore, who did not file an executed Submission Agreement in this matter:

1. Pursuant to Section 1 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that Biltmore was a member of the NASD at the time this controversy arose. Consequently, the panel found personal jurisdiction over Biltmore pursuant to Section 12(a) of the Code.
3. The panel found that Biltmore was required to file a properly executed Submission Agreement pursuant to Section 25(b) of the Code.

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.

Subsequent to the hearings in this matter, respondents made a motion to strike the testimony of claimant's expert witness and to dismiss all of claimant's claims. The panel considered this motion and has ruled that it be denied.

### **AWARD**

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

1. Claimant is hereby awarded actual damages in the amount of \$130,000.00, inclusive of interest, assessed as follows:

- a. Biltmore be and hereby is liable and shall pay claimant the sum of \$65,000.00.
  - b. Biltmore and Gostfrand be and hereby are jointly and severally liable and shall pay claimant the sum of \$32,500.00.
  - c. Biltmore and Pronesti be and hereby are jointly and severally liable and shall pay claimant the sum of \$32,500.00.
2. The panel hereby finds that respondents committed fraud and, therefore, claimant is awarded the sum of \$30,000.00, representing attorneys' fees, assessed as follows:
    - a. Biltmore be and hereby is liable and shall pay claimant the sum of \$15,000.00.
    - b. Biltmore and Gostfrand be and hereby are jointly and severally liable and shall pay claimant the sum of \$7,500.00.
    - c. Biltmore and Pronesti be and hereby are jointly and severally liable and shall pay claimant the sum of \$7,500.00.
  3. Each party shall bear their own costs, except that respondents be and hereby are jointly and severally liable and shall pay claimant the sum of \$750.00 to reimburse claimant for the hearing session deposit previously paid to the NASD.
  4. All other claims are hereby denied.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 filing fee previously paid by claimant and have assessed the following forum fees:

1 pre-hearing conference (one arbitrator) x \$300.00	= \$ 300.00
1 pre-hearing conference (full panel) x \$750.00	= \$ 750.00
9 hearing sessions x \$750.00	= <u>\$6,750.00</u>
Total forum fees assessed	= \$7,800.00

Respondents Biltmore, Gostfrand and Pronesti be and hereby are jointly and severally liable for the sum of \$7,800.00, representing the total amount of forum fees assessed. Claimant previously deposited \$750.00 with the NASD and therefore, Biltmore, Gostfrand and Pronesti shall pay \$7,050.00 to the NASD, representing the total amount of forum fees outstanding.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures



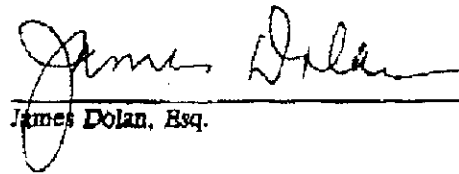
James Dolan, Esq.  
Chairperson-Public Arbitrator

Julio J. Castro, Jr.  
Public Arbitrator

Fred Shinagel  
Industry Arbitrator

Date of Decision: January 17, 1997

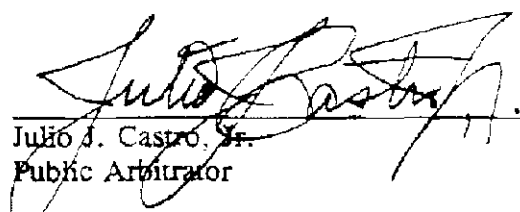
I, James Dolan, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



James Dolan, Esq.

Concurring Arbitrators' Signatures

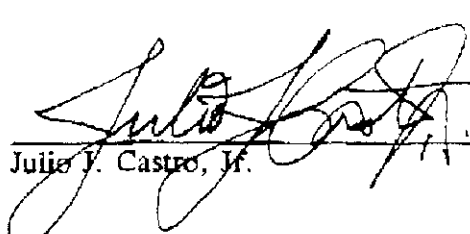
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James Dolan, Esq.  
Chairperson-Public Arbitrator

  
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Julio J. Castro, Jr.  
Public Arbitrator

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Fred Shinagel  
Industry Arbitrator

Date of Decision: January 17, 1997

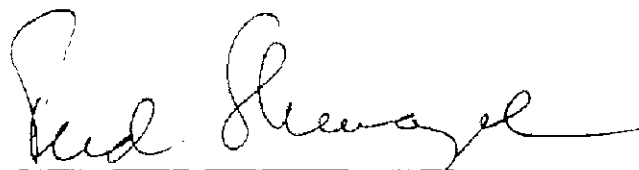
I, Julio J. Castro, Jr., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
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Julio J. Castro, Jr.

Concurring Arbitrators' Signatures

\_\_\_\_\_  
James Dolan, Esq.  
Chairperson-Public Arbitrator

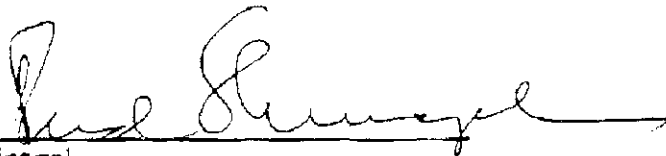
\_\_\_\_\_  
Julio J. Castro, Jr.  
Public Arbitrator



\_\_\_\_\_  
Fred Shinagel  
Industry Arbitrator

Date of Decision: January 17, 1997

I, **Fred Shinagel**, 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.



\_\_\_\_\_  
Fred Shinagel