

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

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*In the Matter of the Arbitration Between*

*Name of Claimant*

Robert T. Murtagh

Case No. 99-00474

*Name of Respondent*

Merrill Lynch, Pierce, Fenner & Smith, Inc.

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**REPRESENTATION OF PARTIES**

For Robert T. Murtagh ("Murtagh"), hereinafter referred to as "Claimant": Delmer C. Gowing, III, Esq., Delray Beach, Florida.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Respondent": Alison Fiala Mullen, Esq., Rubin & Associates, Paoli, Pennsylvania.

**CASE INFORMATION**

Statement of Claim filed on or about: February 2, 1999.

Claimant Murtagh signed the Uniform Submission Agreement: January 25, 1999.

Statement of Answer filed by Respondent Merrill Lynch on or about: May 21, 1999.

Respondent Merrill Lynch signed the Uniform Submission Agreement: May 20, 1999.

**CASE SUMMARY**

Claimant asserted the following: Respondent defamed Claimant by placing the words "Inability to perform to PDP standards" on Claimant's U-5. The per se defamation was wilful and has caused injury to Claimant in that he was unable to find similar employment in the securities industry. The branch manager of Respondent, Douglas Hornberger, had an ulterior motive in writing the defamatory U-5 and intended to harm Claimant. In addition, Claimant asserted that Respondent breached his employment contract when Respondent terminated Claimant's employment.

Unless specifically admitted in its Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim and asserted the following: During his employment with Respondent, Claimant committed several errors while servicing clients of Respondent. Respondent terminated Claimant for consistently demonstrating poor business judgment and for his overall failure to perform to Respondent's standards. Respondent has not

disseminated or otherwise published any information concerning Claimant that is not true and accurate. All statements made by or on behalf of Respondent are protected by a qualified privilege applicable to any allegedly untruthful statement made without malicious intent to injure. Any losses sustained by Claimant were due to his own failure to mitigate, by his own failures and omissions, and by his own conduct and/or negligence. Claimant cannot prove special damages of a material and pecuniary nature. By execution of the Form U-4, Claimant consented to Respondent's publication of information within Respondent and to others with a reasonable business interest about or concerning Claimant's performance and/or termination of employment at Respondent. Accordingly, all statements made by Respondent are privileged. All of Respondent's actions in assessing Claimant's conduct were made in good faith and for proper business reasons. Claimant is precluded from any recovery because the damages he seeks are necessarily speculative and not recoverable as a matter of law. Claimant fails to state a claim for punitive damages because no conduct alleged to have been engaged in by Respondent could possibly be considered to constitute conduct "so extreme and outrageous as to go beyond the bounds of all decency tolerated by a civilized community" as required by law.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages of \$150,000.00 for the defamation claim and \$48,000.00 for the breach of contract claim, punitive damages of \$100,000.00 plus costs and attorney's fees.

Respondent Merrill Lynch requested that all claims against it be dismissed in their entirety. Respondent Merrill Lynch also requested that all costs and all other reasonable and appropriate relief be assessed against Claimant Murtagh.

#### **OTHER ISSUES CONSIDERED AND 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.

On February 16, 2000, Claimant dismissed, with prejudice, his claim for breach of contract.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are denied in their entirety.

Claimant's request for punitive damages is denied.

Respondent is liable and shall pay to Claimant the sum of \$500.00 which represents

reimbursement of the claim filing fee.

All other requests for relief not specifically addressed herein are 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	= \$500.00
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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 person at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

#### **Adjournment Fees**

Adjournments requested during these proceedings:

April 18 through 19, 2000 hearing dates, adjournment by Claimant. The adjournment fee of \$750.00 was waived by the arbitration panel.

#### **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 \$750.00	= \$750.00
Pre-hearing conference: September 8, 1999	1 session
Two (2) Hearing sessions x \$750.00	= \$1,500.00
Hearing Date(s): September 6, 2000	2 sessions
Total Forum Fees	= \$2,250.00

The Panel has assessed the total forum fees of \$2,250.00 to Respondent Merrill Lynch.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided

without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during these proceedings.

**Fee Summary**

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$500.00
Total Fees	= \$500.00
<u>Less payments</u>	<u>= \$500.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

Respondent be and hereby is solely liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	<u>= \$2,250.00</u>
Total Fees	= \$6,850.00
<u>Less payments</u>	<u>= \$6,850.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

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

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/  
Mitchell A. Yelen, Esq.  
Public Arbitrator, Presiding Chair

October 13, 2000  
Signature Date

\_\_\_\_\_/s/  
J. Porter McClean  
Public Arbitrator

October 13, 2000  
Signature Date

/s/

Lee Alan Rosenblum  
Industry Arbitrator

October 16, 2000  
Signature Date

October 18, 2000  
Date of Service (For NASD-DR office use only)

without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during these proceedings.

**Fee Summary**

Claimant be and hereby is solely liable for:

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Total Fees	= \$500.00
<u>Less payments</u>	<u>= \$500.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

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Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

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

**Concurring Arbitrators' Signatures**

Mitchell A. Yelen

Mitchell A. Yelen, Esq.  
Public Arbitrator, Presiding Chair

10/13/00

Signature Date

J. Porter McClean  
Public Arbitrator

Signature Date



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without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during these proceedings.

Fee Summary

Claimant be and hereby is solely liable for:

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Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

Respondent be and hereby is solely liable for:

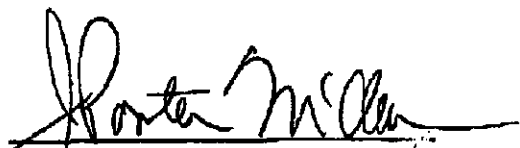
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Concurring Arbitrators' Signatures

Mitchell A. Yelen, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

  
J. Porter McClean  
Public Arbitrator

10/13/00  
Signature Date

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Lee Alan Rosenblum  
Industry Arbitrator

10/16/00  
Signature Date

Date of Service (For NASD-DR office use only)