

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

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In the Matter of the Arbitration Between:

Robert Welton IRA (Claimant) v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Domenic Ruggiero, and Vincenzo Costanzo (Respondents)

Case Number: 03-00420

Hearing Site: Cleveland, Ohio

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Nature of the Dispute: Customer vs. Member and Associated Persons.

**REPRESENTATION OF PARTIES**

Claimant Robert Welton IRA ("Welton") hereinafter referred to as "Claimant": Philip D. Sever, Esq., The Sever Law Firm, Brecksville, OH and Ron Miller, Party Representative, Incline Village, NV.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), Domenic Ruggiero ("Ruggiero"), and Vincenzo Costanzo ("Costanzo") hereinafter collectively referred to as "Respondents": Edwin A. Zipf, Esq., Bressler, Amery & Ross, P.C., New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: January 14, 2003.

Claimant signed the Uniform Submission Agreement: December 16, 2002.

Joint Statement of Answer filed by Respondents on or about: May 15, 2003.

MLPFS did not sign the Uniform Submission Agreement.

Ruggiero did not sign the Uniform Submission Agreement.

Costanzo did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: unsuitability; fraud and misrepresentation in violation of the Securities Exchange Act; negligent misrepresentation; breach of fiduciary duty; failure to supervise; respondent superior. Claimant's claim involved a variable annuity.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested recovery of all losses in the amount of \$85,000.00; recovering all loss of income in the amount of \$40,000.00; disgorging Respondents' commissions and compensation; attorneys' fees; costs; prejudgment and post-judgment interest; punitive damages; and other and further relief the Arbitration Panel deems just and proper.

Respondents requested that Claimant's claims be dismissed with prejudice, and that those claims be expunged from Respondent Ruggiero's and Respondent Costanzo's records, and that the cost of this arbitration be assessed against Claimant.

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

Respondents did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

Respondents made a motion to remove Claimant's wife and Claimant's expert from hearing testimony of witnesses. After due consideration, the Panel allowed the expert to remain; the wife was asked to leave as she is a fact witness in the case. The parties agreed to allow the wife to stay for opening statements. She was used as the first witness and was allowed to remain throughout the proceeding.

Respondents made a motion to limit the testimony of Claimant's expert to exclude references to opinion on supervision, suitability, standards of care/industry practices, and recommended damages. After due consideration, the Panel allowed Claimant's expert to express an opinion on the topics noted. The Panel would use discretion in determining the relevance and extent of expertise in the area identified and the Panel would weight the testimony accordingly.

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, and 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 dismissed in their entirety.
2. Any and all relief not specifically addressed herein, including punitive damages, is

denied.

3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Domenic Ruggiero'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 Domenic Ruggiero must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
4. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Vincenzo Costanzo'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 Vincenzo Costanzo must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.

#### **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	= \$300.00
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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. Accordingly, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

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

The Panel has assessed forum fees for each session conducted. A 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 @ \$1,125.00	= \$1,125.00
Pre-hearing conference: September 4, 2003 1 session	
Six (6) Hearing sessions @ \$1,125.00	= \$6,750.00
Hearing Dates: April 20, 2004 2 sessions	
April 21, 2004 2 sessions	

April 22, 2004 2 sessions

Total Forum Fees = \$7,875.00

1. The Panel has assessed \$3,937.50 of the forum fees against Claimant.
2. The Panel has assessed \$3,937.50 of the forum fees against Respondent MLPFS.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$3,937.50</u>
Total Fees	= \$4,237.50
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution	= \$2,812.50
  
2. Respondent MLPFS is solely liable for:

Member Fees	= \$5,200.00
<u>Forum Fees</u>	<u>= \$3,937.50</u>
Total Fees	= \$9,137.50
<u>Less payments</u>	<u>= \$7,350.00</u>
Balance Due NASD Dispute Resolution	= \$1,787.50

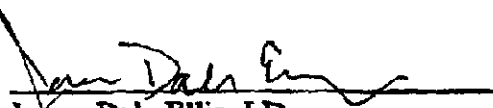
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.
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**ARBITRATION PANEL**

James Dale Ellis, J.D.	-	Public Arbitrator, Presiding Chair
Edward F. Siegel, Esq.	-	Public Arbitrator
Henry Ott-Hansen	-	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.

  
\_\_\_\_\_  
James Dale Ellis, J.D.  
Public Arbitrator, Presiding Chairperson

4/30/04.  
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Signature Date

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Edward F. Siegel, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Henry Ott-Hansen  
Non-Public Arbitrator

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

May 4, 2004

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Date of Service (For NASD Dispute Resolution use only)

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Public Arbitrator

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Edward F. Siegel, Esq.  
Public Arbitrator

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

*Henry Ott-Hansen*  
*Henry Ott-Hansen*  
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Henry Ott-Hansen  
Non-Public Arbitrator

*April 30, 2004*  
*April 30, 2004*  
\_\_\_\_\_  
Signature Date

May 4, 2004

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Date of Service (For NASD Dispute Resolution use only)