

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

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In the Matter of the Arbitration Between:

Name of the Claimant  
Dominic Porcaro

Case Number: 05-01215

Name of the Respondent  
Merrill, Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Boca Raton, Florida

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Nature of the Dispute: Customer v. Member.

**REPRESENTATION OF PARTIES**

For Dominic Porcaro, hereinafter referred to as "Claimant": Marc S. Dobin, Esq., Dobin & Jenks, LLP, Jupiter, Florida.

For Merrill, Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": Benjamin J. Biard, Esq., Office of General Counsel, Merrill Lynch Pierce Fenner & Smith, Inc., Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: March 8, 2005.  
Claimant signed the Uniform Submission Agreement: March 8, 2005.  
First Amended Statement of Claim filed on or about: April 8, 2005.  
Statement of Answer filed on or about: May 5, 2005.  
Respondent signed, but did not date, the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: 1) unsuitability; 2) negligence; 3) failure to supervise; 4) fraud; 5) misrepresentations; 6) breach of contract; and, 7) violation of Florida Statutes, Chapter 517. The causes of action relate to Claimant's investment in variable annuities and mutual funds including, but not limited to, the MLF Retirement Plus Annuity.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim, as amended, and asserted various affirmative defenses.

**RELIEF REQUESTED**

Claimant requested: 1) compensatory damages in the amount of \$185,000.00; 2) costs; and, 3) attorneys' fees pursuant to Section 517.211(6) of the Florida Statutes.

Respondent requested: 1) a dismissal of the Statement of Claim in its entirety; 2) costs and expenses of the arbitration, including forum fees and reasonable attorneys' fees;

and, 3) such other and further relief as deemed just and proper.

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

During the evidentiary hearing, on or about August 17, 2005, Respondent filed a Motion to Amend Request for Relief wherein Respondent requested expungement of all references to the above captioned arbitration proceeding from the NASD Central Registration Depository ("CRD") U-4/U-5 record of non-party Gerald A. Martin (CRD #319640). The undersigned arbitrators (the "Panel") granted said motion.

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, 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:

Respondent is liable on the claim for unsuitability and shall pay to Claimant compensatory damages in the amount of \$24,000.00. Additionally, Claimant shall recover \$6,000.00, inclusive of interest, from Respondent, which shall be paid by a credit to the existing annuity account and treated as a non-reportable reimbursement of capital. Respondent shall waive all redemption fees associated with any liquidation or transfer.

The Panel recommends the expungement of all reference to the above captioned arbitration from Gerald A. Martin's CRD #3196400 registration record maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 04-16, Gerald A. Martin must obtain confirmation from a court of competent jurisdiction before the NASD CRD will execute the expungement directive.

Unless specifically waived in writing by the NASD, parties seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party and serve NASD with all appropriate documents.

Pursuant to Rule 2130, the Panel has made the following affirmative findings of fact:

The claims, allegations, or information, as they relate to Gerald A. Martin, are false and frivolous.

Claimant's request for attorneys' fees is granted, with the amount to be determined by a court of competent jurisdiction pursuant to Chapter 517 of the Florida Statutes.

Respondent is liable and shall pay to Claimant the sum of \$300.00, representing reimbursement of the non-refundable claim filing fee previously paid by Claimant to NASD.

Any and all claims for relief not specifically addressed herein, including Claimant's request for relief under Chapter 517 of the Florida Statutes and Respondent's request for attorneys' fees, are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure ("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, Respondent is a party and a member firm.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$2,750.00</u>
Total Member Fees	= \$5,200.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

February 28 – March 2, 2006, adjournment requested by Respondent. The Panel assessed an adjournment fee in the amount of \$1,125.00 to Respondent.

#### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

There were no three-day cancellation fees incurred during these proceedings.

#### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

There were no injunctive relief fees incurred during these proceedings.

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

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. 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) Decision on a discovery-related motion on the papers with One (1) arbitrator @ \$200.00	= \$ 200.00
Respondent submitted (1) discovery-related motion	
Two (2) Pre-hearing sessions with Panel @ \$1,125.00/session	= \$2,250.00
Pre-hearing conferences: July 21, 2005 1 session	
February 24, 2006 1 session	
Four (4) Hearing sessions @ \$1,125.00/session	= \$4,500.00
Hearing Dates: August 16, 2006 2 sessions	
August 17, 2006 2 sessions	
<hr/> Total Forum Fees	<hr/> = \$6,950.00

The Panel has assessed the total forum fees of \$6,950.00 to Respondent.

#### **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 are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

#### **Fee Summary**

Claimant is solely liable for:

<u>Initial Filing Fee</u>	= \$ 300.00
<u>Total Fees</u>	= \$ 300.00
<u>Less payments</u>	= \$ 300.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent is solely liable for:

Member Fees	= \$ 5,200.00
Adjournment Fee	= \$ 1,125.00
Forum Fees	= \$ 6,950.00
<u>Total Fees</u>	= \$13,275.00
<u>Less payments</u>	= \$ 5,200.00
Balance Due NASD Dispute Resolution	= \$ 8,075.00

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

**ARBITRATION PANEL**

Edwin Fradkin, Esq.	-	Public Arbitrator, Presiding Chairperson
Christopher J. Klein, Esq.	-	Public Arbitrator
Carl J. Hegner	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Edwin Fradkin, Esq.  
Public Arbitrator, Presiding Chairperson

August 18, 2006  
Signature Date

/s/  
Christopher J. Klein, Esq.  
Public Arbitrator

August 18, 2006  
Signature Date

/s/  
Carl J. Hegner  
Non-Public Arbitrator

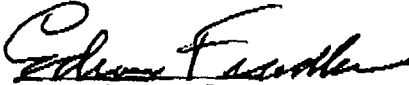
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Public Arbitrator, Presiding Chairperson

8/18/06  
Signature Date

Christopher J. Klein, Esq.  
Public Arbitrator

Signature Date

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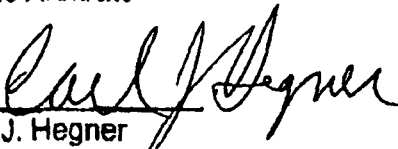
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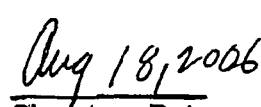
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