

Award  
NASD Dispute Resolution, Inc.

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In the Matter of the Arbitration Between:

Denis M. Crowley (Claimant) vs. David L. Witherbee (Respondent)

Case Number: 99-02703

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**REPRESENTATION OF PARTIES**

Claimant, Denis M. Crowley, hereinafter referred to as "Claimant," appeared *pro se*.

Respondent, David L. Witherbee, hereinafter referred to as "Respondent": Matthew J. Kadnar, Esq.,  
LPL Financial Services, Boston, Massachusetts

**CASE INFORMATION**

Statement of Claim filed on or about: June 14, 1999

Claimant signed the Uniform Submission Agreement: June 7, 1999

Statement of Answer filed by Respondent on or about: September 29, 1999

Respondent signed the Uniform Submission Agreement: September 27, 1999

**CASE SUMMARY**

Claimant asserted Respondent did not purchase a major index fund as directed, but, instead, purchased a smaller, less-known stock fund. Claimant alleged his later review of the stock fund prospectus showed it had a history of poor returns and higher marketing fees. Claimant contended that certain other mutual funds purchased by Respondent were unsuitable for a customer of Claimant's age and investment objectives.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the mutual funds recommended to Claimant were suitable for Claimant with a declared investment objective of "growth with income," and were prior approved by Claimant in all instances. Respondent maintained that Claimant is a sophisticated investor with thirty years experience and a net worth, at the time the account was opened, of \$4,500,000. In addition, Respondent asserted that Claimant's managed account returned 23% during the ten-month period at issue, and that Claimant suffered no damages as a result of any action by Respondent.

**RELIEF REQUESTED**

Claimant requested:

Compensatory Damages

\$30,000

Respondent requested the Statement of Claim be denied in its entirety.

### 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.

At the conclusion of Claimant's case, Respondent moved to dismiss asserting Claimant failed to offer conclusive evidence or proof of any of the issues set forth in the Statement of Claim. After consideration of Respondent's motion and Claimant's response, the motion was denied, and the case proceeded.

### AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator decided in full and final resolution of the issues submitted for determination as follows:

1. That the claims asserted against Respondent Witherbee are denied; and
2. That each party shall bear its own costs and expenses, with the exception of forum fees as specified below; and
3. That the arbitrator recommends the expungement of all reference to the above captioned arbitration for Respondent Witherbee's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Witherbee must obtain confirmation from a court of competent jurisdiction before CRD will execute an expungement directive.
4. That any and all relief not specifically addressed herein is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$150

#### 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, Linsco/Private Ledger Corporation, is the Respondent's employer.

Member surcharge = \$600

Pre-hearing process fee = \$600

Hearing process fee = \$1,000

Forum Fees and Assessments

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

2 Pre-hearing sessions with a single arbitrator x \$450	= \$900
Pre-hearing conferences:      March 13, 2000      1 session	
June 27, 2000    1 session	
2 Hearing sessions x \$450	= \$900
Hearing Date:                    September 7, 2000      2 sessions	
Total Forum Fees	= \$1,800

1. The Arbitrator assessed \$900 of the forum fees to Claimant.
2. The Arbitrator assessed \$900 of the forum fees to Respondent.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee	= \$150
Forum Fees	= <u>\$900</u>
Total Fees	= \$1,050
Less payments	= <u>\$1,050</u>
Balance Due NASD Regulation, Inc.	= - 0 -

Linsco/Private Ledger Corp. is solely liable for:

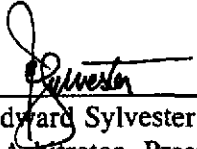
Member Fees	= \$2,200
Total Fees	= \$2,200
Less payments	= \$2,200
Due from Linsco/Private Ledger Corp.	= - 0 -

Respondent is solely liable for:

Forum Fees	= \$900
Less payments	= \$450
Balance Due NASD Regulation, Inc.	= \$450

All balances are due to NASD Dispute Resolution, Inc. and are payable within 30 days of the service date of this Award.

**Arbitrator's Signature**

  
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John Edward Sylvester, Jr.  
Public Arbitrator, Presiding Chair

10.05.00

Date Signed

October 12, 2000  
Date of Service (For NASD office use only)