

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimants

Angel Pagan  
Windy Pagan  
AW Investment Corp.

Case Number: 17-01639

vs.

Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: San Juan, Puerto Rico

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Nature of the Dispute: Customers vs. Member

This case was decided by an all-public panel.

**REPRESENTATION OF PARTIES**

For Claimants Angel Pagan, Windy Pagan and AW Investment Corp.: Lloyd R. Schwed, Esq. and Bailey Fore, Esq., Schwed Kahle & Kress, P.A., Palm Beach Gardens, Florida and Jose Rafael Ramirez Ramos, Esq., Ramirez & Ramirez Law Offices, Mayaguez, Puerto Rico.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.: Keith Olin, Esq., Johnathan C. Schwartz, Esq. and Tanya Lambrechts, Esq., Bressler, Amery & Ross, P.C., Fort Lauderdale, Florida and Frances R. Pesquera-Rivera, Pietrantonio Mendez & Alvarez LLC, San Juan, Puerto Rico.

**CASE INFORMATION**

Statement of Claim filed on or about: June 20, 2017.

Claimants signed the Submission Agreement: June 19, 2017.

Statement of Answer filed by Respondent on or about: October 18, 2017.

Respondent signed the Submission Agreement: October 23, 2017.

Amended Statement of Answer filed by Respondent on or about: June 17, 2019.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty; gross negligence and breach of the duty of due care; breach of contract and the covenant of good faith and fair dealing; violations of Puerto Rico and state securities laws; common law fraud and deceit; failure to supervise; control person liability; respondeat superior;

and violation of FINRA and securities industry rules and standards of conduct. The causes of action relate to Claimants' investments in Puerto Rico municipal bonds and closed-end bond funds.

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

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested: compensatory damages in excess of \$2,000,000.00, plus the growth and income that would have been generated on Claimants' principal if the money had been properly invested; a full accounting of Claimants' investment accounts and Respondent's handling of Claimants' money; disgorgement of all commissions, margin interest and any other compensation or fees received by Respondent in connection with Claimants' accounts; rescission of all unsuitable or improper transactions; pre-judgment and post-judgment interest at the legal rate during the applicable period; costs and fees of this action, including FINRA fees and expert witness fees; reasonable attorneys' fees pursuant to Puerto Rican law; punitive damages in the amount of \$6,000,000.00; and such other relief as the arbitrators deemed appropriate.

In its Statement of Answer, as amended, Respondent requested: that the Statement of Claim be denied with prejudice; that the costs associated with the proceeding be assessed against Claimants; and that all references to this arbitration be expunged from the records of non-party Alex Gierbolini.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On or about June 13, 2019, Respondent filed an Unopposed Motion for Leave to File an Amended Answer in which it sought to change the calculations of Claimant's account composition made in the original Statement of Answer. Claimants did not oppose the motion. On or about June 17, 2019, the Panel granted the motion and the Amended Statement of Answer was deemed filed.

On or about August 9, 2019, Respondent filed a Motion in Limine to Exclude Regulatory Settlements, Irrelevant and Prejudicial Documents and Arbitration Awards ("Motion in Limine") in which it argued, among other things, that Claimants should be precluded from offering regulatory settlements into evidence because the practice is barred by applicable law. On or about August 14, 2019, Claimants filed an Opposition to the Motion in Limine in which they argued, among other things, that the regulatory settlements are not precluded from being offered as evidence because they are not confidential settlement agreements. On or about August 16, 2019, the Panel issued an Order denying the Motion in Limine.

The parties present at the hearing 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:

1. Respondent is liable for and shall pay to Claimants the sum of \$1,731,024.57 in compensatory damages.
2. Respondent is liable for and shall pay to Claimants simple interest on the above-stated sum at the rate of 4.5% per annum from June 20, 2017, through and including the date of the Award.
3. Respondent is liable for and shall pay to Claimants the sum of \$88,758.31 in costs.
4. Respondent is liable for and shall pay to Claimants the sum of \$750.00 which represents reimbursement of the non-refundable portion of the filing fee.
5. Any and all claims for relief not specifically addressed herein, including Claimants' requests for punitive damages and attorneys' fees and Respondent's request for expungement on behalf of non-party Gierbolini (CRD Number 2894231), are denied.

## **FEES**

Pursuant to the Code of Arbitration Procedure (the "Code"), the following fees are assessed:

### **Filing Fees**

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee	= \$2,250.00
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*\*The filing fee is made up of a non-refundable and a refundable portion.*

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$3,600.00
Member Process Fee	= \$6,800.00

### **Postponement Fees**

Postponements granted during these proceedings for which fees were assessed or waived:

August 26 – 28, 2019, postponement jointly filed

WAIVED

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Total Postponement Fees	WAIVED
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The Panel has waived the postponement fees.

**Last Minute 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:

August 26 – 28, 2019, postponement jointly filed	=\$1,800.00
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Total Last Minute Cancellation Fees	=\$1,800.00
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The Panel has assessed \$900.00 of the last minute cancellation fees jointly and severally to Claimants.

The Panel has assessed \$900.00 of the last minute cancellation fees to Respondent.

**Discovery-Related Motion Fee**

Fees apply for each decision rendered on a discovery-related motion.

Two (2) decisions on a discovery-related motion on the papers with one (1) arbitrator @ \$200.00/decision	=\$ 400.00
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Respondent submitted two (2) discovery-related motions

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Total Discovery-Related Motion Fees	=\$ 400.00
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The Panel has assessed \$200.00 of the discovery-related motion fees jointly and severally to Claimants.

The Panel has assessed \$200.00 of the discovery-related motion fees to Respondent.

**Hearing Session Fees and Assessments**

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

One (1) pre-hearing session with a single arbitrator @ \$450.00/session	=\$ 450.00
Pre-hearing conference: July 8, 2019	1 session

Two (2) pre-hearing sessions with the Panel @ \$1,500.00/session	=\$3,000.00
Pre-hearing conferences: December 12, 2017	1 session
September 27, 2019	1 session

Twenty-one (21) hearing sessions @ \$1,500.00/session	=\$31,500.00
Hearing Dates: August 19, 2019	2 sessions
August 20, 2019	2 sessions

August 21, 2019	3 sessions
August 22, 2019	2 sessions
August 23, 2019	2 sessions
November 2, 2019	2 sessions
November 3, 2019	2 sessions
November 4, 2019	2 sessions
January 11, 2020	3 sessions
January 12, 2020	1 session

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Total Hearing Session Fees	= \$34,950.00
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The Panel has assessed \$1,725.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$33,225.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

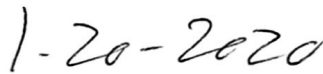
**ARBITRATION PANEL**

Sam Gowin	-	Public Arbitrator, Presiding Chairperson
Scott A. Schweber	-	Public Arbitrator
Randy Jeff Branitsky	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Sam Gowin  
Public Arbitrator, Presiding Chairperson

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

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Scott A. Schweber  
Public Arbitrator

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

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Randy Jeff Branitsky  
Public Arbitrator

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

January 21, 2020

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Date of Service (For FINRA Office of Dispute Resolution office use only)

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*Scott A. Schweber*  
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Public Arbitrator

*1/20/2020*  
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Signature Date

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Randy Jeff Branitsky  
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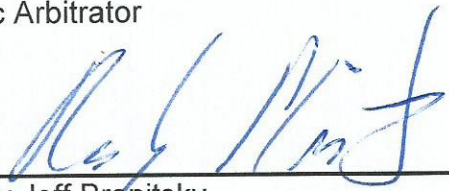
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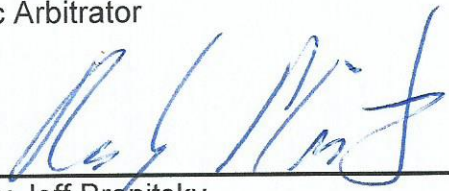
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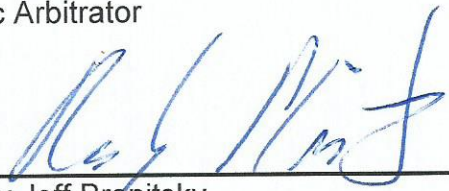
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