



October 21, 2013

Diane A. Nygaard, Esq.  
Kenner Schmitt Nygaard, LLC  
117 West 20th Street  
Suite 201  
Kansas City, MO 64108

Subject: FINRA Dispute Resolution Arbitration Number 12-02507  
Robert L. Cox vs. Ameriprise Financial Services, Inc. and Mitchell W. Black

Dear Ms. Nygaard:

Enclosed please find the decision reached by the arbitrator(s) in the above-referenced matter.

Responsibility to Pay Monetary Award

FINRA rules provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

- If not paid within 30 days of receipt;
- If the award is the subject of a motion to vacate which is denied; or
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

Expedited Suspension Proceedings for Non-Payment of Awards

Article VI, Section 3 of the FINRA By-Laws and FINRA Rule 9554 permit FINRA to suspend or cancel the registration of any firm or associated person that fails to comply with a FINRA arbitration award.

Firms are required to notify FINRA in writing within 30 days of receipt of an award that they or their associated persons have paid or otherwise complied with the award, or to identify a valid basis for non-payment. We also request that prevailing claimants notify us in writing when their awards have not been paid within 30 days of receipt of the award.

Written notification concerning award compliance or lack thereof should be directed to:

David Carey  
FINRA Dispute Resolution  
One Liberty Plaza, 165 Broadway, 52nd Floor  
New York, NY 10006  
212-858-4333 (tel) | 301-527-4706 (fax) | david.carey@finra.org (email)

#### Right to File Motion to Vacate Award

FINRA rules provide that, unless the applicable law directs otherwise, all awards rendered are final and are not subject to review or appeal. Accordingly, FINRA has no authority to vacate this award. Any party wishing to challenge the award must make a motion to vacate the award in a federal or state court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, or applicable state statute. There are limited grounds for vacating an arbitration award, and a party must bring a motion to vacate within the time period specified by the applicable statute. If you are not represented by counsel and wish to challenge the award, we urge you to seek legal advice regarding any rights or remedies available to you.

#### Forum Fees

You will receive under separate cover an invoice that reflects the fees assessed and any outstanding balance or refund due. Fees are due and payable to FINRA Dispute Resolution upon receipt of the invoice and should be sent to the address specified on the invoice. Any applicable refunds will also be sent under separate cover approximately 45 days after the case closes. All questions regarding payment of fees and refunds should be directed to FINRA Finance at (240) 386-5910.

#### Arbitrator Evaluation

FINRA encourages parties to complete Arbitrator Evaluation Forms at the conclusion of every case. We will utilize your comments in our ongoing efforts to evaluate and improve the services our forum provides. You can complete the Arbitrator Evaluation Form on our website at [www.finra.org/arbevaluation](http://www.finra.org/arbevaluation).

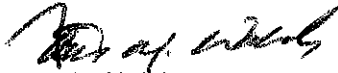
#### Party Submissions to Arbitrators After a Case Closes

FINRA rules provide that parties may not submit documents to arbitrators in cases that have been closed except under the following limited circumstances: 1) as ordered by a court; 2) at the request of any party within 10 days of service of an award, for typographical or computational errors, or mistakes in the description of any person or property referred to in the award; or 3) if all parties agree and submit documents within 10 days of service of an award. Any documents, if submitted, must be sent through FINRA.

Questions Concerning Award

Should you have any questions, please contact me at the phone number or email address provided below. Parties should not directly contact arbitrators under any circumstances.

Very truly yours,



Patrick Walsh  
Case Administrator  
Phone: 312-899-4440  
Fax: 301-527-4855  
Patrick.Walsh@finra.org

PW:gcg:LC09A  
idr: 06/27/2013  
Enclosure

RECIPIENTS:

Diane A. Nygaard, Esq., Robert L. Cox  
Kenner Schmitt Nygaard, LLC, 117 West 20th Street, Suite 201, Kansas City, MO 64108

Roger N. Walter, Esq., Mitchell William Black  
Morris, Laing, Evans, Brock & Kennedy,, 800 SW Jackson St., Suite 1310, Topeka, KS  
66612-1216

Roger N. Walter, Esq., Ameriprise Financial Services, Inc.  
Morris, Laing, Evans, Brock & Kennedy,, 800 SW Jackson St., Suite 1310, Topeka, KS  
66612-1216

**AWARD**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of Claimant

Robert L. Cox

vs.

Case Number: 12-02507  
Hearing Site: Kansas City, Missouri

Names of Respondents

Ameriprise Financial Services, Inc.  
and Mitchell William Black

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**NATURE OF THE DISPUTE**

Customer vs. Member and Associated Person

This case proceeded under the Optional All Public Panel Rule / All Public Panel

**REPRESENTATION OF PARTIES**

Robert L. Cox ("Claimant") was represented by Diane A. Nygaard, Esq. and Jared Rose, Esq., Kenner Smith Nygaard, LLC, Kansas City, Missouri.

Ameriprise Financial Services, Inc. ("Ameriprise") and Mitchell William Black ("Black"), hereinafter collectively referred to as "Respondents," were represented by Roger N. Walter, Esq., Morris, Laing, Evans, Brock & Kennedy, Chtd, Topeka, Kansas.

**CASE INFORMATION**

The Statement of Claim was filed on or about July 6, 2012. The Submission Agreement of Claimant was signed on or about June 21, 2012. An Amended Statement of Claim was filed on or about September 21, 2012.

The Statement of Answer was filed jointly by Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, on or about October 24, 2012. The Submission Agreement of Respondent, Ameriprise Financial Services, Inc., was signed on or about August 22, 2012, by Howard M. Klausmeier, VP and Group Counsel, Litigation. The Submission Agreement of Respondent, Mitchell William Black, was signed on or about October 25, 2012.

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### CASE SUMMARY

Claimant asserted causes of action including the following: violation of the Missouri Uniform Securities Act; Missouri Merchandising Practices Act; breach of fiduciary duty; breach of contract and violation of FINRA Rules; and negligence. Claimant alleged that Respondents recommended that he liquidate his previously-held securities and make new purchases in various variable life insurance policies and annuities in his accounts. Claimant alleged that Respondents recommended he purchase \$650,000.00 in several non-tradable real estate investment trusts ("REITS"). Claimant stated that these investments were unsuitable, illiquid, and based either high commission or fee-laden and as a result, he suffered losses.

Unless specifically admitted in their Answer, Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, denied the allegations made in the Statement of Claim and asserted affirmative defenses.

### RELIEF REQUESTED

In its Statement of Claim, Claimant requested an award in the amount of:

Actual/Compensatory Damages (Rescission of REITS)	\$ 650,000.00
Actual/Compensatory Damages (Rescission of Variable Annuities)	\$1,330,000.00
Actual/Compensatory Damages (Return of Commissions)	Unspecified
Punitive/Exemplary Damages	Unspecified
Interest	Unspecified
Attorneys' Fees	Unspecified
Costs	Unspecified
Other Monetary Relief	Unspecified

At the hearing, Claimant, through evidence and closing argument supported alternate damage requests with more specificity than provided in pleading, but pleading did include catch-all "6. Such other and further relief as arbitrators deem appropriate." In addition to other remedies specified in the pleadings, Claimant at closing asked specifically for \$106,000.00 lost on insurance and for the difference in value between Claimant's portfolio as managed and a prudently managed portfolio in the amount of \$937,577.00.

Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

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Arbitration No. 12-02507  
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### **OTHER ISSUES CONSIDERED & DECIDED**

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

On or about August 23, 2013, Respondent filed a Motion in Limine. On or about August 30, 2013, Claimant filed a Response to Respondent's Motion in Limine. At the arbitration hearing, the Panel denied Respondent's Motion in Limine.

Based on the evidence and testimony presented at the hearing, the Panel made the following findings:

Respondents asserted in the pleadings, in their pre-hearing brief, and at the hearing, that the Missouri Securities Act and Missouri Merchandising Practices Act are inapplicable to annuities and insurance policies, and that the claims with respect to the life insurance policies are not eligible for FINRA arbitration because they are not securities, and that claims with respect to the annuities are not eligible for FINRA arbitration because of the six-year time eligibility requirement. The Panel decided to hear the evidence on all such matters and not rule until after the conclusion of the hearing. Based on the evidence, the Panel concluded that there was no misconduct with respect to the insurance policies; therefore it was not necessary to consider the legal argument about the propriety of the forum. Regarding the annuities, while they were purchased more than six years prior to the initiation of the FINRA arbitration, the Panel (by a 2 to 1 vote) concluded that "the occurrence or event giving rise to the claim" did not necessarily occur at the moment of purchase (it is reasonable to expect that discovery of the breach may be delayed) and that the fiduciary duty represented a continuing obligation, especially since the Respondents continued to receive commissions regarding the annuities throughout the six year period of time.

The remedies listed in the Award section below are based on the Panel's finding (by a 2 to 1 vote) that Respondents breached their fiduciary duty to Claimant in connection with the recommended and completed sale to Claimant of the below identified REITS and variable annuities, and that Ameriprise Financial Services, Inc. failed to adequately supervise Mitchell William Black's performance of his fiduciary responsibilities.

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.

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### **AWARD**

After considering the pleadings, the testimony, the evidence presented at the hearing, the Panel (by a 2 to 1 vote), has decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Claimant, Robert L. Cox, is to convey ownership to Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, of the following non-publically traded REITS: (1) C.P.A. 16 REIT; (2) KBS REIT; (3) Inland American REIT. Claimant, Robert L. Cox, is to pay to Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, an amount of money equal to the total of all dividends and other distributions, if any, received by Claimant from the REITS during his ownership of these REITS. Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, are to pay Claimant, Robert L. Cox, an amount of money equal to the price that Claimant paid for the purchase of these REITS, in the amount of \$650,000.00;
- 2.) Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black, are liable and shall pay to Claimant the amount of \$111,824.00. This represents equitable relief in the form of relinquishment of certain commissions ("Gross Dealer Concessions") received by Respondents associated with the Claimant's purchase and continuance of a "Retirement Advisor Variable Annuity" and a "RiverSource Retirement Advisor Variable Annuity" and return of fees charged to Claimant and paid to Respondents for Financial Plans;
- 3.) Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black are liable for and shall pay to Claimant, Robert L. Cox, costs for expert witness fees in the amount of \$14,000.00;
- 4.) Respondents, Ameriprise Financial Services, Inc. and Mitchell William Black are liable for and shall pay to Claimant, Robert L. Cox, \$600.00 as reimbursement of the non-refundable filing fee; and
- 5.) Any relief not specifically enumerated, including punitive damages and attorneys' fees, is hereby denied with prejudice.

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### FEES

Pusuant to the Code, the following fees are assessed:

#### Filing Fees

FINRA Dispute Resolution will retain the non-refundable filing fee\* for each claim:

Initial Claim filing fee = \$ 1,800.00

*\*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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Ameriprise Financial Services, Inc. is assessed the following:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

#### Adjournment Fees

Adjournments granted during these proceedings:

June 25-27, 2013, adjournment requested by Respondents	= \$ 1,200.00
<u>Total Adjournment Fees</u>	<u>= \$ 1,200.00</u>

The Panel has assessed \$1,200.00 of the adjournment fees jointly and severally to Ameriprise Financial Services, Inc. and Mitchell William Black.

#### Discovery-Related Motion Fees

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

One (1) Decision on discovery-related motion on the papers with one (1) arbitrator @ \$200.00	= \$ 200.00
<u>Respondent submitted one (1) discovery-related motion</u>	
<u>Total Discovery-Related Motion Fees</u>	<u>= \$ 200.00</u>

The Panel has assessed \$200.00 of the discovery-related motion fees jointly and severally to Ameriprise Financial Services, Inc. and Mitchell William Black.



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### **Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each hearing 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 x \$1,200.00		= \$ 1,200.00
Pre-hearing conference: January 16, 2013	1 session	
Eight (8) Hearing sessions x \$1,200.00		= \$ 9,600.00
Hearing Dates: September 10, 2013	2 sessions	
September 11, 2013	1 session	
September 12, 2013	3 sessions	
September 13, 2013	2 sessions	
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Total Hearing Session Fees		= \$ 10,800.00

The Panel has assessed \$10,800.00 of the hearing session fees jointly and severally to Ameriprise Financial Services, Inc. and Mitchell William Black.

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

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Arbitration No. 12-02507  
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**ARBITRATION PANEL**

Murray S. Levin - Public Arbitrator, Presiding Chair  
Henry R. Cox, J.D. - Public Arbitrator  
Walter N. Vernon, III - 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:

/s/ Murray S. Levin  
Murray S. Levin  
Public Arbitrator, Presiding Chair

10/18/13  
Signature Date

/s/ Henry R. Cox, J.D  
Henry R. Cox, J.D.  
Public Arbitrator

10/21/13  
Signature Date

Dissenting Arbitrator's Signature:

/s/ Walter N. Vernon, III  
Walter N. Vernon, III  
Public Arbitrator

10/18/13  
Signature Date

10/21/13  
Date of Service (For FINRA office use only)


FINRA Dispute Resolution  
Arbitration No. 12-02507  
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Public Arbitrator, Presiding Chair

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Public Arbitrator

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

**Dissenting Arbitrator's Signature:**

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Walter N. Vernon, III  
Public Arbitrator

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Signature Date

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Date of Service (For FINRA office use only)

FINRA Dispute Resolution  
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**ARBITRATION PANEL**

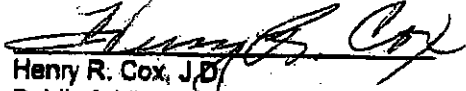
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Public Arbitrator

10-21-2013  
Signature Date

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Public Arbitrator

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FINRA Dispute Resolution  
Arbitration No. 12-02507  
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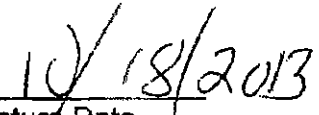
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