

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

---

In the Matter of the Arbitration Between:

Claimant

████████████████████

Case Number: ██████████

vs.

Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Newark, New Jersey

---

Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant ██████████: Dochter Kennedy, Esq. and Owen Harnett, Esq.,  
AdvisorLaw LLC, Broomfield, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.: Sarah Yates, Esq.,  
Bressler, Amery & Ross, P.C., Birmingham, North Carolina.

**CASE INFORMATION**

Statement of Claim filed on or about: November 7, 2016.  
Claimant signed the Submission Agreement: November 7, 2016.

Statement of Answer filed by Respondent on or about: December 12, 2016.  
Respondent signed the Submission Agreement: December 8, 2016.

**CASE SUMMARY**

Claimant asserted the following cause of action: expungement of customer complaints  
from his CRD records.

Unless specifically admitted in the Statement of Answer, Respondent denied the  
allegations made in the Statement of Claim.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement of three customer dispute  
occurrences from his CRD records, compensatory damages in the amount of \$1.00,  
and any and all other relief deemed just and equitable.

Claimant withdrew his request for compensatory damages at the initial pre-hearing  
conference on February 28, 2017.

In the Statement of Answer, Respondent did not oppose the request for expungement but requested that the claim for compensatory damages be denied.

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

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

The Arbitrator conducted a recorded telephonic hearing on May 18, 2017 so that the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and did not contest the request for expungement.

The Arbitrator ordered the Claimant to provide a copy of the Statement of Claim to the customers in the underlying disputes and to provide them with the opportunity to participate in the expungement hearing. On March 8, 2017, the customers were duly served with notice of the expungement request and none of them opposed the request or appeared at the expungement hearing.

The Arbitrator finds that the customers did not wish to participate in the expungement hearing and that a decision on the merits of Claimant's requests can be entered.

The Arbitrator reviewed Claimant's BrokerCheck® Report and the settlement documents for Occurrence Number [REDACTED], considered the amount of payments made to the customers, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on the customer not opposing the request for expungement. The Arbitrator also noted that Claimant did not contribute to the settlement amount.

The Arbitrator noted that Claimant did not previously file a claim requesting expungement of the same disclosures in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: the pleadings, Claimant's testimony, the exhibits, and the arguments of counsel.

### **AWARD**

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

1. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from Claimant [REDACTED] (CRD # [REDACTED]) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] Respondent must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

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

Pursuant to Rule 12805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 finding based on the following reasons:

In this Occurrence, the customer alleged that Claimant recommended unsafe investments that resulted in principal losses, and thereafter neglected to respond to her concerns. The record shows frequent contact between the customer and Claimant. 20% of her portfolio was in a Unit Investment Trust comprised of higher dividend Blue Chip stocks. The remaining 80% was disbursed among tax-exempt bonds that were "laddered" for security.

The customer's allegation was false in that Claimant's recommendations did not exceed her "moderate to moderately aggressive risk tolerance" profile. Respondent found the customer's claim without merit, and closed its file without settlement.

2. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from Claimant [REDACTED] (CRD # [REDACTED]) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] Respondent must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.  
Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 finding based on the following reasons:

In this Occurrence, the customer alleged Claimant made unsuitable investment recommendations and sought damages of \$300,000.00.

On first working with Claimant around 1990, the customer expressed a desire to aggressively seek growth through equity investments. This approach yielded positive returns for several years. Between 1995 and 1999, Claimant advised the customer to "pull back" to a less aggressive portfolio. She refused this guidance on several occasions when they met. The account suffered losses at the time of the 2000

Dotcom Crash. The customer, however, did not file a complaint with Respondent for the next 6 years. She cited coping with a parental illness as the reason for the delay.

Respondent determined that the customer's claim lacked merit, and closed its file without engaging in settlement negotiations.

The customer's allegation was false in that Claimant cautioned her to invest in less risky financial products and she declined his guidance.

3. The Arbitrator recommends the expungement of all references to Occurrence Number [REDACTED] from Claimant [REDACTED] (CRD # [REDACTED]) registration records maintained by the Central Registration Depository ("CRD"), with the understanding that, pursuant to Notice to Members 04-16, Claimant [REDACTED] Respondent must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive. Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 finding based on the following reasons:

In this Occurrence, the customers alleged that Claimant misrepresented the effect that their voluntary change of the ownership on a variable annuity would have on its Guaranteed Withdrawal Investment Benefit (GWIB) Rider. The record, however, clearly shows that the customers lacked a basis for this conclusion. The Rider had been explained to them by Claimant, by another representative of Respondent, and by representatives of MetLife (the issuing Company). Respondent subsequently funded a replacement Rider in the name of customer "good will". Claimant did not contribute to the settlement. The customers remain clients of Respondent to this day, and Claimant serves as their financial representative.

4. Any and all relief not specifically addressed herein is denied

### **FEES**

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

#### **Filing Fees**

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

Initial Claim Filing Fee	= \$ 50.00
--------------------------	------------

*\*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, Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed the following:

Member Surcharge = \$ 150.00

**Hearing Session Fees and Assessments**

The Arbitrator has assessed hearing session fees for each session conducted. A 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:

One (1) pre-hearing session @ \$50.00/session = \$ 50.00  
Pre-hearing conference: February 28, 2017 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00  
Hearing Date: May 18, 2017 1 session

---

Total Hearing Session Fees = \$100.00

The Arbitrator has assessed the hearing session fees of \$100.00 to Claimant.

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

**ARBITRATOR**

Patrick R. Westerkamp

-

Sole 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.

**Arbitrator's Signature**

Patrick  
Westerkamp

Digitally signed by Patrick Westerkamp  
DN: cn=Patrick Westerkamp, o=Westerkamp  
ADR Services, LLC, ou,  
email=mediatorpat@verizon.net, c=US  
Date: 2017.05.28 11:10:16 -04'00'

May 28, 2017

---

Patrick R. Westerkamp  
Sole Public Arbitrator

---

Signature Date

May 30, 2017

---

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