

AWARD

FINRA Office of DISPUTE RESOLUTION

CASE #: [REDACTED]

[REDACTED] (Claimant) vs. Merrill Lynch, Pierce, Fenner & Smith Incorporated (Respondent)

REPRESENTATION OF PARTIES:

For Claimant [REDACTED]: Owen Harnett, Esq., AdvisorLaw LLC, Broomfield, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated: Randi Perry Spallina, Esq., Bressler, Amery & Ross, P.C., Ft. Lauderdale, Florida.

NATURE OF DISPUTE: Associated Person vs. Member

Statement of Claim filed on or about: December 7, 2016.

Statement of Answer filed on or about: February 2, 2017.

CASE SUMMARY: Claimant asserted claims seeking the expungement of customer dispute occurrence numbers [REDACTED], [REDACTED], [REDACTED], and [REDACTED] (the "Occurrences").

Unless specifically admitted in the Statement of Answer, Respondent takes no position as to Claimant's allegations in the Statement of Claim, other than objecting to the claims for \$1.00 in compensatory damages and "any and all other relief that the Arbitrator deems just and equitable," and asserted various affirmative defenses.

RELIEF REQUESTED: In the Statement of Claim, Claimant requested:

1. Expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(A) as the claims, allegations, or information is factually impossible or clearly erroneous;
2. Expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(C) as the claims, allegations, or information is false;
3. Damages in the amount of \$1.00 from the Respondent for its part in contributing to the Claimant's injury; and
4. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent objected to the claims for \$1.00 in compensatory damages and "any and all other relief that the Arbitrator deems just and equitable", and did not set forth any other relief request.

OTHER ISSUES: The Arbitrator acknowledges that she has read the pleadings and other materials filed by the parties.

In the Statement of Answer, Respondent stated that it did not oppose the request for expungement made by Claimant and did not intend to participate in the final hearing on this matter.

On May 31, 2017, Claimant submitted correspondence regarding service of the Statement of Claim and notice of the expungement hearing on the customers from the Occurrences.

The Arbitrator conducted a recorded telephonic hearing on June 8, 2017 so the parties could present oral argument on Claimant's request for expungement. None of the customers from the Occurrences appeared at the hearing. The Arbitrator noted that one customer is deceased and that Claimant sent the remaining customers notice of the expungement hearing by certified mail.

Counsel for Respondent participated in the expungement hearing and stated to the Arbitrator that it does not oppose the request for expungement. Respondent's counsel only requested that Claimant drop the request for \$1.00 in compensatory damages. Thereafter, Claimant waived the request for \$1.00 in compensatory damages.

The Arbitrator reviewed Claimant's BrokerCheck® report.

The Arbitrator noted that the underlying customer disputes in Occurrence Numbers [REDACTED] and 1 [REDACTED] settled. On June 19, 2017, the Arbitrator ordered Claimant to produce the settlement documents regarding Occurrence Numbers [REDACTED] and [REDACTED]. On June 22, 2017, Claimant submitted a response. The Arbitrator reviewed Claimant's response and made the following determination:

Claimant has exhausted various avenues to locate and provide the settlement agreements in this case regarding Occurrence Numbers [REDACTED] and [REDACTED]. On March 20, 2017, counsel for Respondent informed Claimant that they could not locate the settlement agreements in this case due to the age of the settlements. Respondent on June 7, 2017 stipulated that it does not have a copy of the settlement agreements reached between Respondent and the customer from Occurrence Number [REDACTED], or a copy of the settlement agreement reached between Respondent and the customer from Occurrence Number [REDACTED]. Further, Respondent has no documents or information that indicate these aforementioned settlements were conditioned on the customers from Occurrence Numbers [REDACTED] and [REDACTED] consenting to expungement.

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: Statement of Claim – exhibits 1-12; Statement of Answer; Claimant's telephonic testimony; and Claimant's CRD record.

AWARD: The Arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Claimant's request for expungement is granted.

The Arbitrator recommends the expungement of all references to customer dispute occurrence numbers [REDACTED], [REDACTED], [REDACTED], and [REDACTED] and to NASD Arbitration Number [REDACTED] from Claimant's (CRD # [REDACTED]) registration records maintained by the CRD, with the understanding that pursuant to Notice to Members 04-16, Claimant 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 13805 of the Code of Arbitration Procedure ("Code"), the Arbitrator has made the following Rule 2080 affirmative findings of fact: the claim, allegation, or information is factually impossible or clearly erroneous; and the claim, allegation, or information is false.

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

Occurrence Number [REDACTED]

On March 1, 1990, the customer, Ms. Y, filed a court case in Contra Costa County, California Superior Court. Ms. Y alleged that the "purchase of mutual funds was unsuitable for her account." She alleged damages of \$40,000.00. Ms. Y's allegation that the "purchase of mutual funds was unsuitable for her account" is false and erroneous and therefore meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard.

Ms. Y and Claimant agreed that her investment objective was monthly income and that she wanted to invest in good quality funds. Claimant presented Ms. Y with a variety of investment options within her income and risk parameters. The income potential and risks associated with CDs, utility stocks and government bonds were discussed. Ms. Y chose to purchase the government bond mutual fund with an understanding of the potential income and risk of each investment option.

The underlying complaint was the result of Ms. Y's unwillingness to accept the fluctuations and declines in income even though she understood the risk and the correlation that movements in the bond market could have on her income. Ms. Y's unwillingness to accept the loss in income led to the complaint that Claimant had provided unsuitable recommendations.

As of June 1, 1991, a thorough investigation by Respondent found that Ms. Y authorized the transactions in her account, that the government bond mutual funds were suitable for Ms. Y based on her demand for higher income, and that Claimant and Respondent had disclosed that the net asset value of Ms. Y's funds could fluctuate. To avoid the costs of litigation, Respondent chose to settle the claim for \$10,000.00. Claimant did not contribute to the settlement.

Occurrence Number [REDACTED]

On May 7, 1996, the customer, Ms. H, alleged that Claimant had “recommended unsuitable investments.” Ms. H. alleged \$92,529.00 in compensatory damages plus \$300,000.00 for emotional distress and \$500,000.00 in punitive damages.

Ms. H’s allegation that Claimant “recommended unsuitable investments” is false and erroneous and, therefore, meets both FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard.

Through several meetings and phone conversations, Ms. H and Claimant agreed that her objective was income and that her risk tolerance was moderate.

Claimant presented Ms. H with the potential risks associated with different investment options within her risk tolerance. Knowing the risk, Ms. H chose to invest in the disputed short term global fund, which was investment grade and designed for moderately conservative investors.

Pursuant to information obtained through the reasonable diligence of Respondent, Claimant had a reasonable basis to believe that the investment in the short term bond fund was suitable.

Claimant and Ms. H met in person and spoke on the telephone frequently prior to and following the purchase of the fund. Claimant continued to reiterate to Ms. H the effect that volatility in the bond market could have on her income.

Ms. H was happy with the income from her investment until the bond market continued to decline.

The underlying complaint is the result of the bond fund not performing as Ms. H had grown accustomed to and her unwillingness to accept corresponding declines in income following declines in the bond markets, even though she understood the risk.

On September 25, 1996, an NASD arbitration case was initiated based upon Ms. H’s claims of unsuitability and misrepresentation. Respondent and Claimant denied the claims and found that Ms. H authorized the transaction, that the mutual funds were suitable based on Ms. H’s demand for higher income, and Claimant and Respondent had disclosed the risk.

On February 12, 1997, Respondent agreed to settle the claim for \$40,000.00 to avoid the expense and uncertainty of an arbitration hearing and pursuant to their fiduciary duty to their shareholder. Ms. H withdrew her claim against Claimant with prejudice.

Claimant was not required to contribute any amount to the settlement and Respondent does not oppose expunging Occurrence Number [REDACTED] from Claimant’s CRD record.

The Arbitrator determined that Occurrence Number [REDACTED] is also reflected on Claimant's CRD record as NASD Arbitration Number [REDACTED]. Accordingly, NASD Arbitration Number [REDACTED] is also to be expunged.

Occurrence Number [REDACTED]

On February 12, 1998, the customer, Dr. B, filed a complaint. Dr. B alleged "negligence and unauthorized trading." Dr. B alleged damages of \$151,000.00. Dr. B's allegation of "negligence and unauthorized trading" is false and erroneous and therefore meets both FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard.

Claimant met with Dr. B in person, and spoke with him on the telephone on several occasions about his investment portfolio, investment objectives, and risk tolerance. Claimant and Dr. B agreed that Dr. B's investment objective was growth and his risk tolerance was moderate. Claimant presented Dr. B with potential investment options to meet his objectives that were within his risk tolerance. Claimant did not deviate from Dr. B's investment objectives or risk tolerance with his recommendation or actions.

Based upon his prior investment experience and with knowledge of the risks, Dr. B chose the stocks to be purchased and authorized Claimant to make the purchases. The investments included the disputed investment. Dr. B received monthly statements that made him aware of his investments and their performance. At no point over this period did he complain or express a concern regarding negligent or unauthorized trading. Dr. B was happy with the disputed investment's stock price until the stock's rapid decline.

It is Dr. B's unwillingness to accept the decrease as part of the risk associated with investment in stock which led to his complaint that Claimant was "negligent" and had participated in "unauthorized trading."

On March 13, 1998, after conducting a thorough investigation, Respondent sent Dr. B a letter denying his claim, finding that the claim was not supported by the facts and that no trades were unauthorized.

No settlement was reached in this case. No further action has been taken and Respondent does not oppose the expungement of Occurrence Number [REDACTED] from Claimant's CRD record.

Occurrence Number [REDACTED]

The customer, Mr. Y's, complaint letter of August 22, 2002 was reported on Claimant's BrokerCheck® Report as an allegation of "unsuitable recommendations by his financial advisor and Respondent," with stated damages of \$325,000.00.

Mr. Y's allegation of "negligence and unauthorized trading" is false and erroneous and meets FINRA Rule 2080 (b)(1)(A) standard and the Rule 2080(b)(1)(C) standard.

Claimant met with Mr. Y in person and spoke with him on the telephone on several occasions about his investment portfolio, investment objective, and risk tolerance. Claimant and Mr. Y agreed that Mr. Y's investment objective was total return and his risk tolerance was aggressive as confirmed by Respondent's administrative manager in a March 10, 2002 phone conversation.

Mr. Y had prior experience in the stock market and understood the risks associated with investment in stocks. He requested high growth stocks, was informed about the option to invest in bonds and chose to invest in the disputed stock. After his initial investment he made additional unsolicited purchases of shares in the disputed investments.

Mr. Y was happy with the disputed investments until they continued to decline. Mr. Y's unwillingness to accept the decrease as part of the risk associated with investment in stocks led to the complaint that Claimant was "negligent" and participated in "unauthorized trading."

On October 24, 2002, after conducting a thorough investigation, Respondent found no merit to the allegations and denied Mr. Y's claims. Respondent found that Claimant had discussed every transaction, including the disputed investments, with Mr. Y "in great detail." Respondent determined that the ratings of the investments were discussed, as well as the risks involved. Respondent found that Mr. Y agreed to make the purchases of the disputed investments with knowledge of the risks and that Mr. Y made additional unsolicited purchases of the disputed investments.

Respondent informed Mr. Y that they would not be settling the claim, as they were "not a guarantor of market performance." No further action was taken by Mr. Y in this matter. Respondent does not oppose the expungement of this claim from Claimant's CRD record.

2. All other relief requests are denied.

FEES:

Pursuant to 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	= \$ 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(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 = \$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) hearing session on expungement request @ \$50.00/session	= \$ 50.00
<hr/>	
Total Hearing Session Fees	= \$ 50.00

The Arbitrator has assessed \$50.00 of the hearing session fees to Claimant.

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

ARBITRATOR


Laurel Littman Gothelf

-

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



Laurel Littman Gothelf
Sole Public Arbitrator

Laurel Littman Gothelf
Public Arbitrator

7-16-17
Signature Date

July 11, 2017
Date of Service (For FINRA-ODR office use only)