Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

Case Number:

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Incorporated

Hearing Site: Washington, D.C.

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant Armin Sarabi, Esq. and Dochtor Kennedy, Esq., AdvisorLaw, LLC, Broomfield, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated: Sarah K. Yates, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: March 22, 2017.
signed the Submission Agreement: March 22, 2017.

Statement of Answer filed by Respondent on or about: May 10, 2017.
Merrill Lynch, Pierce, Fenner & Smith Incorporated signed the Submission Agreement: May 10, 2017.

CASE SUMMARY

Claimant asserted the cause of action of inaccurate reporting on his Central Registration Depository ("CRD") records. The cause of action relates to a customer complaint ("Occurrence No.) made while Claimant was employed by Respondent that resulted in a settled arbitration.

In its Statement of Answer, Respondent stated it does not oppose the request for expungement, but asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of all references to Occurrence No. from his CRD records, $1.00 in compensatory damages, and such other and further relief deemed just and equitable.

In the Statement of Answer, Respondent objected to Claimant's request for $1.00 in compensatory damages.

At the conclusion of the hearing, Claimant withdrew his request for $1.00 in compensatory damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about July 19, 2017, Claimant filed with FINRA Office of Dispute Resolution proof of service of the Statement of Claim and notice of the expungement hearing upon the underlying customers in Occurrence No. [redacted] and advised them of their right to participate in the expungement hearing scheduled for October 10, 2017.

The Arbitrator conducted a recorded telephonic hearing on October 10, 2017, so 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 customers in Occurrence No. [redacted] did not participate in the recorded telephonic expungement hearing and did not contest the request for expungement.

The Arbitrator reviewed the BrokerCheck® Report for Claimant. The Arbitrator also reviewed the settlement agreement ("Settlement") regarding Occurrence No. [redacted] and did not find the contents of the settlement agreement, including the settlement amount, to have substantial evidentiary value. The Arbitrator noted the Settlement was not conditioned on the underlying customers not opposing the request for expungement nor did Claimant contribute to the settlement amount. Further, Claimant did not previously file a claim requesting expungement of the same disclosure in the CRD.

In recommending expungement, the Arbitrator relied primarily upon Claimant's testimony during the expungement hearing, and, to a lesser degree, on the Award of the arbitration panel in FINRA Case No. [redacted] which involved the same customers and broker, and essentially identical claims. The Arbitrator was persuaded by the panel's decision in FINRA Case No [redacted] which found the claims to be without merit and recommended expungement. The Arbitrator also relied to some degree on the Claimant's BrokerCheck Report, which shows no other customer complaints despite Claimant having been in the business for almost 25 years.

The Arbitrator provided an explanation of his decision in this Award. The explanation is for the information of the parties only and is not precedential in nature.

AWARD

After considering the pleadings, the testimony and evidence presented at the recorded telephonic hearing, and the post-hearing submissions (if any), 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 No. [redacted] from registration records maintained by the CRD for Claimant (CRD# [redacted]), 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 made the following Rule 2080 affirmative finding of fact:

   The claim, allegation, or information is factually impossible or clearly erroneous.

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

   This expungement proceeding stems from the settlement of an arbitration regarding the underlying customer complaint, to which Claimant was not a party. For a number of reasons, there is currently almost no documentary evidence to review in this proceeding. Those reasons include, among others, the age of the underlying transactions, all of which date back more than a decade, and the absence of a hearing on the merits of the customers' underlying claims. Consequently, the primary source of evidence comes from Claimant's written submissions and oral testimony in this expungement proceeding. According to that evidence, the customers, who won $38 million in the Texas lottery, had at least two deleterious traits that harmed their own self-interest, as well as the interests of those they hired to provide financial and other advice.

   First, the customers lacked the ability to control their own spending, consistently spending beyond what even their generous annual lottery proceeds could support. In fact, they often spent as much as $200,000 a month for long periods of time, despite repeatedly agreeing to spend a tenth of that to comply with their long-term financial objectives. Claimant's contemporaneous notes and correspondence show he frequently and consistently counseled the customers to curtail their spending, they regularly agreed to do so, but failed to follow through on their commitments.

   Second, the customers also lacked the ability to accept responsibility for their own actions and sought to shift the blame, as well as the financial liability, for their actions onto others. In the process, they asserted claims of misfeasance and malfeasance against a litany of financial, legal and tax advisors, including claims against two of Claimant's employers, Morgan Stanley and Respondent. In both cases, the customers alleged Claimant had: (1) recommended unsuitable investments; (2) engaged in excessive trading; and (3) engaged in unauthorized trading. Based on Claimant's testimony, as well as supporting evidence from

several other sources, the customers' claims were clearly erroneous, one of the grounds for expungement established in FINRA Rule 2080.

With respect to the claim of unsuitable investment recommendations, Claimant's testimony and written submissions demonstrate he recommended, and the customers agreed, to invest approximately two-thirds of their assets with Morgan Stanley and, subsequently, with Respondent, in fixed-income products, including two variable annuities structured to provide a continuing income stream once their lottery payments had ceased, while also offering important tax advantages. Claimant recommended, and the customers agreed, to invest another 21% of their assets held by Morgan Stanley and Respondent in cash and money markets, with the balance placed in stocks or stock mutual funds. Nothing about these investment recommendations appears unreasonable for customers with a significant current income stream and the objective of maintaining cash flow in future years.

With respect to the excessive trading claim, the customers' allegations are clearly erroneous if for no other reason than the fact nearly 90% of their assets with Respondent were in variable annuities and cash or near-cash equivalents. While trading does occur in the assets making up a variable annuity investment – e.g., to rebalance the portfolio – Claimant testified he does not earn any commissions from such trading, thus eliminating the only obvious motivation he would have had for engaging in excessive trading. The same appears to be true for the assets held in cash and money markets. Moreover, Claimant testified there was very little trading in the customers' account in any event, and the bulk of the trading that did occur was to liquidate assets to provide the customers with additional cash as their spending continued unabated.

With respect to the unauthorized trading claim, Claimant testified that, not only was there no unauthorized trading, but:

1. The customers, as well as their lawyer and their accountant, approved the investment strategy Claimant recommended and additional authorization was not required for the transactions required to implement it;
2. Nevertheless, Claimant went to great lengths to keep both the customers and their other legal and tax advisors informed of activity within their account; and
3. At the customers' own direction, their attorney and accountant received copies of all transaction and other investment notices and records sent to the customers; yet no one ever challenged or otherwise questioned any transactions until the customers filed suit, and subsequently FINRA arbitration claims, at least four years after ending their relationship with Claimant and Respondent.

This testimony establishes not only that there was no unauthorized trading, but also that, if there had been, the customers and their advisors would have had regular opportunities to identify and challenge it.

The value of that testimony hinges on its credibility and Claimant's testimony was credible for several reasons. First, Claimant recalled past events clearly, providing details in his testimony supporting the conclusion it reflects the actual rather than a fabricated version of his recommendations to and relationship with the customers.

Second, Claimant remained objective and professional throughout his testimony, declining to personally attack his former customers, and focusing on the facts of his relationship with them instead.

Third, Claimant has worked in the financial industry for almost 25 years. Yet, despite that long tenure, his FINRA BrokerCheck Report does not reflect a single customer complaint other than the two asserted by the customers in this case. Third, those customers were notified of the expungement proceedings and their opportunity to participate, but they chose not to do so.

Fourth, and perhaps most significantly, the customers in this case brought two virtually identical sets of claims in two separate FINRA arbitration cases. As noted above, the first involved Morgan Stanley, where Claimant worked when the customers first became his clients. When Claimant moved to the employment of Respondent, the customers followed him there. Then, several years after they ended their relationships with both Morgan Stanley and Respondent, the customers filed essentially the same claims against both, in each case alleging Claimant had provided unsuitable investment recommendations, and had engaged in excessive and unauthorized trading. A three-member arbitration panel held a full hearing on the customers' claims in the Morgan Stanley case and found them without merit, returning an award in favor of Morgan Stanley and recommending the complaint be expunged from Claimant's public record. While not controlling in this case, the panel's decision in the Morgan Stanley case – involving the same parties and essentially the same conduct – is highly persuasive. Simply stated, it tends to show Claimant's testimony in this case is corroborated by the independent judgment of a three-member panel of neutrals who had a full opportunity to review the evidence and assess the credibility of the customers in this case.

In sum,

1. Claimant's testimonial evidence in this case establishes the underlying customer claims of wrongdoing are unfounded;
2. That testimony – bolstered by external factors such as the customers' and their other advisors' behavior during and after the period in question, Claimant's contemporaneous notes and correspondence, the absence of any prior customer complaints against Claimant, and the independent decision of the arbitral panel in the Morgan Stanley case – is credible; and
3. The allegations Claimant engaged in the types of misconduct alleged are clearly erroneous and should therefore be expunged from his public BrokerCheck Report.

2) Any and all claims for relief not specifically addressed herein 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(s), 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 with a single arbitrator @ $50.00/session			=$ 50.00
Pre-hearing conference:	July 14, 2017	1 session	
One (1) hearing session on expungement request @ $50.00/session			=$ 50.00
Hearing Date:	October 10, 2017	1 session	
Total Hearing Session Fees			=$ 100.00

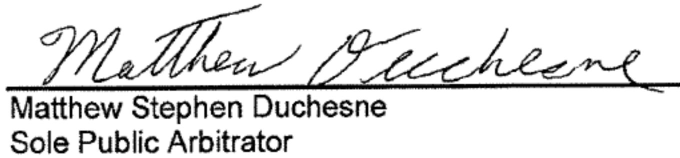
The Arbitrator has assessed the total $100.00 in hearing session fees to Claimant.

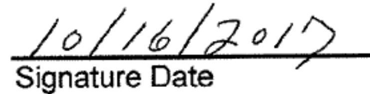
ARBITRATOR

Matthew Stephen Duchesne - 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.

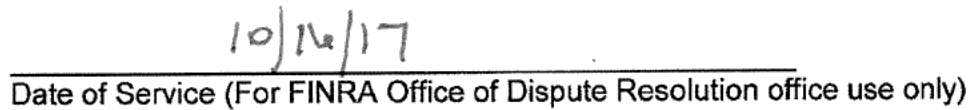
Arbitrator's Signature





Matthew Stephen Duchesne
Sole Public Arbitrator

Signature Date



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