

**AWARD**

FINRA Office of DISPUTE RESOLUTION

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CASE #: [REDACTED]

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

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**REPRESENTATION OF PARTIES:**

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

For Respondent Merrill Lynch, Pierce, Fenner & Smith Inc.: Randi P. Spallina, Esq., Bressler Amery & Ross, Fort Lauderdale, Florida.

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**NATURE OF DISPUTE:** Associated Person vs. Member

Statement of Claim filed on or about: March 2, 2017.

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**CASE SUMMARY:** Claimant requested expungement of a total of nine occurrences from his Central Registration Depository ("CRD") record ("Underlying Claims"). The occurrences consisted of four customer complaints (occurrence numbers [REDACTED], [REDACTED], [REDACTED], and [REDACTED]) and five arbitration claims (occurrence numbers [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]).

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**RELIEF REQUESTED:**

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Claims from his CRD record pursuant to FINRA Rule 2080(b)(1)(A) finding the claim, allegation or information is factually impossible or clearly erroneous;
2. Expungement of occurrence numbers [REDACTED] and [REDACTED] from his CRD record pursuant to FINRA Rule 2080(b)(1)(B) finding the Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds;
3. Expungement of the Underlying Claims from his CRD record pursuant to FINRA Rule 2080(b)(1)(C) finding the claim, allegation or information is false;
4. An award of damages in the amount of \$1.00 for Respondent's part in contributing to Claimant's injury; and
5. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent advised that while it takes no position as to the request for expungement made by Claimant, it objects to Claimant's request for \$1.00 in compensatory damages and asserted various affirmative and other defenses.

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

On August 8, 2017, Claimant provided a notice of death records for Mr. and Mrs. W, customers in underlying arbitration case no. [REDACTED] (occurrence number [REDACTED]). The notice indicated that Mr. W passed away on May 31, 2012 and Mrs. W passed away

on February 1, 2012. Accordingly, the Arbitrator determined that service on Mr. and Mrs. W could not be completed.

On August 9, 2017, Claimant provided notice that the remaining customers in the Underlying Claims had been served with the Statement of Claim and notice of the expungement hearing. On August 14, 2017, Claimant provided an Affidavit of Service regarding service of the Statement of Claim on the remaining customers in the Underlying Claims.

The Arbitrator conducted a recorded telephonic hearing on October 9, 2017 and October 10, 2017 so the parties could present oral argument and evidence on Claimant's request for expungement. The customers in the Underlying Claims did not appear at the expungement hearing.

During the expungement hearing, Claimant withdrew the request for \$1.00 in damages.

The Arbitrator reviewed the settlement documents in connection with occurrence numbers [REDACTED], [REDACTED], [REDACTED] and [REDACTED] and considered the amount of payments made to any party and any other terms and conditions of settlement. The Arbitrator determined that Claimant did not contribute to the settlements, and that the settlement agreements were not conditioned upon any customer's agreement not to oppose expungement.

The Arbitrator determined that there were no settlement agreements regarding the remaining occurrence numbers.

The Arbitrator noted that Claimant did not previously request expungement of the Underlying Claims.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's BrokerCheck® Report, Claimant's Statement of Claim (including Exhibits 1-30) and Claimant's oral testimony.

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

1. The Arbitrator recommends the expungement of all references to the Underlying Claims, namely occurrence numbers [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] from Claimant [REDACTED] (CRD# [REDACTED]) registration records maintained by the CRD, with the understanding that pursuant to Notice to Members 04-16, Claimant [REDACTED] 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 for each of the occurrence numbers:

- a. Occurrence numbers [REDACTED], [REDACTED], and [REDACTED]: Pursuant to Rule 13805 of the 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.

For occurrence number [REDACTED] (in which “Mr. and Mrs. W” are the customers in underlying arbitration case no. [REDACTED]), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

The bond that Claimant recommended for purchase appears to have conformed to Mr. and Mrs. W’s criteria for replacing a bond that had come due. The allegation that the recommended bond was unsuitable is false and clearly erroneous.

Mr. and Mrs. W may not have understood or remembered the bond pricing information provided by Claimant orally at the time of the purchase, but the evidence strongly supports the inference that the Claimant provided it (and that it was disclosed in the confirmation sent to Mr. and Mrs. W). Mr. and Mrs. W’s allegation to the contrary is false.

For occurrence number [REDACTED] (in which “Mr. P and Ms. M” are the customers in the underlying customer complaint), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

Changes in Mr. P’s portfolio reflected (1) the purchase of shares that the customer wished to buy and (2) the purchase of mutual funds that increased the diversification of Mr. P’s portfolio. The allegation that these changes were unsuitable is false and clearly erroneous.

When Mr. P moved his account to another brokerage, the portfolio was liquidated and transferred precisely as ordered by a Liquidation Authorization Letter (LAL) signed by Mr. P and Mr. P’s co-trustee, Ms. M. The allegation that Claimant breached a duty by honoring the LAL is false and clearly erroneous.

For occurrence number [REDACTED] (in which “Ms. VH” is the customer in underlying arbitration case no. [REDACTED]), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

This occurrence resulted in the filing of an arbitration claim but neither a decision nor a settlement was reached in the underlying claim. BrokerCheck reports that the underlying claim was received on May 30, 2003 and is listed as “closed/no

action” on June 17, 2003. In response to the Arbitrator’s order of October 18, 2017, Claimant affirmed that the matter was not settled. It appears that Ms. VH decided not to pursue her claim.

Ms. VH’s principal allegation was that Claimant recommended an unsuitable portfolio. This allegation is false and clearly erroneous. Claimant recommended a diversified portfolio of mutual funds. Claimant recommended purchasing B shares in these mutual funds in part to help Ms. VH meet her long-term income requirements.

Ms. VH also alleged that Claimant failed to provide information about the fee structure for the B shares. This allegation is false. Ms. VH may not have understood or remembered the information, but the evidence strongly supports the inference that Claimant provided it.

- b. Occurrence number [REDACTED]: Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

For occurrence number [REDACTED] (in which “Ms. C” is the customer in the underlying customer complaint), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

Ms. C complained about transactions conducted by a broker other than the Claimant. The registered person was not involved in the alleged investment-related sales practice violation.

- c. Occurrence number [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]: Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is false.

For occurrence numbers [REDACTED] and [REDACTED] (in which “Mr. L” is the customer in the underlying customer complaint regarding occurrence number [REDACTED], and underlying arbitration case no. [REDACTED] regarding occurrence number [REDACTED]), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

Mr. L alleged that Claimant recommended unsuitable mutual funds and, relatedly, that Claimant misrepresented that they were suitable. The allegation of unsuitability rested on the weighting of sectors within the mutual funds, but the data marshaled in the complaint provide no support for this allegation. The allegation is false.

For occurrence number [REDACTED] (in which “Mr. P” is the customer in the underlying customer complaint), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

Mr. P alleged that the portfolio of mutual funds recommended by Claimant was unsuitable because it was inadequately diversified, but Mr. P’s complaint letter provides not even a hint of support for this allegation. The allegation is false.

For occurrence number [REDACTED] (in which “Ms. H” is the customer in underlying arbitration claim no. [REDACTED]), the Arbitrator has made the above Rule 2080 finding based on the following reasons:

This occurrence resulted in the filing of a claim in arbitration which was settled without any contribution by Claimant. Claimant recommended a diversified portfolio consisting of mutual funds with betas well within Ms. H’s expressed risk tolerance even though the portfolio had to include some growth-oriented funds because of the annual withdrawals that Ms. H planned to take. When offered the opportunity to move funds at no-cost to less risky mutual funds, Ms. H declined. The allegation that the Claimant recommended an unsuitable portfolio is false.

For occurrence number [REDACTED] (in which “Mr. TC” is the customer in underlying arbitration claim no. [REDACTED]) the Arbitrator has made the above Rule 2080 finding based on the following reasons:

This occurrence resulted in the filing of a claim in arbitration which was settled without any contribution by Claimant.

Claimant recommended a diversified portfolio of mutual funds. Claimant included some growth oriented funds in the portfolio that he recommended because otherwise Mr. TC’s portfolio would have had little or no prospect of generating the funds that Mr. TC planned to withdraw annually. The allegation that the recommended portfolio was unsuitable is false.

2. Any and all claims for relief not specifically addressed herein are denied.

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OTHER FEES: Respondent has paid to FINRA Office of Dispute Resolution the \$150.00 Member Surcharge previously invoiced.

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

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|--------------------------|------------|
| Initial Claim Filing Fee | = \$ 50.00 |
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\*The filing fee is made up of a non-refundable and a refundable portion.

#### Hearing Session Fees and Assessment

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(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

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|--|------------|
| One (1) Pre-hearing session with a single arbitrator @ \$50.00/session | = \$50.00  |
| Pre-hearing conference: June 22, 2017                                  | 1 session  |
| Two (2) Hearing sessions on expungement request @ \$50.00/session      | = \$100.00 |
| Hearing Date: October 9, 2017  | 1 session  |
| October 10, 2017   | 1 session  |
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| Total Hearing Session Fees   | =\$150.00  |

The Arbitrator has assessed \$150.00 of the hearing session fees to Claimant.

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

**ARBITRATOR**

Mark R. Lee

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



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Mark R. Lee  
Sole Public Arbitrator

NOV. 2, 2017  
Signature Date

November 3, 2017  
Date of Service (For FINRA-ODR office use only)