

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

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In the Matter of the Arbitration Between:

Claimant  
[REDACTED]

Case Number: [REDACTED]

vs.

Respondent  
BB&T Investment Services, Inc.

Hearing Site: Charlotte, North Carolina

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant [REDACTED] Dochter Kennedy, MBA, J.D. and Eric Litow, Esq., Advisor Law, LLC, Broomfield, Colorado.

For Respondent BB&T Investment Services, Inc.: Katherine M. McGrail, Esq., Murphy & McGonigle, P.C., Glen Allen, Virginia.

**CASE INFORMATION**

Statement of Claim filed on or about: June 1, 2017.

[REDACTED] signed the Submission Agreement: May 31, 2017.

Statement of Answer filed by Respondent on or about: August 3, 2017.

BB&T Investment Services, Inc. signed the Submission Agreement: August 1, 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. [REDACTED]) recorded on Claimant's CRD records regarding a Wells Fargo Real Estate Investment Trust and a Hartford Variable Annuity.

In its Statement of Answer, Respondent did not take a position with respect to any of Claimant's relief requests.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement of all references to Occurrence No. [REDACTED] from his CRD records and compensatory damages in the amount of \$1.00.

In the Statement of Answer, Respondent requested that all forum fees be assessed against Claimant.

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

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

On or about August 18, 2017, Claimant filed with FINRA Office of Dispute Resolution proof of service of the Statement of Claim upon the underlying customers (the "customers"). The customers did not submit a written response thereto.

On or about October 24, 2017, Claimant filed with FINRA Office of Dispute Resolution proof of service upon the customers of notice of the date and time of the expungement hearing scheduled in this matter, and of their right to participate therein.

The Arbitrator conducted a recorded telephonic expungement hearing on November 30, 2017, so the parties could present oral argument and evidence on Claimant's request for expungement.

The customers did not participate in the expungement hearing.

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

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

Respondent denied the underlying customers' complaint in connection with Occurrence [REDACTED]. Therefore, there was no settlement agreement for the Arbitrator to review.

The Arbitrator reviewed Claimant's BrokerCheck® Report. Further, the Arbitrator noted that Claimant did not previously file a claim requesting expungement of the same disclosure in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Statement of Claim, Answer, and correspondence sent to the underlying customers by Claimant.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, 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 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:

This case arises from a complaint originally filed by the customers with Respondent in February 2009 related to investments made through Claimant, an employee of Respondent at the time. The two investments were in a Hartford Annuity, and a real estate investment trust, Wells REIT II, made in 2004 and 2006, respectively. The complaint was investigated and denied by Respondent, in a filing entered on Claimant's BrokerCheck Report in March 2009.

This case involves an action filed by Claimant against Respondent solely for the purpose of expungement of the complaint entered on his BrokerCheck Report by Respondent. The customers indicated on their signed Client Profile that they were seasoned real estate professionals with 19 years of experience investing in individual stocks. Their complaint, as noted in Claimant's BrokerCheck Report, stated:

"Clients allege that the Wells REIT was not suitable and that they were not told it had risk. Clients allege that when they requested their Hartford VA's to be reallocated they were not. Clients allege they were told there was nothing they could change on their Hartford Account to save the investment. Clients say they should have been told to move to the MMKT or to surrender the contract."

### WELLS REIT II

In 2006 when the customers invested in the Wells REIT II, their signed Client Profile indicated a Risk Tolerance for Growth and Income: seeking a combination of growth and income, which will have moderate risk to principal. On the signed Subscription Agreement and Client Disclosure Form, the customers acknowledged receiving and reviewing the Prospectus (which included a detailed explanation of the risk of investing in the Wells REIT II), and recognizing that the investment was not liquid. The evidence indicates that Claimant also advised the customers verbally that the investment "had no liquid value, and that it was a long-term investment." The evidence also indicates that the customers even invested a larger percentage of their available funds in the Wells REIT II (which increased their financial risk), against the advice of Claimant.

Claimant avers that in 2008 the financial markets suffered declines across the board of approximately 30 percent, which resulted in the Wells REIT II restricting redemptions, including no sales, and moving to cut dividends. He further asserts that these actions led to declines in the customers' investment value and income, which they complained about to management of Respondent. No testimony to the contrary was offered at the hearing.

### HARTFORD ANNUITIES

The customers did not assert that the Hartford Annuities were unsuitable at the time of their initial investment. Instead, they asserted that in 2009 they requested Claimant to reallocate the funds in the Hartford Annuities sub-accounts and that they were not reallocated. They further claimed that they were told there was nothing they could change in their Hartford account to save the investment.

Claimant asserts that the customers' allegations are false. The written evidence suggests that during the discussions between the customers and Claimant regarding the potential reallocation, Claimant did not tell the customers "... that you could [emphasis added] not make changes and that you had to ride it out." Rather, they discussed "... if changes should [emphasis added] be made to your accounts." Claimant alleges he further advised the customers that the subaccount allocations were in line with their investment objectives, tolerance for risk, and investment time horizon.

The customers never filed a complaint with FINRA after their original complaint filed with Respondent was investigated and denied by Respondent. They also declined to respond to or participate in this proceeding for expungement despite receiving repeated notifications of the hearing.

Claimant denies all of the allegations of the customers and further contends that his recommendations to the customers were suitable at the time. He also asserts that the decline in value of the investments during the 2008 financial crisis "does not change the fact that the investments were suitable at the time of Claimant's recommendation and does not and cannot retroactively render either investment unsuitable."

Respondent, in its answer to this FINRA complaint, took no position with respect to the relief sought by Claimant, except to request "that any and all forum fees for this matter be assessed against Claimant."

Accordingly, there are valid bases for granting expungement in this case because the original claims are factually impossible or clearly erroneous, and false as to Claimant.

### 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(s) 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: September 25, 2017 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00  
Hearing Date: November 30, 2017 1 session

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Total Hearing Session Fees = \$100.00

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

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

**ARBITRATOR**

Douglas Earl McLaren

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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**

*D/ Douglas Earl McLaren*  
Douglas Earl McLaren  
Sole Public Arbitrator

*02/28/2018*  
Signature Date

*2/1/18*

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