

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

Case Number: [REDACTED]

vs.

Respondents

Hearing Site: Pittsburgh, Pennsylvania

A.G. Edwards & Sons, Inc. and Merrill
Lynch Pierce Fenner & Smith, Inc.

Nature of the Dispute: Associated Person vs. Members

REPRESENTATION OF PARTIES

For Claimant [REDACTED] ("Claimant"): Armin Sarabi, Esq., AdvisorLaw LLC, Broomfield, Colorado.

For Respondent A.G. Edwards & Sons, Inc. ("AGE"): Deirdre C. Wolff, Esq., Wells Fargo, St. Louis, Missouri.

For Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("MLPFS"): Kathryn D. Perreault, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: September 27, 2017.

Claimant signed the Submission Agreement: September 27, 2017.

Statement of Answer filed by AGE on or about: November 20, 2017.

AGE signed the Submission Agreement: November 20, 2017.

Statement of Answer filed by MLPFS on or about: November 20, 2017.

MLPFS signed the Submission Agreement: November 20, 2017.

CASE SUMMARY

Claimant asserted the following cause of action: expungement. The cause of action related to two underlying customer complaints against Claimant, Occurrence Numbers [REDACTED] and [REDACTED]. The customer in Occurrence Number [REDACTED] ("Customer BS") alleged that Claimant sold him Eli Lilly & Company ("Lilly") stock without his authorization. The customer in Occurrence Number [REDACTED] ("Customer MS") alleged that Claimant recommended and sold him stocks, including Cisco, Bay Networks, Intel, and other technology companies, which Customer MS asserted were not suitable for his investment objectives.

In the Statement of Answer, AGE did not object to or oppose Claimant's request for expungement made in the Statement of Claim, but asserted that Claimant's claims were not eligible for arbitration.

In the Statement of Answer, MLPFS took no position with respect to Claimant's request for expungement, objected to Claimant's request for compensatory damages made in the Statement of Claim, and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested an award of \$1.00 in compensatory damages, other appropriate relief, and expungement of all references to Occurrence Numbers [REDACTED] and [REDACTED] from his registration records maintained by the Central Registration Depository ("CRD").

At the close of the hearing, Claimant withdrew his request for \$1.00 in compensatory damages from AGE and MLPFS, hereinafter collectively referred to as "Respondents."

In the Statement of Answer, AGE requested that the Panel dismiss Claimant's claim for damages and award no other relief against it.

In the Statement of Answer, MLPFS opposed Claimant's request for 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 October 28, 2017, Claimant filed the Affidavit of Customer MS, in which Customer MS stated that he had received notice of the request for expungement and fully supported the request for expungement of his complaint from Claimant's registration records maintained by the CRD. Additionally, Customer MS stated that his complaint was never intended as a complaint against Claimant and the current allegation in Claimant's registration records is false and inaccurate.

On or about February 8, 2018, Claimant filed a Notice of Service Letter to Customer BS which included the Statement of Claim, the date and time of the expungement hearing, and information on how Customer BS could participate.

On or about February 8, 2018, Claimant filed a Notice of Service Letter to Customer MS which included the Statement of Claim, the date and time of the expungement hearing, and information on how Customer MS could participate.

On or about February 14, 2018, Claimant filed an Affidavit of Service stating that the Notice of Service Letter to Customer BS and the Notice of Service Letter to Customer MS, hereinafter collectively known as "Service Letters," included the Statement of Claim and were served on Customer BS and Customer MS, hereinafter collectively known as "Customers," by certified mail.

The Arbitrator conducted a recorded telephonic hearing on March 13, 2018, so the parties could present oral argument and evidence on Claimant's request for expungement.

AGE did not oppose Claimant's request for expungement, but asserted that Claimant's request for expungement was not eligible for arbitration.

On the record at the hearing, AGE argued that Claimant's relief requests were as not arbitrable, as the matters sought to be expunged occurred in excess of six years before the Statement of Claim was filed on September 28, 2017 ("Eligibility Motion"). The Arbitrator denies AGE's Eligibility Motion as follows, noting that this explanation is for the information of the parties only and is not precedential in nature:

AGE's Statement of Answer raised the issue that the request for expungement of Occurrence Number [REDACTED] in the Statement of Claim is not arbitrable under Rule 12206 of the Code, as the underlying claim (Occurrence Number [REDACTED]) was allegedly made on Claimant's Form U4 in or about April, 2001, and the Statement of Claim in this proceeding was not filed until September 28, 2017. Thus, AGE states that the filing of the Statement of Claim was well more than the six years following the occurrence allowed by Rule 12206 of the Code.

This Arbitrator has determined that the issue is arbitrable. The Arbitrator finds that AGE, having raised the issue of arbitrability, has the burden of supporting the same and has not sufficiently done so. AGE did not file any briefs in support of this position as provided for in paragraph 8 of the Initial Pre-hearing Scheduling Order in this case, dated January 24, 2018. AGE did not cite any authority for its position, other than the Rule 12206 of the Code, at the arbitration hearing. Further, Claimant argued at the hearing that the six year period did not commence with the filing of a complaint against Claimant, but commenced on the last known occurrence of harm from the complaint and referenced case law in support of that argument. Claimant argued that, given that the Form U4 is public notice and that simply viewing this document, which is constantly viewable all the time on the internet, would be a harmful disclosure of inaccurate information, the Statement of Claim was well within the 6 year period of Rule 12206 of the Code. AGE did not dispute Claimant's argument in this regard.

The Arbitrator also noted, at the hearing, that Rule 12206 of the Code was initially adopted as a rule on April 16, 2007, well after the underlying claim (Occurrence Number [REDACTED]) was initiated, and AGE did not offer any argument that Rule 12206 of the Code would relate back to such claims.

MLPFS did not oppose Claimant's request for expungement. The Arbitrator notes that MLPFS did not assert that Claimant's expungement claim was not arbitrable.

Customer BS did not participate in the expungement hearing, did not contest Claimant's request for expungement, and did not provide information at the hearing.

Customer MS did not participate in the expungement hearing and supported Claimant's request for expungement.

The Arbitrator reviewed Claimant's BrokerCheck® Report. The Arbitrator found that neither Occurrence Number [REDACTED] nor Occurrence Number [REDACTED] were settled. Accordingly, the Arbitrator did not review any settlement agreements.

The Arbitrator found 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: Claimant's Exhibits 1 through 14 and the Affidavit of Customer MS.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the 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 Numbers [REDACTED] and [REDACTED] from registration records maintained by the CRD for Claimant [REDACTED] (CRD # [REDACTED]), 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 (the "Code"), the Arbitrator has made the following Rule 2080 affirmative findings of fact concerning Occurrence Number [REDACTED]:

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

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

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 findings concerning Occurrence Number [REDACTED] based on the following reasons:

This complaint filed by Customer BS asserted that on May 1, 1998, Claimant made an unauthorized sale of 4,000 shares of stock in Lilly, a pharmaceutical company, which amounted to approximately 20% of his total portfolio. Customer BS's allegation that Claimant made an "unauthorized sale of stock in his account"

is clearly erroneous, factually impossible, and false and, therefore, meets the Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement. Furthermore, Claimant was not involved in the alleged investment-related sales practice violation, and, as such, Customer BS's allegation in Claimant's CRD records and BrokerCheck meets the Rule 2080(b)(1)(B) standard for expungement for the following reasons:

Customer BS's account was non-discretionary and it was not possible, due to MLPFS's procedures, to make trades in Customer BS's accounts without Customer BS's consent and approval.

The allegation is clearly erroneous, because phone records prove that Claimant's assistant, who was himself a fully registered and licensed broker with the title of Orientation Financial Consultant, called Customer BS on the day Customer BS sold his Lilly stock and that Customer BS called into the office on the same day. Claimant's assistant called Customer BS after Claimant asked him to call all of his clients who owned Lilly stock to apprise them of its having been downgraded. MLPFS confirmed that Claimant was out of the office on the day of the sale and that Customer BS sold his 4,000 shares of Lilly stock that same day.

The allegation is factually impossible, because MLPFS's records prove that Claimant was not in the office on the day that Customer BS sold his Lilly stock, and, therefore, Claimant could not have sold the stock, whether or not the sale was authorized. It was Claimant's assistant who spoke with Customer BS about the Lilly stock having been downgraded.

The allegation is false because, even if Customer BS did not authorize the sale of his Lilly stock on May 1, 1998, did not review the confirmation slip, and did not see the sale on his next three monthly statements, he had the opportunity, through August of 1998, to reverse the transaction with little loss, and he chose not to do so. At least as of August of 1998, Customer BS knew about the transaction, as evidenced by his talking about it to Claimant, yet he made no complaint about it at that time. It was not until the Lilly stock had increased in value that Customer BS filed his complaint.

Furthermore, as Customer BS was aware that he would have to sell some of the securities in his account in order to purchase more securities, and Customer BS purchased Gillette and Halliburton stocks in August of 1998, Customer BS knew or should have known that there was a sale of securities in his account prior to his purchase of Gillette and Halliburton. The Gillette and Halliburton purchase is indicative of Customer BS's approval of the sale of his Lilly stock.

Claimant was not involved in the alleged investment-related sales practice violation and is therefore entitled to relief pursuant to FINRA Rule 2080(b)(1)(B). As Claimant was out of the office at the time of the alleged unauthorized trade, and as Claimant neither ordered the trade nor made the

trade on the Customer's behalf, Claimant was not involved in the alleged unauthorized trade.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact concerning Occurrence Number [REDACTED]:

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 concerning Occurrence Number [REDACTED] based on the following reasons:

This complaint filed by Customer MS asserted that he was sold unsuitable investments and that his investments were miscategorized while Claimant was with AGE. Customer MS's assertions are clearly erroneous, factually impossible, and false and, therefore, meet both the Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement for the following reasons:

The allegation of unsuitability is clearly erroneous because, pursuant to FINRA Rule 2111, Claimant had a reasonable basis to believe that Customer MS's investments were suitable for Customer MS based on the reasonable diligence of Claimant, AGE, and Customer MS to ascertain Customer MS's investor profile. Customer MS was a high-net-worth, experienced investor. He had many opportunities to review and, if need be, change his stated investment goals, but never did so. Only when his account began to lose money did he claim to have an objective other than what he had previously stated. Further, even after losing money in 2001, Customer MS told Claimant that he was continuing to invest in technology companies such as Cisco and Corning.

The allegation of miscategorization is clearly erroneous and false because Customer MS's account included investments in numerous blue-chip companies, along with his technology sector investments. So long as those investments made money, Customer MS felt that they were appropriate. Only when he lost money in the market decline beginning in 2000, did he allege that his investments had been miscategorized. Further, Claimant submitted an affidavit appearing to be from Customer MS, dated October 27, 2017, in which Customer MS stated, under oath, the following:

I received notice of the request for expungement by Claimant and I fully support the expungement of my complaint from his BrokerCheck. The complaint was never intended as a complaint against Claimant and the current allegation on his BrokerCheck is false and inaccurate.

The claim, as a whole, is factually impossible, because loss of value is always a risk of investing in the stock market, and, as a high-net-worth, knowledgeable investor, Customer MS understood or should have understood not only the risks that he was undertaking, but also that his investments were neither guaranteed nor protected against loss. Further, neither Claimant nor AGE ever purported to act as a guarantor against loss. Furthermore, Customer MS and Claimant reviewed Customer MS's portfolio on a regular basis, allowing Customer MS ample opportunity to make changes in his both his investments and his stated investment objectives. Customer MS voiced no complaints whatsoever with the handling or content of his portfolio until the market decline beginning in 2000.

The allegation of unsuitability is false, because the suitability of an investment is determined at the time when the investment is made and was based upon the information provided to Claimant by Customer MS. Customer MS stated that his objective was income and growth, and Customer MS specifically noted that he expected returns of 12% or more from his investments, which is consistent with an aggressive risk tolerance. Claimant's recommendations to Customer MS did not deviate from Customer MS's investor profile at the time when they were recommended. A subsequent diminution of value reveals nothing about the quality of the investment when it was purchased and does not illuminate reasons as to why the investment was allegedly unsuitable for Customer MS's investment objectives.

2. Any and all claims for relief not specifically addressed herein are 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
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**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 firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, A.G. Edwards & Sons, Inc. and Merrill Lynch Pierce Fenner & Smith, Inc. are each assessed the following:

A.G. Edwards & Sons, Inc.:

Member Surcharge	= \$ 150.00
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Merrill Lynch Pierce Fenner & Smith, Inc.:

Member Surcharge	= \$ 150.00
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