

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

██████████

Case Number: ██████████

vs.

Respondent

Merrill Lynch Pierce Fenner & Smith Inc.

Hearing Site: New York, New York

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant ██████████: Dochter Kennedy and Eric Litow, Esq., AdvisorLaw, LLC, Broomfield, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc.: Stuart D. Roberts, Bressler, Amery & Ross, Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: August 11, 2017.

██████████ signed the Submission Agreement: August 11, 2017.

Statement of Answer filed by Respondents on or about: October 3, 2017.

Merrill Lynch Pierce Fenner & Smith Inc. signed the Submission Agreement: October 3, 2017.

CASE SUMMARY

Claimant asserted the following causes of action: expungement.

Respondent takes no position regarding Claimant's request for expungement.

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 are 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 are false;
3. an award of damages in the amount of \$1.00 from the Respondent; and
4. any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer Respondent requested that Claimant's request for damages be denied.

At the hearing, Claimant withdrew his request for an award of compensatory damages in the amount of \$1.00.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about January 29, 2018, Claimant provided FINRA Dispute Resolution with proof that he notified the customers related to occurrence numbers [REDACTED] and [REDACTED] of the expungement request and of their right to participate and testify at the expungement hearing and he provided the customers with a copy of the Statement of Claim.

The Arbitrator conducted a recorded telephonic hearing on March 27, 2018 so the parties could present oral argument and evidence on Claimant's request for expungement.

The customers did not participate in the expungement hearing and did not contest the request for expungement. Respondent participated in the expungement hearing, but did not contest the request for expungement.

The Arbitrator reviewed the BrokerCheck® Report for [REDACTED] and the settlement agreement related to occurrence # [REDACTED], considered the amount of payments made to the customers, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on the customers not opposing the request for expungement. The Arbitrator also noted that [REDACTED] did not contribute to the settlement amount.

The settlement agreement related to occurrence # [REDACTED] could not be located. The Arbitrator believes that even in the absence of the settlement agreement that expungement is appropriate.

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: Claimant's Statement of Claim, Claimant's BrokerCheck® Report, Respondent's Statement of Answer, the settlement agreement related to occurrence # [REDACTED] and the evidence and testimony presented at the expungement hearing.

The Arbitrator noted that [REDACTED] did not previously file a claim requesting expungement of the same disclosures in the CRD.

The parties present at the hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

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 numbers [REDACTED] and [REDACTED] from registration records maintained by the Central Registration Depository ("CRD"), for [REDACTED] (CRD# [REDACTED]), with the understanding that, pursuant to Notice to Members 04-16, [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, 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 # [REDACTED]

An informal, customer oral complaint was made to Respondent on September 8, 2008

by the customer related to occurrence # [REDACTED], who alleged unsuitable investment recommendations. The customer became a client of [REDACTED] in 2004 by way of Mr. [REDACTED] partner at Advest, Claimant's previous employer before it was acquired by Respondent. The customer was a sophisticated investor with 20 years of experience and stated he had moderate risk tolerance and was looking to generate income from his investments. After Respondent acquired Advest, the customer retired from his position with the New York City Comptroller's Office and requested that Respondent increase the monthly amount sent to him from his investments. Mr. [REDACTED] discussed two possible investments options to generate higher income. These were two Fannie Mae stocks that at the time were suitable securities for the customer, who purchased them in May, 2008. By August 2008, however, the share prices for Fannie Mae had plunged, and although Claimant asked the customer if he wanted to sell and advised him of the possible consequences of holding onto the stock, the customer declined. During the first week of September 2008, Fannie May stock stopped paying dividends, as Claimant had previously discussed with the customer, who now asked for his money back. Subsequently, the customer phoned Respondent and formally alleged unsuitability in reference to the Fannie Mae Stock. The customer sought damages in the amount of \$88,000.00, and within a few weeks the Respondent settled with the customer for \$63,000.00.

Mr. [REDACTED] denies any wrongdoing, was not privy to the settlement discussions, and did not contribute to it.

The Arbitrator reviewed the exhibits and found the customer to be a sophisticated investor who was looking to generate income with his investments. The recommendations were suitable for the customer at the time they were made and Mr. [REDACTED] subsequent warnings of the possibilities what would happen in the ensuing volatile financial environment were ignored.

Accordingly, the customer's allegation is false because, at the time the Fannie Mae stocks were purchased, they were suitable investments for the customer's stated financial goals. For the same reasons, the customer's allegation of unsuitability is clearly erroneous and factually impossible.

Occurrence [REDACTED]

A complaint was filed against Respondent, Mr. [REDACTED] and his partner on May 5, 2009 by the customers related to occurrence # [REDACTED] alleging unsuitability. At the time, Claimant was a licensed, junior partner who assisted his partner, who had managed the customers' accounts since approximately 1986. The customer (husband) was an experienced investor who had been an executive for Dreyfus Corporation, a pioneer of the mutual fund industry. The investment profile for the Cohens indicated they had a moderate risk tolerance with a primary investment objective of income and a secondary investment objective of growth.

Mr. [REDACTED] credibly testified that the customer (husband) was a sophisticated investor who studied the market and preferred to be invested in fixed income securities. By August 2007 the markets were dropping in value and Mr. [REDACTED] recommended that the customers should be diversifying. The customer (husband) requested information regarding Freddie Mae and Fannie Mae preferred stock in late November 2007 and subsequently purchased them. From December 2007 through September 2008, Claimant's partner wrote letters to the customer (husband) emphasizing that both he and Mr. [REDACTED] had made numerous recommendations to sell certain holdings and the customer (husband) had repeatedly ignored the advice of his financial advisors.

The Arbitrator reviewed the exhibits which confirmed Mr. [REDACTED]s testimony. The exhibits consist of notes from conversations with the husband, e-mails and investment profiles.

Based upon the foregoing, the customers' allegations of unsuitable investment recommendations, breach of fiduciary duty, failure to diversify, negligence, negligent supervision, breach of contract, and fraud are clearly erroneous, factually impossible, and false.

Respondent settled with the customers for \$50,000, approximately one year after the customers filed for FINRA arbitration. The Claimant denied any wrongdoing and did not contribute to the settlement, nor was he privy to the settlement discussions between the customers and had no involvement in the settlement agreement.

At the time the investments in the customers' portfolio were purchased, they were suitable and appropriate for the customers' investment profile. They had had years of investment history in fixed income investments, specifically government agencies, municipal and corporate bonds and preferred stock. Likewise, the claim of failure to diversify is factually impossible, supported by documentary evidence wherein Claimant made repeated, specific recommendations toward diversification which were ignored.

2. Any and all claims for relief not specifically addressed herein and attorneys' fees, 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 firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed the following:

Member Surcharge	= \$ 150.00
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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) pre-hearing session with a single arbitrator @ \$50.00/session	= \$ 50.00
Pre-hearing conference: December 19, 2017 1 session	

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: March 27, 2018 1 session	

Total Hearing Session Fees	= \$ 100.00
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The Arbitrator has assessed the \$100.00 hearing session fees to Claimant.

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

ARBITRATOR

Madelon M. Rosenfeld

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature



Madelon M. Rosenfeld
Sole Public Arbitrator



Signature Date

April 9, 2018

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