

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

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In the Matter of the Arbitration Between:

Claimant

Case Number: [REDACTED]

[REDACTED]

vs.

Respondent

Hearing Site: Kansas City, Missouri

Merrill Lynch Pierce Fenner & Smith Inc.

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant [REDACTED] ("Claimant"): Eric Litow, Esq., Advisor Law, Broomfield, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc. ("Respondent"): Sarah K. Yates, Esq., Bressler Amery Ross, Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: November 7, 2017.  
Claimant signed the Submission Agreement: November 7, 2017.

Statement of Answer filed on or about: January 5, 2018.  
Respondent signed the Submission Agreement: January 5, 2018.

**CASE SUMMARY**

In the Statement of Claim, Claimant asserted a claim seeking expungement of two customer claims ("Underlying Claims"), Occurrence Numbers [REDACTED] (a customer complaint) and [REDACTED] (a FINRA arbitration case), from his registration records maintained by the Central Registration Depository ("CRD").

Unless specifically admitted in the Statement of Answer, Respondent took no position on Claimant's request for expungement and asserted various affirmative defenses.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement, an award of \$1.00 in compensatory damages, and other appropriate relief.

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

On the record at the expungement 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 March 7, 2018, Claimant filed copies of Service Letters sent to the customers in the Underlying Claims. On or about March 13, 2018, Claimant filed an Affidavit of Service in which Claimant's counsel stated that the customers in the Underlying Claims had been served with the Statement of Claim by certified mail.

On or about April 13, 2018, the customer in Occurrence Number [REDACTED] ("Customer MC") submitted a letter in opposition to Claimant's request for expungement.

The Arbitrator conducted a recorded telephonic hearing on April 24, 2018, 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 Claimant's request for expungement.

Customer MC did not participate in the expungement hearing, but contested the request for expungement through correspondence dated April 13, 2018.

The customers in Occurrence Number [REDACTED] ("Customers HA") neither participated in the expungement hearing nor filed a submission in response to Claimant's request for expungement. The Arbitrator determined that Customers HA had notice of the expungement request and hearing.

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator also reviewed the settlement document ("General Release") for Occurrence Number [REDACTED], considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement. The Arbitrator found that the settlement was not conditioned on Customers HA not opposing the request for expungement. The Arbitrator also found that Claimant did not contribute to the settlement amount.

The Arbitrator found that Occurrence Number [REDACTED] was not settled and accordingly there were no settlement agreements to review.

The Arbitrator also found that Claimant did not previously file a claim requesting expungement of the same disclosures in the CRD.

In recommending expungement of Occurrence Number [REDACTED] the Arbitrator relied upon the following documentary or other evidence:

- The Statement of Claim; and
- The letter from Customer MC to FINRA dated April 13, 2018.

In recommending expungement of Occurrence Number [REDACTED], the Arbitrator relied upon the following documentary or other evidence:

- The General Release;
- The Answer to First Amended Statement of Claim filed in the underlying arbitration; and
- Claimant's testimony.

### 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 ("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 in regard to Occurrence Number [REDACTED] based on the following reasons:

This complaint was entered in CRD in 2002 and closed without any action. In response to notice from Claimant required as part of this expungement request, the Statement of Claim, Customer MC submitted a letter dated April 13, 2018, objecting to the expungement request. Claimant testified with respect to the complaints set forth in Customer MC's letter at the telephonic hearing on expungement. Claimant's testimony established that Customer MC's complaints failed to allege a sales practice violation and did not allege any damages. Furthermore, his testimony showed that the transactions at issue were suitable, authorized, and not misrepresented to the customer, who was Customer MC's mother, not Customer MC.

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

This complaint was made after the settlement of the underlying arbitration case filed by the Co-Trustee of Customers HA's trust ("Co-Trustee"), against Claimant and Respondent, arising out of investments made before the Co-Trustee became Co-Trustee of his parents' trust. The Co-Trustee's parents were the original customers of Claimant.

The evidence considered established that all investments at issue were made at the direction of Customers HA and were suitable. Claimant also presented evidence that there had been no complaints in the twelve years Claimant handled the account before the Co-Trustee took over management of the trust after the resignation of his brother. Also, the Co-Trustee had no authority with respect to this account during the relevant time period, as his brother, and before that their father, controlled all the investments.

Respondent settled the underlying arbitration without any contribution from Claimant and over his objections. The settlement was not conditioned on the Co-Trustee agreeing not to oppose any expungement request by Claimant.

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
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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, Respondent 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(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: February 15, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: April 24, 2018 1 session	
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Total Hearing Session Fees	= \$ 100.00

The Arbitrator has assessed \$100.00 of the hearing session fees to Respondent.

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

**ARBITRATOR**

John R. Loss

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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**

/s/ John R. Loss

John R. Loss  
Sole Public Arbitrator

May 22, 2018

Signature Date

May 22, 2018

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

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Hearing Date: April 24, 2018 1 session	
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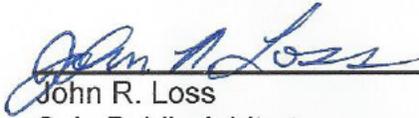
**ARBITRATOR**

John R. Loss

- 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**

  
\_\_\_\_\_  
John R. Loss  
Sole Public Arbitrator

5/22/18  
\_\_\_\_\_  
Signature Date

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