

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 ██████████: Owen Harnett, Esq., AdvisorLaw LLC, Broomfield, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: August 23, 2017.
Claimant signed the Submission Agreement: August 23, 2017.

Statement of Answer filed by Respondent on or about: November 10, 2017.
Respondent signed the Submission Agreement: November 14, 2017.

CASE SUMMARY

Claimant asserted the following cause of action: expungement.

In the Statement of Answer, Respondent did not oppose Claimant's expungement request.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of Occurrence numbers [REDACTED], [REDACTED] and [REDACTED], compensatory damages in the amount of \$1.00, and all other relief deemed just and equitable.

In the Statement of Answer, Respondent requested that the request for compensatory damages be denied.

During the hearing, Claimant withdrew the request for compensatory damages of \$1.00.

OTHER ISSUES CONSIDERED AND DECIDED

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

The Arbitrator conducted a recorded in-person hearing on May 2, 2018 so that the parties could present oral argument and evidence on Claimant's request for expungement.

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

On March 27, 2018, Claimant notified the customers in the underlying complaints of her request for expungement and of their right to participate in the expungement hearing and also provided the customers with a copy of the Statement of Claim.

The customers in the underlying complaint did not participate in the expungement hearing but opposed Claimant's expungement request.

The Arbitrator finds that the customers do not desire to participate in the expungement hearing and that a decision on the merits of Claimant's request can be entered.

The Arbitrator reviewed Claimant's BrokerCheck® Report and 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: the pleadings, Claimant's testimony, exhibits, and the customers' written objections.

AWARD

After considering the pleadings, the testimony and evidence presented at the expungement 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], [REDACTED], and [REDACTED] from registration records maintained by the Central Registration Depository ("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, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 finding based on the following reasons:

All of the customers' complaints were investigated by the Respondent when they were first raised in written form by the customers, and after investigation, as reflected in Claimant's BrokerCheck Report, were determined to be without merit. Apparently, none of the customers as they had the right to do, brought arbitration proceedings against the Respondent and/or the Associated Person, the Claimant, Ms. [REDACTED] in this case.

Claimant's BrokerCheck Report included three other customer complaints, not involved in this case, which counsel for the Claimant represented had been the subject of a distinct FINRA arbitration case in which the Panel had recommended that those three customer complaints should be expunged.

Regardless of the foregoing representation, the pendency of those other complaints by themselves, whether expunged or not, does not in the view of the Arbitrator weigh in any material way, against the expungement of the customer complaints involved in this proceeding. In response to questioning of the Claimant by the Arbitrator, [REDACTED] testified that in her career she did not have any other customer complaints filed against her and therefore had no other complaints recorded in her CRD records that had ever been expunged from her CRD records.

Ordinarily while some evidentiary weight might be given in support of an award recommending expungement to contemporaneously written documents, including notes written by any person, and some documents that previously existed, the customers have failed to provide any material documents to support their allegations and although they had the opportunity to commence arbitrations in a timely manner, they did not avail themselves of those opportunities. Concomitantly, while the Claimant here might have been able to obtain additional contemporaneous documents to support her claims and delayed for years the bringing of this proceeding, although she had the right to bring such proceedings earlier, applying the discretion that the Arbitrator has in evaluating the credibility of witnesses and weighing any documentary evidence that is presented, and noting that no claim has been made that these proceedings are untimely, given the foregoing discretion, the Arbitrator has determined, after considering the timeliness of these proceedings and the implications of the lack of contemporaneous documents in support of the testimony of Ms. [REDACTED], except for the limited documents and other exhibits presented by Claimant, when weighed given the absence of any testimony and/or material documentary evidence in support of any of the claims made against Ms. [REDACTED], I find the testimony of [REDACTED] regarding the suitability of the investments that were made in the non-discretionary accounts of each of the three customers involved here was clear and convincing and that the investments were appropriate investments based upon the investment goals, levels of risk and timeline horizons for the periods that the accounts of these customers were opened till and including when the accounts were closed and transferred out to other brokerage firms. While there was volatility in the markets in general during the periods the investors held their accounts with Respondent, and under the care of [REDACTED], there was nothing inappropriate or inconsistent with the risk tolerance and investment goals of the investors with the advice she provided to hold the positions ["stay the course"] since doing so would have enabled the investments to recover and restore the unrealized profits that the customers claim they lost by not selling. Indeed, a consideration in not prematurely selling such positions was the fact that in many instances a significant portion of the unrealized profits would have been subject to capital gains tax.

In addition, with respect to the claim by a customer that is not supported by any documentary evidence, that [REDACTED] failed to follow through on discussion to sell the position she held at a future date, if market conditions reflected a situation prescribed by the customer, [REDACTED] presented clear and convincing testimony that it would have been outside her authority and she would have been subject to immediate termination by the Respondent had she acted upon such earlier verbal instructions, as opposed to contemporaneous instructions given by the customer on the actual date the customer says that her prior instructions should have been acted upon. Claimant testified that such instructions were never given to her either when alleged by the customer or on the date the customer claims the position should have been liquidated.

In addition to all the foregoing, there are other aspects of [REDACTED] testimony which were unconverted and credible, which support the award to expunge here, which may be found in the record of the proceedings here that the allegations and assertions of the customers that resulted in the three matters as to which expungement is sought here, are false and/or to the extent that the customers have a mistaken basis for making such assertions and allegations that they are also clearly erroneous expressions of fact or opinion.

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 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 @ \$50.00/session	= \$ 50.00
Pre-hearing conference: January 4, 2018	1 session

Two (2) hearing sessions on expungement request @ \$50.00/session	= \$100.00
Hearing Date: May 2, 2018	2 sessions

Total Hearing Session Fees	= \$150.00
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The Arbitrator has assessed the hearing session fees of \$150.00 to Claimant.

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

ARBITRATOR

Joseph I. Liebman

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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



Joseph I. Liebman
Sole Public Arbitrator

5/24/2018
Signature Date

May 25, 2018

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