Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

<u>Claimant</u>
[redacted]

vs.

<u>Respondent</u>
Merrill Lynch Pierce Fenner & Smith Inc.

<u>Case Number</u>: [redacted]

<u>Hearing Site</u>: Kansas City, Missouri

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant [redacted] ("Claimant"): Eric Litow, Esq., and Dochtor Kennedy, Esq., AdvisorLaw LLC, Broomfield, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: November 27, 2017.
Claimant signed the Submission Agreement: November 27, 2017.

Statement of Answer filed on or about: January 17, 2018.
Respondent signed the Submission Agreement: January 19, 2018.

CASE SUMMARY

Claimant asserted a claim seeking expungement of two customer complaints, occurrence numbers [redacted] and [redacted] ("Underlying Complaints") from his registration records maintained by the Central Registration Depository ("CRD").

Unless specifically admitted in the Statement of Answer, Respondent took no position as to Claimant's request for expungement; however, Respondent objected to Claimant's request for compensatory damages and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of all references to the Underlying Complaints from his CRD records, $1.00 in compensatory damages, and other equitable relief.

In the Statement of Answer, Respondent advised that it took no position on Claimant's request for expungement and objected to Claimant's request for compensatory damages.

At the hearing, Claimant withdrew his request for $1.00 in compensatory damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about April 12, 2018, Claimant filed a copy of its correspondence, dated April 10, 2018, in which the customers in occurrence number [redacted] were provided with a copy of the Statement of Claim and notice of the hearing.

On or around April 12, 2018, Claimant submitted an obituary for the customer in occurrence number [redacted].

On or about May 7, 2018, the customers in occurrence number [redacted] filed an opposition to Claimant's request for expungement.

On or about June 9, 2018, Claimant filed additional exhibits in support of his request for expungement, including the settlement agreements with the customers in the Underlying Complaints.

On or about June 25, 2018, Claimant submitted an updated BrokerCheck® Report.

The Arbitrator conducted a recorded telephonic hearing on June 26, 2018, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing, but took no position on Claimant's request for expungement.

The customers in occurrence number [redacted] did not participate in the expungement hearing, but contested Claimant's request for expungement.

The customer in occurrence number [redacted] did not participate in the expungement hearing.

The Arbitrator reviewed the BrokerCheck® Report for Claimant and the settlement documents, 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 the customers in the Underlying Complaints not opposing the request for expungement. The Arbitrator also found that Claimant did not contribute to the settlement amount.

The Arbitrator found 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:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

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, as to occurrence number [redacted], based on the following reasons:

In the 1990s, Claimant, an assistant V.P. at Respondent, met the customer through a referral from a highly regarded local estate planning attorney. The customer moved $1.2M from a safety deposit box to Claimant's professional asset management. At Claimant's recommendation, a trust was drafted designating that upon his death, his remaining assets should go to charities.

At some point, the customer's great niece ("the niece") discovered his net worth and repeatedly urged him to change his trust attempting to convince him charity begins at home not to others. She continually requested he leave her the money. In 1995, the customer's same estate planning attorney and another attorney went to the customer's house to inquire about this trust change because the attorney believed the customer was being coerced. The customer told the attorney the change was not out of his own free will so this attorney refused to change his trust. The niece convinced the customer to fire his attorney. The niece then hired a different attorney, who rewrote the trust, which left her money upon his death. In 1996, the customer died.

The niece took her inherited share of the trust and became a client of Claimant. At that time, the niece was married, she was 55 years old, and she worked as a hairdresser. Her husband worked in a labor intensive job. The couple's combined income was $60,000. With this inheritance, their combined liquid net worth became $250,000. Through personal interviews, Claimant determined the niece's investment objective was total return with little liquidity needs, a moderately aggressive risk tolerance, and a long-term time-horizon. They expected to use the funds when the niece's husband retired in four to six years. Claimant met with the couple three to four times per year and built a portfolio which included Individual Retirement Accounts (IRA's) and Uniform Transfers to Minors Act accounts (UTMAs).

A few years later and during the late 1990's in the dotcom bubble, equity markets grew exponentially, and the niece's funds did very well. One fund was up 24% and her IRA was up 16% in one year. Unfortunately, this led the niece to receive a false sense of security. The niece claimed this increase was not enough and sought more risk, commenting that Respondent was behind the times and did not understand the power of the internet. Claimant attempted to educate her on the importance of creating a balanced asset allocation, but she refused and insisted on changing her goal from moderately aggressive to very aggressive and risky investments. She reallocated to a highly rated 100% equity portfolio. Claimant reviewed each trade, he fully explained the risks, but she chose investments in aggressive growth mutual funds. These were not discretionary accounts.

Also during that same time period in the late 1990s, the niece began riding and training horses. She purchased horses and trailers believing short-term profits from her financial investments would allow her to afford them and further believed she would make money training horses. The niece chose to use a margin account to fund this horse-related venture. As her margin balance increased, Claimant repeatedly warned her of the risks associated with margin. He further explained financial planning does not include leverage and is more of a short-term vehicle, but she refused to sell any stock.

After the dotcom crash, the niece's portfolio dramatically decreased in value. She complained to the firm compliance manager. This claim was denied because most, if not all, of the niece's trades were made at her own direction. This angered the niece so she moved her account elsewhere. Over the next three years different attorneys contacted Claimant. The first two attorneys who approached Claimant did not take the niece's case.

The third attorney filed an arbitration alleging "unsuitable investment recommendations and misrepresentations" seeking $300,000.00. On September 18, 2006, the complaint led to a FINRA arbitration. Before arbitration, the parties participated in mediation. At that time, Respondent entered into a $17,000.00 Settlement with the niece and her husband without admitting fault or liability. Claimant was not asked to participate in the settlement. Claimant did not participate in the settlement and Claimant did not contribute to this settlement. The firm told Claimant because the award was so small, the matter would drop off his CRD, but it remains.

The allegation of unsuitability is clearly erroneous because the niece failed to follow most of the suitable investment recommendations Claimant made. She also acted contrary to Claimant's other recommendations. Furthermore, the allegation of unsuitability is factually impossible because the niece chose high-risk mutual funds against Claimant's advice and also ignored his repeated attempts to create a balanced asset allocation. Lastly, suitability is moot where the niece's investment choices in aggressive, high-risk investments were entirely her own choosing.

The allegation of misrepresentation is clearly erroneous where Claimant's recommendations were made to achieve a balanced asset allocation based upon the niece and her husband's stated investment goals. Claimant warned them about the risks of leverage, and also that expenditures on horses and horse trailers would result in significant losses. For the above stated reasons, expungement in occurrence number [redacted] is warranted.

The Arbitrator has made the above Rule 2080 findings, as to occurrence number [redacted], based on the following reasons:

In 1993, the customer became a client of Claimant after the customer's son-in-law, who had been a financial advisor with Respondent and had previously managed the customer's accounts, left the industry to pursue another career. The customer was in his mid-50s when he became a client of Claimant. He was a financial entrepreneur with 25 years of experience, who earned over $400,000 per year. During personal interviews, he learned the customer's investment objective was total return, he had no liquidity needs, and he was still generating income. His risk tolerance was aggressive and his time horizon was over 10 years.

In the late 1990s, a bank which the customer and other investors had started was bought by Bank of America ("BOA"), leaving him with $6M worth of BOA stock, which comprised 70% portfolio. With $0 cost basis, the customer was reluctant to sell this stock as he earned approximately $300,000-350,000 per year in dividends. At that time, the customer's net worth was approximately $10M.

In 2008, the global financial crisis occurred followed by the Great Recession. The customer's BOA stock dropped in value from $6.5M to $700,000 and the customer wanted some cash flow to replace the risk of the BOA stock. Claimant researched three municipal bond market funds to produce tax free income. During this period, Claimant and the customer talked two to three times per week. The customer became particularly interested in this topic because two other big banks had recently failed. The customer invested 20-25% of his assets into an equity portfolio.

During the last quarter of 2008, there was an exact correlation between equities and bond funds in the market. This was because hedge funds used municipal bonds as collateral for trading. This meant there was the same volatility for both equities and bond funds and both decreased in value.

In November 2008, when the customer saw his November 2008 statement, he noticed the value of his investments had continued to drop. The customer wanted to get out of equities and did not understand they had already sold the equities to buy bonds. In December 2008, the customer again saw that the value of his investments had decreased. Again, the customer insisted he wanted to get rid of equities to buy bonds. He did not understand that, he had already sold his equities and currently owned bonds. The customer thought this would help him get out of his losses. Seeking to keep his long-time, 20-year customer and faithful client satisfied, Claimant cancelled the customer's request to trade $500,000 from equities to bonds and instead moved money to cash so as not to expose the customer's account to effects of the declining equity markets, either directly or indirectly. Claimant did this to help the customer during these challenging economic times. Claimant canceled the trade with complete understanding that he personally would pay the difference in market value to keep his long-term client.

A few days after cancelling the trade, Claimant learned from his administrative manager that if the trade was being cancelled, it had to be registered as a complaint, even though the customer never complained about it. On December 13, 2008, Respondent reported to Claimant's CRD and BrokerCheck® Report the customer had complained, alleging a "failure to follow instructions." On January 23, 2009, Respondent without admitting fault or liability, agreed to settle for the cost of cancelling the municipal bond purchase. Claimant did not contribute personally to this settlement amount.

The customer continued as Claimant's client until he died in 2016. The heirs within the customer trust, the customer's second wife and daughters, today remain clients of Claimant.

The allegation of “failure to follow instructions” is clearly erroneous, factually impossible, and false because Claimant followed the customer’s instructions and traded $500,000 worth of equities for municipal bonds. The allegation is factually impossible because the customer’s oral expression of dissatisfaction was based on a “misunderstanding” when he actually meant he wanted to move his equities to bonds and this had already occurred previously. Since both bonds and equities lost money, the customer thought his money was still in equities. The customer never complained about Claimant and the customer never requested damages from Claimant or Respondent, so this allegation is false. It was Claimant who actually cancelled the trade himself to ease his client’s worries, reduce losses in the client’s account and paid the transaction fees. For all of the above stated reasons, expungement is granted in occurrence number [redacted].

2. Other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter.

3. 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

**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

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:	March 23, 2018	1 session	
One (1) hearing session on expungement request @ $50.00/session			=$ 50.00
Hearing Date:	June 26, 2018	1 session	
Total Hearing Session Fees			=$ 100.00

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

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

ARBITRATOR

Lynn Hirschfeld Brahin - 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/ Lynn Hirschfeld Brahin
Lynn Hirschfeld Brahin
Sole Public Arbitrator

July 17, 2018
Signature Date

July 17, 2018
Date of Service (For FINRA Office of Dispute Resolution office use only)

ARBITRATOR

Lynn Hirschfeld Brahin - 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

Lynn Hirschfeld Brahin
Lynn Hirschfeld Brahin
Sole Public Arbitrator

July 17, 2018
Signature Date

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