

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, J.D., AdvisorLaw, LLC, Broomfield, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: November 22, 2017.

Amended Statement of Claim filed on or about: January 17, 2018.

████████████████████ signed the Submission Agreement: November 22, 2017.

Statement of Answer filed by Respondent on or about: January 22, 2018.

Merrill Lynch, Pierce, Fenner & Smith Inc. signed the Submission Agreement: January 23, 2018.

CASE SUMMARY

Claimant asserted the following cause of action: expungement of occurrence numbers ██████████ ██████████ and ██████████ from his CRD records.

RELIEF REQUESTED

In the Statement of Claim, and Amended Statement of Claim, Claimant requested

- a. expungement of the occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claims, allegations, or information is factually impossible or clearly erroneous;
- b. expungement of the occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(C), as the claims, allegations, or information is false;

- c. an award of damages in the amount of \$1.00 from the Respondent; and
- d. any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent took no position as to Claimant's request for expungement, but objected to Claimant's request for compensatory damages.

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

OTHER ISSUES CONSIDERED AND DECIDED

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

Claimant provided FINRA Office of 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 included a copy of the Statement of Claim with the notice.

The Arbitrator conducted a recorded telephonic expungement hearing on July 16, 2018 so the parties could present oral argument and evidence on Claimant's request for expungement.

The Arbitrator noted that the customer related to occurrence number [REDACTED] is deceased, per a death certificate forwarded to FINRA Office of Dispute Resolution. The customer related to occurrence [REDACTED] did not respond to the hearing notification and the customer related to occurrence number [REDACTED] responded to FINRA that he would not participate in the hearing and neither supported nor opposed the Claimant's expungement request.

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

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: Claimant's Statement of Claim, Claimant's Amended Statement of Claim, Respondent's Statement of Answer, [REDACTED] BrokerCheck® Report 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 disclosure 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, 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 number [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:

On February 18, 2003 the customer alleged that "unsuitable investments were made to her account" and sought compensatory damages in the amount of \$60,000.

The customer became a client of Respondent on or about June 1998 when she was referred to Claimant by her CPA. She was 76 years old at the time, retired with investment objectives of growth and income with moderate risk tolerance. She told Claimant she required a minimum of \$800.00 in monthly income. Claimant advised the customer that she would need equity exposure and he devised a moderate/conservative portfolio, suitable for her objectives at the time. She was in agreement with Claimant's advice as was her CPA and nephew. In 1998 she established a Standing Letter of Authorization with Claimant which authorized Respondent to automatically issue the monthly checks for \$800.00. Claimant spoke with the customer monthly over the next two years and advised her to reduce the amount of her withdrawals, as the market environment at that time would not allow her portfolio to produce the \$800.00 monthly income. The customer declined to change the amount and eventually depleted her account. At no time did she speak with Claimant prior to lodging a formal complaint for unsuitability. Respondent found that the customer had been fully aware that she did not have the financial resources to sustain the level of income that she required; that all investments in her account were made with her authorization and were suitable; and concluded that the claim had no merit. Additionally, after a thorough review, the Certified Financial Planner Board of Standards Inc. found that no investigation was warranted and closed the dispute. The allegation of unsuitability is erroneous, factually impossible and false

and therefore meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement.

The customer's allegation is factually impossible because Respondent performed a thorough review of the customer's case and found it to be without merit. Respondent further found that all investments made in the customer's account were made with her authorization and were suitable to her investor profile. It is false because the customer agreed to the plan devised to achieve her monthly income goal and ignored the Claimant's advice when market conditions changed and her goal was no longer attainable.

2. The Arbitrator recommends the expungement of all references to occurrence number [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:

The customer, mother of Claimant's client was referred to and became a customer of Claimant in July 2000. She informed Claimant that she wished to transfer her accounts from another office of Respondent because she was unhappy with their performance and she wanted more income. Her objectives were income and growth and she was assessed with a moderate risk tolerance. She had more than 20 years of investment experience. Over the next four years Claimant spoke with the customer to review her portfolio and met with her personally. She approved all changes to her portfolio, which were made to keep her portfolio healthy. Claimant made repeated requests to the customer to sign the forms needed to authorize a reduction in the customer's monthly withdrawals. The reduction was necessary in order to cover the debit balance in the customer's portfolio which was caused because the customer was withdrawing more than her portfolio was generating. Over the next four years Claimant made numerous attempts to discuss this situation with the customer and even spoke with the customer's son, who said that he understood. When the customer transferred her accounts away from the Respondent, she did not indicate to Claimant that she planned to file a formal complaint. She ultimately completed a NASD request for mediation form wherein she alleged she had never been told to reduce her monthly withdrawal. Her alleged

losses included a fund which had begun before the Claimant became her Financial Advisor and also a loss from a fund which was not held at the Respondent. Her complaint was reported to the CRD and on the Claimant's BrokerCheck® Report alleging unsuitable investment recommendations. As of September 20, 2004 the dispute is listed on the Claimant's CRD as "Withdrawn. The customer did not pursue her complaint in court.

The claim is false because Claimant did not design the customer's initial portfolio and he did not make any recommendations that were not in response to a direct request from the customer. The two investments recommended by Claimant were purchased at the customer's request to purchase a fixed income investment. They were suitable to an investor with the customer's stated investment objectives of income and growth. They were suitable at the time of purchase, based upon the information provided to the Claimant at the time when the investments were made.

The claim is erroneous because the Claimant repeatedly advised the customer that she was withdrawing more money than the portfolio was generating and that she needed to either reduce the amount of her withdrawals or liquidate some of her securities.

3. The Arbitrator recommends the expungement of all references to occurrence number [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:

The customer became a client of claimant on November 5, 1985 after they met at a seminar. The customer was interested in investment and retirement planning and in trading and investing in stocks in the retailing sector, an industry in which the customer had practical experience. The customer had extensive experience as an investor in mutual funds, stocks and options, an investment objective of long-term, aggressive growth with aggressive risk tolerance. Claimant moved the customer into managed portfolios. In November 1988 the customer sent a letter to the Assistant Vice President at the Claimant's branch of the Respondent praising the Claimant and stating that he had never used a full-service brokerage house such as the

Respondent because he generally knew the type of trading in which he was interested. He was a very active investor and traded often, making all of the investment decisions in his account. In 1989 the customer established an equity line of credit but at no time did Claimant advise him to use it to purchase securities. In 1997 the customer defaulted on the equity line. Throughout 2000 and 2001 the customer began aggressively trading in his accounts, resulting in periods of losses. Claimant presented the customer with proposals to avoid the losses that he was incurring but these recommendations were ignored.

In June, 2004 the customer alleged that the Claimant made unsuitable recommendations and investments, and misrepresented and omitted material facts regarding his accounts.

After Respondent completed a thorough investigation in September 2004 it denied the customer's claim, finding it to be without merit.

As of January, 2005 the customer dispute is listed on the Claimant's CRD record as "Closed/No Action."

The customer's allegation of unsuitability is false, because the investments at issue were entirely appropriate for the customer's stated investment objective of long-term, aggressive growth and aggressive risk tolerance. Furthermore the customer made the investment decisions in his account and also directed the Claimant as to the investment strategy of investing. The customer insisted on trading as he pleased and consistently refused to implement any of the plans presented by Claimant. The customer's trading record indicates that he traded recklessly based upon his own whims, repeatedly failed to complete paperwork that would have enabled the Claimant to implement an investment strategy to which the customer had himself agreed, and ran up a margin debt on his account large enough to get him sued by the Respondent. The customer's allegation of misrepresentation is clearly erroneous, factually impossible and false because the Claimant thoroughly discussed every trade in the accounts with him prior to any trade being entered.

4. 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 event(s) giving rise to the dispute. Accordingly, as a party, Merrill Lynch, Pierce, Fenner & Smith Inc. 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 27, 2018 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing Date: July 16, 2018 1 session

Total Hearing Session Fees = \$ 100.00

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

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

July 25, 2018

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