

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: San Diego, California

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant ██████████ (“Claimant”): Dochter Kennedy, J.D., MBA, and Armin Sarabi, Esq., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc. (“Respondent”): Randi P. Spallina, Esq., Bressler, Amery & Ross, P.C., Fort Lauderdale, Florida.

CASE INFORMATION

Statement of Claim filed on or about: February 5, 2018.
Amended Statement of Claim dated: August 23, 2018.
Claimant signed the Submission Agreement: February 5, 2018.

Statement of Answer filed by Respondent on or about: April 2, 2018.
Respondent signed the Submission Agreement: April 2, 2018.

CASE SUMMARY

Claimant asserted a claim seeking expungement of two customer disputes (“Underlying Claims”) from his Central Registration Depository (“CRD”) records: a FINRA Arbitration case, occurrence number ██████████; and a customer complaint, occurrence number ██████████.

In the Statement of Answer, Respondent advised that it takes no position as to the request for expungement but objected to Claimant’s request for compensatory damages and stated various affirmative defenses.

In the Amended Statement of Claim, Claimant corrected a statement in the Statement of Claim regarding a settlement in occurrence number ██████████.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Claims from his CRD records pursuant to FINRA Rule 2080(b)(1)(A), as the claim, allegation, or information is factually impossible or clearly erroneous;
2. Expungement of the Underlying Claims from his CRD records pursuant to FINRA Rule 2080(b)(1)(C), as the claim, allegation, or information is false;
3. Damages in the amount of \$1.00 from Respondent; and
4. Any and all further relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent did not set forth a specific relief request.

In the Amended Statement of Claim, Claimant set forth the same relief request as in the Statement of Claim.

At the hearing, Claimant withdrew his request for \$1.00 in damages from Respondent.

OTHER ISSUES CONSIDERED AND DECIDED

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

On August 23, 2018, Claimant filed a Motion to Amend the Statement of Claim. Respondent did not file an opposition to Claimant's motion. On September 10, 2018, the Arbitrator granted Claimant's motion and it became part of the record.

On September 25, 2018, Claimant provided notice that Amended Statement of Claim and notice of the expungement hearing was served on the customer in occurrence number [REDACTED] and the customer in occurrence number [REDACTED] ("Ms. J").

On October 9, 2018, FINRA Office of Dispute Resolution ("ODR") advised the parties and the Arbitrator that the Director of FINRA ODR determined that Claimant's request for expungement of occurrence number [REDACTED] is not eligible for arbitration as it arises from a prior adverse award. Accordingly, pursuant to Rule 13203(a) of the Code of Arbitration Procedure ("Code"), the forum was denied as to occurrence number [REDACTED]. The letter further advised that the case would proceed as to occurrence number [REDACTED].

On October 15, 2018, Claimant submitted an Affidavit of Service signed by Claimant's counsel, advising that the customer in occurrence number [REDACTED] and Ms. J had been served with the Statement of Claim.

The Arbitrator conducted a recorded telephonic hearing on October 25, 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 the request for expungement. The Arbitrator found that Ms. J had notice of the expungement request and hearing but did not participate.

At the expungement hearing, Claimant requested that the Arbitrator consider Claimant's request for expungement of occurrence number [REDACTED] despite the Director of FINRA ODR's October 9 decision to deny the forum as to occurrence number [REDACTED].

The Arbitrator reviewed the BrokerCheck® Report for Claimant.

The Arbitrator noted that there was no settlement in occurrence number [REDACTED] and therefore there were no settlement documents to review.

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

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: testimony of Claimant.

The parties present at the hearing have agreed 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. Claimant's request for the Arbitrator to consider Claimant's request for expungement of occurrence number [REDACTED] is denied for the following reasons:

This occurrence was the subject of a FINRA arbitration case which resulted in an award in favor of the customer and against Claimant and Respondent, jointly and severally. Accordingly, the Director of FINRA ODR determined that this forum was unavailable for a request to expunge this occurrence from Claimant's CRD records and BrokerCheck® Report. If recommending expungement in light of this determination were ever appropriate, it would require a compelling justification. Even absent such a determination, second-guessing an arbitrator who heard or read all of the evidence would itself require a compelling justification. No such compelling justification exists here.

2. The Arbitrator recommends the expungement of all references to occurrence number [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, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous.

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

Ms. J inherited, from her parents, a trust whose portfolio consisted exclusively or almost exclusively of high quality, investment-grade California municipal bonds. Her parents had “laddered” the bonds and reinvested upon maturity, using Claimant as their broker. Ms. J did likewise which suited her investment objectives. On April 24, 2009, Ms. J complained to Respondent, alleging “misrepresentation and unsuitable investment recommendations” during the period between July 1998 and April 2009.

The complaint did not specify any particular misrepresentations made by Claimant. Claimant credibly testified that he provided thorough explanations of the bonds and how Ms. J’s parents handled them over time. Given the history of Ms. J’s portfolio and Claimant’s testimony, I find Ms. J’s vague allegation of “misrepresentation” not credible and therefore clearly erroneous.

Similarly, Ms. J did not specify how the bonds she purchased or the strategy she pursued was “unsuitable.” Both appear well-suited to someone with her investment objectives and lack of investment sophistication. This appearance was reinforced by the fact that for 11 years Ms. J bought “laddered” high quality California municipal bonds and reinvested upon maturity. I find Ms. J’s general allegation of “unsuitable investment recommendations” clearly erroneous.

I therefore recommend that this occurrence be expunged from Claimant’s CRD records and BrokerCheck® Report.

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
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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(s) that employed the associated person(s) at the time of the event(s) 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: June 5, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$50.00
Hearing Date: October 25, 2018	1 session

Total Hearing Session Fees	= \$100.00
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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

Mark R. Lee

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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

Mark R. Lee

Mark R. Lee
Sole Public Arbitrator

11-2-18

Signature Date

November 5, 2018
Date of Service (For FINRA Office of Dispute Resolution office use only)