

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

Case Number: [REDACTED]

vs.

Respondents

Hearing Site: Seattle, Washington

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Wells Fargo Securities Inc.

Nature of the Dispute: Associated Person vs. Members

REPRESENTATION OF PARTIES

For Claimant [REDACTED] ("Claimant"): Dochter Kennedy, MBA, J.D. and Michael O'Gara, Esq., AdvisorLaw, LLC, Westminster, Colorado.

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

For Respondent Wells Fargo Securities Inc. ("Wells Fargo"): Judy Louie, Esq., Wells Fargo Law Department, Pasadena, California.

Hereinafter, Merrill Lynch and Wells Fargo are collectively referred to as "Respondents."

CASE INFORMATION

Statement of Claim filed on or about: February 21, 2018.
Claimant signed the Submission Agreement: February 21, 2018.

Statement of Answer filed by Non-party Wells Fargo Clearing Services, LLC ("WFCS") on or about: April 11, 2018.
Non-party WFCS signed the Submission Agreement: April 10, 2018.

Statement of Answer filed by Merrill Lynch on or about: April 13, 2018.
Merrill Lynch signed the Submission Agreement: April 13, 2018.

CASE SUMMARY

Claimant requested expungement of reference to two customer complaints ("Underlying Complaints"), occurrence numbers [REDACTED] and [REDACTED] from his Central Registration Depository ("CRD") records.

In the Statement of Answer, non-party WFCS stated that it has no objection or opposition to Claimant's expungement request so long as it is not required to take any action, including amending Claimant's CRD record.

In the Statement of Answer, Merrill Lynch stated that it takes no position on Claimant's expungement request and asserted affirmative defenses against any award of damages to Claimant.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Complaints from his CRD records pursuant to:
 - a. FINRA Rule 2080(b)(1)(A) as the claim, allegation or information is factually impossible or clearly erroneous; and
 - b. FINRA Rule 2080(b)(1)(C) as the claim, allegation or information is false;
 - c. Damages in the sum of \$1.00 from Respondents; and
 - d. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, non-party WFCS requested that any FINRA fees associated with the expungement hearing be assessed against Claimant, and any costs associated with confirming an expungement award be paid by Claimant.

In the Statement of Answer, Merrill Lynch objected to Claimant's request for damages in the sum of \$1.00.

During the expungement hearing, Claimant withdrew his request for damages in the sum of \$1.00 from Respondents.

OTHER ISSUES CONSIDERED AND DECIDED

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

Wells Fargo did not file with FINRA Office of Dispute Resolution a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and is bound by the determination of the Arbitrator on all issues submitted.

In the Statement of Answer, non-party WFCS advised that Wells Fargo is a previously registered securities broker-dealer and investment adviser firm that withdrew its registration from FINRA in December 2001. Further, non-party WFCS advised that it is the parent company of Wells Fargo brokerage serves and was served with the Statement of Claim. While Wells Fargo and non-party WFCS may have had the same owner, Wells Fargo & Company, in common, non-party WFCS is not the same entity as Wells Fargo and was wrongfully served. Notwithstanding the above, non-party WFCS submitted the Statement of Answer to Claimant's Statement of Claim.

On October 15, 2018, Claimant provided notice that the customer in occurrence number [REDACTED] ("Mr. M") had been served with the Statement of Claim and notice of the

expungement hearing. That same day, Claimant provided a copy of a LexisNexis Death Record which indicated that the customer in occurrence number [REDACTED] ("Mr. H") was deceased.

On October 17, 2018, Claimant provided an Affidavit of Service advising that Mr. M had been served with the Statement of Claim, and advised that Mr. H could not be served with the Statement of Claim because he is deceased.

The Arbitrator conducted a recorded telephonic hearing on November 15, 2018 so the parties could present oral argument and evidence on Claimant's request for expungement. Non-party WFCS participated in the hearing and did not oppose Claimant's expungement request, and Merrill Lynch participated in the hearing and took no position on the expungement request.

Mr. M did not participate in the hearing. The Arbitrator determined that Mr. M had been properly served with the Statement of Claim and received due notice of the hearing, and noted that Mr. H is deceased.

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator found that Mr. H's complaint in occurrence number [REDACTED] was denied by Wells Fargo (and not settled) on March 2, 2001, and therefore there was no settlement agreement to review.

The Arbitrator found that Mr. M's complaint in occurrence number 135183, which was received on March 12, 1995, settled for \$15,000.00. However, the Arbitrator was not able to review the settlement agreement. Based on an Affidavit filed by Claimant on November 13, 2018, the Arbitrator found that Merrill Lynch did not have a copy of the settlement agreement and that Claimant was unable to get a copy of the settlement agreement from Mr. M, as he was unresponsive. The Arbitrator also found, based on the affidavit, that Claimant was not a party to the settlement, did not contribute to the settlement and therefore did not have a copy of the settlement agreement. Claimant was no longer employed by Merrill Lynch at the time of the settlement and had no knowledge of or involvement with the settlement at that time. The Arbitrator found that Claimant exercised due diligence in his search to obtain the settlement agreement in his preparation for the expungement hearing.

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

In recommending expungement of the Underlying Complaints, the Arbitrator relied upon the following documentary or other evidence: Statement of Claim, in particular the facts outlined in it; Claimant's BrokerCheck® Report; and Claimant's testimony during the expungement hearing.

The Arbitrator has agreed that a handwritten, signed Award may be entered.

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] 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, the Arbitrator has made the following Rule 2080 affirmative finding of fact for both occurrence numbers [REDACTED] and [REDACTED]

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

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

Occurrence Number [REDACTED]

The claim of unsuitability was clearly erroneous. Mr. M's investments in the Pilgrim Adjustable Rate Fund and the Alliance North American Government Income Trust were suitable for Mr. M's risk tolerance. The investments declined when the interest rates rose which was not a sales practice problem. Claimant's investigation of Mr. M's risk tolerance of the products was reasonable. He met with Mr. M several times over several months to review his financial situation and discuss risk tolerance and income goals. Mr. M wanted income to supplement his social security payments. The bond funds were considered conservative investments by Merrill Lynch. The bond funds dropped 10-15% when interest rates rose. It was hard to predict that interest rates would rise. Claimant was not at fault for the loss that resulted because of rising interest rates. Merrill Lynch was responsible for the due diligence on the product, not Claimant.

Occurrence Number [REDACTED]

The claim of unsuitability was clearly erroneous. Mr. H invested in the American Skandia Variable Annuity which was suitable at the time of the purchase given Mr. H's goals and risk tolerance. Mr. H wanted tax deferred growth. Claimant had knowledge of Mr. H and did reasonable due diligence before the purchase. Claimant met with Mr. H numerous times to establish a relationship. They discussed his risk tolerance, his knowledge and his income goals. Many different products were discussed and Mr. H decided that a variable annuity met his goals of tax deferred growth. Mr. H was given a prospectus which disclosed the risks and costs. Claimant stayed in contact with Mr. H after the purchase and his goals and objectives did not change. Mr. H did not complain to him and he did not pursue the complaint after Wells Fargo denied it.

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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as parties, Wells Fargo and Merrill Lynch are assessed the following:

<u>Wells Fargo</u> Member Surcharge	= \$ 150.00
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<u>Merrill Lynch</u> 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 12, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: November 15, 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.

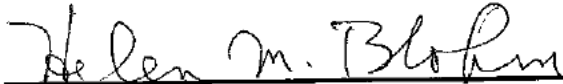
ARBITRATOR

Helen Marinak Blohm

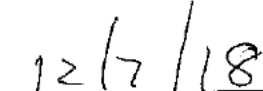
Sole Public Arbitrator

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

_____

Helen Marinak Blohm
Sole Public Arbitrator

_____
Signature Date

December 13, 2018
Date of Service (For FINRA Office of Dispute Resolution office use only)