

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant

Case Number

vs.

Respondent

Hearing Site: Denver, Colorado

Merrill Lynch, Pierce, Fenner & Smith Incorporated

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant [REDACTED] "Claimant": Eric Litow, Esq., HLBS Law, Westminster, Colorado.

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

**CASE INFORMATION**

Statement of Claim filed on or about: May 7, 2018.

Claimant signed the Submission Agreement: May 7, 2018.

Statement of Answer filed by Respondent on or about: July 11, 2018.

Respondent signed the Submission Agreement: July 11, 2018.

**CASE SUMMARY**

Claimant requested expungement of reference to a customer complaint, a court case filed in the Eastern District of Missouri<sup>1</sup> and an NASD (FINRA's predecessor) arbitration case ("Underlying Claims"), occurrence numbers [REDACTED], [REDACTED] and [REDACTED] respectively, from his Central Registration Depository ("CRD") records.

In its Statement of Answer, Respondent asserted various affirmative defenses and stated that it takes no position as to Claimant's requests for expungement.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Claims from his CRD records pursuant to:
  - a. FINRA Rule 2080(b)(1)(A) as the claim, allegation, or information is factually

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<sup>1</sup> The lawsuit was subsequently removed to the U.S. District Court, Eastern District of Michigan.

- impossible or clearly erroneous; and
- b. FINRA Rule 2080(b)(1)(C) as the claim, allegation, or information is false;
  2. Damages in the amount of \$1.00 from Respondent; and
  3. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent objected to Claimant's request for damages.

During the expungement hearing, Claimant withdrew his request for \$1.00 in compensatory damages.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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

On August 28, 2018, the Arbitrator and parties held the Initial Pre-hearing Conference. By Order that same date, the Arbitrator directed that copies of the settlement agreements and proofs of service of the claim and the Order on the customers, or declarations of due diligence if unable to serve any customers, must be filed and served on or by October 31, 2018. The Arbitrator further stated that any customers who want to file documents or participate in the hearing should contact FINRA.

By letter dated October 31, 2018, Claimant provided a copy of his notice to the customers in occurrence numbers [REDACTED] ("Ms. R") and 142049 ("Ms. S") regarding the Statement of Claim, notice of the expungement hearing and a copy of the August 28, 2018 Order. That same day, Claimant provided a copy of a LexisNexis Death Record for the customer in occurrence number [REDACTED] ("Ms. G") indicating that she is deceased.

On November 16, 2018, Claimant provided an Affidavit of Service advising that Ms. R and Ms. S were served with the Statement of Claim.

By letter dated November 26, 2018, Ms. R's counsel filed an objection to Claimant's expungement request.

The Arbitrator conducted a recorded telephonic hearing on November 30, 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. Both Ms. R and her counsel participated in the expungement hearing and objected to Claimant's request for expungement. Ms. S did not participate in the hearing. The Arbitrator determined that Ms. S had been properly served with the Statement of Claim and received due notice of the hearing. Ms. G did not participate in the hearing as she is deceased.

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator also reviewed the settlement document for occurrence number [REDACTED]

considered the amount of payments made to any party, and considered the other relevant terms and conditions of the settlement. The Arbitrator noted that: Claimant was not a party to the settlement agreement; the settlement was not conditioned on Ms. R not opposing the request for expungement; and Claimant did not contribute to the settlement amount.

The Arbitrator notes that she was unable to review the settlement agreements in occurrence numbers [REDACTED] and [REDACTED]. Claimant was unable to obtain copies of the settlement agreements in occurrence numbers [REDACTED] which concerned an event that occurred in 1994, and [REDACTED] which concerned an event that occurred in 1995. The settlement agreements were between 20 and 25 years old and Claimant advised that they were no longer in existence. Evidence presented during the hearing reflected the amount of the settlements; that Claimant did not contribute to the settlements; that Claimant was not a party to either settlement agreement; and that the settlements were not conditioned on Ms. G or Ms. S not opposing the requests for expungement.

The Arbitrator noted that Claimant did not previously file a claim requesting expungement of any of the Underlying Claims.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's sworn testimony during the expungement hearing and Claimant's exhibits 1, 2, 3, 5, 6 and 7, which were attached to the Statement of Claim and admitted into evidence.

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.

#### Occurrence No. [REDACTED]

Pursuant to Rule 13805 of the Code of Arbitration Procedure (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:

Ms. G, who died on June 7, 2000, alleged "...Mr. [REDACTED] [Claimant] provided her incorrect information regarding the transfer of her CD to Merrill Lynch [Respondent] thereby causing her to pay early redemption fees."

All of the evidence presented at the expungement hearing showed that Claimant followed Ms. G's instructions to contact the bank where she held a CD and asked the bank to transfer it to her account at Respondent when it matured. Unfortunately, the bank disregarded Claimant's instructions, automatically rolled over the CD and charged Ms. G a \$1,200.00 transfer fee to redeem the CD. Consequently, the Arbitrator finds the allegation is false because Claimant did not provide Ms. G or the bank incorrect information and his instructions to the bank were timely and not the reason the bank charged Ms. G a \$1,200.00 early redemption fee.

**Occurrence No. [REDACTED]**

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:

Ms. S alleged in a lawsuit against Respondent and a life insurance company, which also named Claimant, breach of contract and negligence because there was a delay in processing an application for a \$100,000.00 life insurance policy on her husband who passed away unexpectedly before the processing had been completed.

All of the evidence presented at the expungement hearing showed that Claimant timely initiated the application for life insurance and was not involved in or responsible for the delay in the processing and issuing of the life insurance policy before Ms. S' husband passed away. Consequently, the Arbitrator finds the allegation that Claimant breached a contract or was negligent is false.

**Occurrence No. [REDACTED]**

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 claim, allegation, or information is false.

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

Ms. R alleged "...her account did not perform well while under management by outside money managers and that the account contained unsuitable securities."

Evidence presented at the expungement hearing showed that when the investments in all six of Ms. R's accounts were considered as a whole, they were diversified and suitable for her in light of her responses on her risk tolerance questionnaire. Four money managers managed her accounts and the evidence showed that the losses in two of the money manager's accounts declined in value due to the decline in the early 2000's in the stock market. Consequently, the Arbitrator finds the allegations are clearly erroneous and false.

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 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: August 28, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: November 30, 2018	1 session

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Total Hearing Session Fees	= \$100.00
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The Arbitrator has assessed the total \$100.00 in hearing session fees to Claimant.

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

**ARBITRATOR**

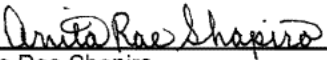
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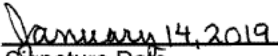
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Sole Public Arbitrator

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**

  
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Anita Rae Shapiro  
Sole Public Arbitrator

  
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Signature Date

January 15, 2019  
Date of Service (For FINRA Office of Dispute Resolution office use only)