

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

██████████

Case Number: ██████████

vs.

Respondents

LPL Financial, LLC and ██████████

Hearing Site: Des Moines, Iowa

Nature of the Dispute: Customer vs. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimant ██████████ ("Claimant"): Ralph W. Heninger, Esq., Heninger and Heninger, P.C., Davenport, Iowa.*

For Respondents LPL Financial, LLC ("LPL") and ██████████ (██████████) (collectively "Respondents"): Brian Harlan, Esq., LPL Financial, LLC., San Diego, California. For the expungement request, ██████████ was represented by: Frances Menzer, Esq. and Dochter Kennedy, Esq., AdvisorLaw LLC, Westminster, Colorado.

*FINRA recorded the appearance of Claimant's counsel at the time of filing of the Statement of Claim. Counsel's representation of Claimant may have ended with the parties' settlement. Please see the Other Issues Considered and Decided section of this Award for information on whether Claimant's counsel appeared at the expungement hearing.

CASE INFORMATION

Statement of Claim filed on or about: July 13, 2018.

Claimant signed the Submission Agreement: July 13, 2018.

Statement of Answer filed by Respondents on or about: September 28, 2018.

██████████ signed the Submission Agreement: October 3, 2018.

LPL signed the Submission Agreement: October 5, 2018.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: negligence, breach of fiduciary duty, elder abuse, omission of facts, and failure to supervise. The causes of action relate to Claimant's allegation that ██████████ while a registered representative of LPL, improperly advised and recommended Claimant to withdraw the gross amount of funds from her Allianz variable annuity and invest the entire proceeds

in accounts managed by [REDACTED] causing Claimant to incur unnecessary and substantial income tax liabilities and increased Medicare costs.

Unless specifically admitted in the Statement of Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

- (1) \$36,509.00 for additional 2016 federal income tax liability incurred;
- (2) \$10,766.00 for additional 2016 Iowa state income tax liability incurred;
- (3) \$10.36 per day for every day after July 18, 2016 until the award is paid for lost investment returns;
- (4) \$369.40 per month from January 1, 2017 until the award is paid for increased deductions from Claimant's social security benefits for Medicare costs;
- (5) \$26,481.00 for federal and Iowa state income tax on the award;
- (6) The costs of filing this arbitration claim; and
- (7) Attorneys' fees incurred by Claimant in prosecuting this claim.

In the Statement of Answer, Respondents requested that the Arbitrator deny the Claimant's Statement of Claim in its entirety; that this matter be expunged from the Central Registration Depository ("CRD") records for [REDACTED] and other, further, and different relief as the Arbitrator may deem appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about May 31, 2019, Claimant filed a Notice of Settlement, withdrawing her Statement of Claim with prejudice and providing notice that the parties agreed to keep this matter remain open so that [REDACTED] request for expungement could be addressed.

On or about June 13, 2019, [REDACTED] filed a Motion for Expungement. On or about June 17, 2019, Claimant filed a Statement of No Interest in [REDACTED] Motion for Expungement.

The Arbitrator conducted a recorded, telephonic hearing on July 30, 2019 so the parties could present oral argument and evidence on [REDACTED] request for expungement.

LPL participated in the expungement hearing and did not contest the request for expungement. Neither Claimant nor Claimant's counsel participated in the expungement hearing.

The Arbitrator has provided an explanation of their decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

AWARD

After considering the pleadings and 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:

[REDACTED] request for expungement of his CRD records is denied.

ARBITRATOR'S FINDINGS

Expungement is an extraordinary remedy for which a respondent has the burden of proof. [REDACTED] asserts that two grounds for granting of expungement have been met. However, one has no basis whatsoever to this motion. As FINRA guidance points out, the factually impossible/clearly erroneous standard would be applicable to situations, for example, where the respondent was not even employed at the brokerage yet joined as a party, etc.

So this motion is one that invokes the standard of falsity: that the claim is false. The facts do not support such a finding. In the first instance, the settlement is far from a nuisance value settlement. It represents an amount which acknowledges the exposure of a potential recovery against [REDACTED] and in turn the truth of the allegations against him.

Further, the pleadings frame the central issue to be whether the duty to disclose the amount of tax a surrender of a variable annuity might create before the actual surrender had been met. Here, if a disclosure had been made, it would have been on a cost basis which [REDACTED] assumed to be the Allianz so-called premium amount. Only after the fact, as [REDACTED] testified, did he actually seek to determine the cost basis and tax, and even then such information was erroneously memorialized within the office notes of [REDACTED]

The assertion that Claimant was not hurt by the error for she could not avoid payment of taxes is speculative, at best. Retention of the annuity, premature death before need for the funds, independent financing options, off-setting deductions, change in brackets or tax laws, etc. could result. But, more importantly, Claimant had a right to be informed before the transaction of the resulting tax liability which might be incurred. This is not debatable.

Curiously, [REDACTED] testified that the significant reason for which he pursued expungement is the intra-family dynamics experienced by his assistant, the estranged daughter of Claimant. None of this is contained within the Statement of Claim or the Statement of Answer. Nonetheless, [REDACTED] testified that his assistant purportedly feels embarrassed and perceives to be "shamed" by family members for working for a person who purportedly mishandled her mother's account. This is not a reason to expunge CRD records.

The Arbitrator has assessed \$450.00 of the pre-hearing session fees jointly and severally to Respondents.

The Arbitrator has assessed \$450.00 of the expungement hearing session fee to [REDACTED]

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

ARBITRATOR

Leo G. Stern

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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



Leo G. Stern
Sole Public Arbitrator

8/12/19

Signature Date

August 12, 2019

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