

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
[REDACTED]

Case Number: [REDACTED]

vs.

Respondent
Securities America, Inc.

Hearing Site: Atlanta, Georgia

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant [REDACTED] ("Claimant"): Dochter Kennedy, MBA, J.D. and Christopher Cummins, Esq., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Securities America, Inc. ("Respondent"): Tyler Schubauer, Esq., Securities America, Inc., La Vista, Nebraska.

CASE INFORMATION

Statement of Claim filed on or about: December 21, 2018.
Amended Statement of Claim filed on: February 1, 2019.
Claimant signed the Submission Agreement: December 21, 2018.

Statement of Answer filed by Respondents on or about: February 12, 2019.
Respondent signed the Submission Agreement: February 1, 2019.

CASE SUMMARY

In the Statement of Claim, Claimant requested expungement of a customer complaint, occurrence number [REDACTED] ("Underlying Complaint") from his Central Registration Depository ("CRD") records.

In the Amended Statement of Claim, Claimant provided additional background and factual information regarding the Underlying Complaint.

In the Statement of Answer, Respondent advised that it does not oppose Claimant's request for expungement but objects to Claimant's request for compensatory damages and any other relief requested.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Complaint 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 Complaint from his CRD records pursuant to FINRA Rule 2080(b)(1)(C) as the claim, allegation or information is false;
3. An award of compensatory damages in the amount of \$1.00 from Respondent; and
4. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested that all forum fees in connection with the hearings on Claimant's expungement request be assessed against Claimant in accordance with Rule 12805.

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

OTHER ISSUES CONSIDERED AND DECIDED

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

On May 28, 2019, Claimant provided a copy of his notice to the customers in the Underlying Complaint ("Customers") regarding the Statement of Claim and notice of the expungement hearing ("May 28 Notice"). On June 17, 2019, Claimant provided an Affidavit of Service signed by Claimant's counsel advising that the Customers had been served with the Statement of Claim ("June 17 Affidavit.")

The Arbitrator conducted a recorded telephonic hearing on June 27, 2019 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 Customers did not appear at the expungement hearing. The Arbitrator found that the Customers were invited to participate in the expungement hearing but did not appear. The Arbitrator further found that Mr. S (one of the Customers in the Underlying Complaint) did not object to the expungement of the Underlying Complaint from Claimant's CRD records as indicated in Mr. S's email to Claimant's counsel (Claimant's Hearing Exhibit 12.)

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator reviewed the settlement documents from the Underlying Complaint and considered the amount of payments made to any party and any other terms and conditions of settlement. The Arbitrator determined that the Underlying Complaint was settled for \$80,000.00 and that Claimant contributed \$15,000.00 to the settlement amount through Claimant's Errors & Omissions insurance policy. The Arbitrator noted that Claimant's testimony showed that the Underlying Complaint was centered around

the fact that there were steep surrender charges and not that the investment vehicle itself was wrong. The Arbitrator further noted that the Underlying Complaint was settled in order to reimburse the Customers of the surrender charges to get out of the variable annuity and the settlement was a good business decision in an effort to avoid needless and expensive arbitration. The Arbitrator further determined that the settlement agreement was not conditioned upon the Customers' agreement not to oppose expungement.

The Arbitrator noted that Claimant did not previously request expungement of the same disclosure in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence:

- Statement of Claim;
- Amended Statement of Claim;
- Statement of Answer;
- Claimant's oral testimony;
- Claimant's BrokerCheck® Report;
- Claimant's May 28 Notice with proof of service;
- Claimant's June 17 Affidavit with proof of service;
- Claimant's Hearing Exhibit 11 – Settlement Agreement dated October 24, 2006; and,
- Claimant's Hearing Exhibit 12 – Mr. S's Response to Notice of Expungement Hearing dated June 24, 2019.

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. The Arbitrator recommends the expungement of all references to the Underlying Complaint, occurrence number [REDACTED] from Claimant [REDACTED] (CRD# [REDACTED] registration records maintained by the CRD, 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 of Arbitration Procedure ("Code"), the Arbitrator has made the following Rule 2080 affirmative finding of fact:

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:

The Underlying Complaint was around the fact that the Customers, husband and wife, no longer wanted a variable annuity, the investment at issue. Before the purchase of the variable annuity, the investment was described and explained in detail to the Customers over the course of several meetings. Written information was also provided to the Customers. There was an additional meeting with the Customers' adult children. The meeting was to explain the investment and also to forge a relationship between the Customers' children and Claimant (and his partner). To make the Customers even more comfortable with the investment, the Customers were further provided with a referral to an independent CPA and independent legal counsel (of which the Customers took advantage) to evaluate the investment based on their financial situation and goal. Subsequent to that, the Customers had a very knowledgeable neighbor confirm to them that the Customers had made a very good and appropriate investment.

At some point, another financial advisor from a different firm convinced the Customers that the variable annuity was not an appropriate investment for them. The Customers chose to believe him, changed their mind about the investment, and made the formal complaint against Claimant. There was no actual problem with the investment and its suitability to the Customers' financial situation and goals but the Customers now wanted out. Based upon the uncontroverted oral testimony provided by Claimant, as well as a review of documentary evidence presented, the Arbitrator finds that the variable annuity was clearly a suitable investment for the Customers at the time it was made (and even at the time the Customers unilaterally changed their mind). At the time of the investment in the variable annuity, there is no question that it was suitable.

There was nothing wrong with the investment vehicle. The investment was still suitable at this later date, only the Customers' changed their minds. Although the Customers alleged suitability in the Underlying Complaint, the essence of the Customers' real complaint centered around the fact that there were steep surrender charges (approximately \$80,000) to get out of the variable annuity.

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

**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

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: May 14, 2019 1 session

One (1) Hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing Date: June 27, 2019 1 session

Total Hearing Session Fees = \$ 100.00

The Arbitrator has assessed \$100.00 of the hearing session fees to Claimant.

ARBITRATOR

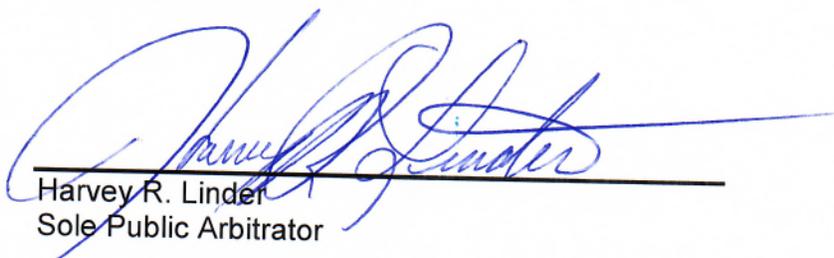
Harvey R. Linder

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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



Harvey R. Linder
Sole Public Arbitrator

July 24, 2019
Signature Date

July 24, 2019
Date of Service (For FINRA Office of Dispute Resolution office use only)