

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

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In the Matter of the Arbitration Between:

Claimant

██████████

Case Number: ██████████

vs.

Respondent

Merrill Lynch Pierce Fenner & Smith Inc.

Hearing Site: Chicago, Illinois

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant ██████████ (“Claimant”): Dochter Kennedy, Esq. and Harris Freedman, Esq. AdvisorLaw, LLC, Westminster, Colorado.

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

**CASE INFORMATION**

Statement of Claim filed on or about: April 23, 2018.

Claimant signed the Submission Agreement: April 23, 2018.

Statement of Answer filed by Respondent on or about: June 13, 2018.

Respondent signed the Submission Agreement: June 13, 2018.

**CASE SUMMARY**

In the Statement of Claim, Claimant asserted a claim seeking expungement of customer complaints, Occurrence Numbers ██████████, ██████████, and ██████████, from his registration records maintained by the Central Registration Depository (“CRD”).

In the Statement of Answer, Respondent took no position on Claimant’s request for expungement and objected to Claimant’s request for \$1.00 in compensatory damages.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement of Occurrence Numbers ██████████, ██████████, and ██████████ from his CRD, \$1.00 in compensatory damages, and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent did not request any relief.

At the 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 or about November 12, 2018, in compliance with the Initial Pre-Hearing Conference Order, Claimant filed a copy of the letter sent to the customers for Occurrence Numbers [REDACTED] and [REDACTED] providing them with the Statement of Claim, notice of the expungement hearing date and time, and the option to participate in the expungement hearing. On or about November 13, 2018, Claimant's counsel filed an Affidavit stating that he was unable to serve the customer for Occurrence Number [REDACTED]. On or about November 27, 2018, Claimant's counsel filed an Affidavit of Service for the letter sent to the customers for Occurrence Numbers [REDACTED] and [REDACTED].

The Arbitrator conducted a recorded, telephonic hearing on December 11, 2018, so the parties could present oral argument and evidence on Claimant's request for expungement. Respondent participated in the expungement hearing but did not contest the request for expungement. None of the customers participated in the hearing. The Arbitrator found that Claimant's efforts to serve the customer for Occurrence Number [REDACTED] and the notice to the customers for Occurrence Numbers [REDACTED] and [REDACTED] were sufficient.

The Arbitrator reviewed the BrokerCheck® Report for Claimant and found that there were no settlements for Occurrence Numbers [REDACTED], [REDACTED], and [REDACTED].

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

In recommending expungement the Arbitrator relied upon Claimant's testimony, the documentary evidence regarding market swings, and the account opening information.

### **AWARD**

After considering the pleadings, the testimony, and the 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 Occurrence Number [REDACTED] from the registration records maintained by the CRD, for Claimant David N. [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 of Arbitration Procedure ("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:

The customer was an elderly lady with modest holdings, limited to securities issued by her late husband's employer. She was referred to Claimant who, after reviewing her life circumstances, recommended a rebalancing into CDs and mutual funds. The customer became upset, however, when she learned the sale of some of her shares resulted in a commission. She filed a complaint that the transaction was not authorized and that the penalties attached to early redemption of the mutual funds had not been explained to her. Claimant, a veteran of 47 years in the business, testified credibly that she had agreed to his recommendations and that the commission structure had been explained to her, along with the backend load aspects of the funds. The evidence at hand established clearly that the complaint she filed was untrue and that expungement is therefore appropriate.

2. The Arbitrator recommends the expungement of all references to Occurrence Numbers [REDACTED] and [REDACTED] from the 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:

- The claim, allegation, or information is false.

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

These CRD entries emanated from a married couple, both of whom, contrary to Claimant's recommendation, sold their equity positions during a sharp decline in the market and then, when it bounced back, brought "unsuitability" complaints. The circumstances are sufficiently similar that they can be treated together. Both of the customers had considerable investment experience when they became customers of Claimant. Claimant spent significant time learning their economic situation and formulated similar strategies, creating for each a portfolio balanced between equities and debt.

The husband rode out the 2007/2008 downturn but became skittish at the 2011 market. The wife, who had not been Claimant's customer in 2007/2008, followed suit. Their "unsuitability" allegations were likely triggered by the market's comeback shortly after they sold, which is a clear case of hindsight. Claimant testified persuasively that he took the time and effort to propose a rational investment strategy for both of the customers. I conclude that their claims had no serious basis and therefore should be expunged.

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 that employed the associated person at the time of the events 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
Hearing Date: August 20, 2018	1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing Date: December 11, 2018	1 session

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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**

Thomas F. Mahoney

- 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**

Thomas F. Mahoney  
Thomas F. Mahoney  
Sole Public Arbitrator

17 JANUARY 2019  
Signature Date

January 18, 2019

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