

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

Case Number: [REDACTED]

vs.

Respondent

Hearing Site: San Francisco, California

LPL Financial LLC

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant [REDACTED] ("Claimant"): Frances Menzer, J.D., HLBS Law, Westminster, Colorado.

For Respondent LPL Financial LLC ("Respondent"): Jon D. Kaplon, Esq., LPL Financial LLC, Boston, Massachusetts.

CASE INFORMATION

Statement of Claim filed on or about: January 2, 2019.
Amended Statement of Claim filed on or about: March 1, 2019.
Claimant signed the Submission Agreement: January 2, 2019.

Statement of Answer filed by Respondent on or about: March 6, 2019.
Respondent signed the Submission Agreement: January 24, 2019.

CASE SUMMARY

Claimant asserted a claim seeking expungement of a FINRA arbitration case ("Underlying Arbitration"), occurrence number [REDACTED] from his Central Registration Depository ("CRD") records.

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

In the Statement of Answer, Respondent advised that it does not oppose or contest Claimant's request for expungement.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Arbitration 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 Arbitration 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 Amended Statement of Claim, Claimant requested:

1. Expungement of the Underlying Arbitration 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 Arbitration from his CRD records pursuant to FINRA Rule 2080(b)(1)(B) as Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds;
3. Expungement of the Underlying Arbitration from his CRD records pursuant to FINRA Rule 2080(b)(1)(C) as the claim, allegation or information is false;
4. An award of compensatory damages in the amount of \$1.00 from Respondent; and,
5. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent did not set forth a relief request.

At the expungement hearing, Claimant withdrew his request for \$1.00 in compensatory damages without objection.

OTHER ISSUES CONSIDERED AND DECIDED

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

On May 17, 2019, Claimant provided a copy of his notice to the customers in the Underlying Arbitration ("Customers") regarding the Amended Statement of Claim and notice of the expungement hearing scheduled for August 14, 2019. On May 24, 2019, Claimant provided an Affidavit of Service signed by Claimant's counsel advising that the Customers had been served with the Statement of Claim.

At Respondent's request, the expungement hearing was rescheduled to August 15, 2019.

The Arbitrator conducted a recorded telephonic hearing on August 15, 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 also did not appear at the expungement hearing. The Arbitrator found that although the Customers were not notified of the rescheduled August 15, 2019 expungement hearing, the Customers were notified of the matter, provided with an opportunity to participate in the original expungement hearing, and elected not to do so.

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator reviewed the settlement documents from the Underlying Arbitration and considered the amount of payments made to any party and any other terms and conditions of settlement. The Arbitrator noted that on November 15, 2013, Respondent acknowledged that it settled with Customers in the amount of \$465,000.00 as a business decision rather than incurring substantial costs and risks associated with ongoing litigation. The Arbitrator determined that Claimant was not asked to contribute to the settlement and did not contribute to the settlement. The Arbitrator further determined that the settlement agreement was not conditioned upon the Customer's agreement not to oppose expungement.

The Arbitrator noted that Claimant did not previously request expungement of the Underlying Arbitration.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's oral testimony; Statement of Claim; Amended Statement of Claim; Statement of Answer and Claimant's Pre-Hearing Brief.

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 Arbitration, 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 registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The claim, allegation, or information is false.

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

In the Underlying Arbitration, the Customers alleged that three 1031 Tenant-in-Common (“TIC”) investments sold in 2007 were unsuitable.

Mr. and Mrs. J, Claimant’s customers, were co-owners of an apartment complex with their family members, including their children who jointly were the Customers in the Underlying Arbitration.

The Customers sold the apartment complex in 2007 and wanted to defer payment of the capital gain taxes on the sale of the property.

Mr. and Mrs. J sought the advice of Claimant for investment options on the gains from the property sale.

Based on Mr. and Mrs. J’s investment profile and investment objectives, Claimant discussed various options, including selling and paying the resulting capital gains taxes, gifting assets to a charitable remainder trust, and utilizing a Section 1031 exchange. Mr. and Mrs. J decided to investigate their options in the 1031 exchange program.

At that time, Claimant referred Mr. and Mrs. J to his colleague at Respondent’s firm, Mr. A, who was more familiar with various 1031 exchange programs. At no time was Claimant Mr. A’s supervisor and at no time did Claimant manage any of the assets for Mr. and Mrs. J’s family members.

In 2007, based on the Customers’ investment profile and investment objectives, Mr. A recommended two TIC investments, the “Defense TIC” and “Omni TIC”, which were direct TIC investments in office buildings. Mr. A explained to the Customers in detail the risks, fees, advantages and disadvantages of the investments at issue. The investments at issue were not solicited by Claimant, and Claimant had no involvement in the sale or purchase of the investments.

In 2007, the Customers utilized a section 1031 exchange from the sale of their apartment building to purchase the Defense TIC and Omni TIC. The Customers completed and signed the “Alternative Investments – Purchase

of an Approved 1031 Exchange Form,” wherein they indicated that they had a total net worth of \$4 million and that their investment objective was for aggressive growth. The Customers further represented that they fully understood the risks they were undertaking because of their investment expertise and because they had reviewed and acknowledged numerous risk disclosure documents.

Due to the global economic downturn in 2008, known as the Great Recession, the investments at issue declined in value. Mr. and Mrs. J did not express to Claimant any dissatisfaction with the performance of the investments at issue and they did not speak with Claimant about filing a formal complaint.

The Customers alleged that three 1031 TIC investments were sold; however, the record reflects that only two TIC investments were the investments at issue. There is no record of a third TIC investment aside from the Defense TIC and Omni TIC.

Based on the facts and evidence presented, the Customers’ allegation, as it relates to Claimant, meets the criteria for expungement as the investments at issue were not solicited by Claimant and although Claimant managed Customers’ other assets, Claimant had no involvement with the sale or purchase of the investments at issue. Claimant only referred the Customers to a colleague who had a better knowledge and understanding of the type of investments that the Customers were interested in. In addition, the evidence clearly indicates that the Customers had knowledge of the risks associated with the investments and the investments were suitable based on the Customers’ investment objectives.

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

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

August 14, 2019, postponement by Respondent = WAIVED

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 3, 2019 1 session

One (1) Hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing Date: August 15, 2019 1 session

Total Hearing Session Fees = \$ 100.00

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

Laurel Littman Gothelf

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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



Laurel Littman Gothelf
Sole Public Arbitrator

8-28-19

Signature Date

August 29, 2019

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