Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant [redacted]

Case Number: [redacted]

vs.

Respondent
B. C. Ziegler and Company

Hearing Site: Milwaukee, Wisconsin

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant [redacted] ("Claimant"): Dochtor Kennedy, Esq. and Erica J. Harris, Esq. AdvisorLaw, LLC, Westminster, Colorado.

For Respondent B. C. Ziegler and Company ("Respondent" or "Ziegler"): Jonathan W. Hackbarth, Esq., Quarles & Brady LLP, Milwaukee, Wisconsin.

CASE INFORMATION

Statement of Claim filed on or about: August 20, 2018.
Claimant signed the Submission Agreement: August 20, 2018.

Respondent did not submit a Statement of Answer.
Respondent signed the Submission Agreement: September 28, 2018.

CASE SUMMARY

In the Statement of Claim, Claimant asserted a claim seeking expungement of two customer complaints from his registration records maintained by the Central Registration Depository ("CRD").

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of Occurrence Numbers [redacted] and [redacted] from his CRD records, an award of compensatory damages in the amount of $1.00, and any and all other relief that the Arbitrator deems just and appropriate.

On the record at the hearing, Claimant withdrew his request for $1.00 in compensatory damages and all other relief.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about October 3, 2018, the parties executed a Joint Agreement and Stipulation in which Respondent stated, among other things, that it did not oppose Claimant's expungement request, would participate further in its sole discretion, and that lack of participation would not result in the waiver of any defenses, claims, arguments, or any other positions or rights. Further, Claimant agreed to withdraw all requests and demands for damages and relief and not to seek or accept any award of damages or other relief.

On or about January 4, 2019, Claimant submitted an Affidavit of Dochtor Kennedy stating that Claimant's counsel had exhausted all avenues from which to obtain information needed to serve the customer or the customer's son associated with Occurrence Number [redacted].

On or about January 4, 2019, Claimant submitted copies of the notice of the expungement hearing sent to the two customers associated with Occurrence Number [redacted] advising them of the date and time of the expungement hearing, advising them of the opportunity to participate in the expungement hearing, and providing them with copies of the Statement of Claim.

Claimant submitted an Affidavit of Service of the Statement of Claim to the customers with respect to Occurrence Number [redacted] dated January 8, 2019.

On or about January 25, 2019, Claimant submitted copies of the notice of the new date and time for the expungement hearing sent to the two customers associated with Occurrence Number [redacted] advising them of the opportunity to participate in the expungement hearing.

Claimant submitted an Affidavit of Service of the updated notice of the expungement hearing to the customers associated with Occurrence Number [redacted] dated February 1, 2019.

The Arbitrator conducted a recorded, telephonic hearing on March 6, 2019, so the parties could present oral argument and evidence on Claimant's request for expungement.

Neither Respondent nor any of the customers participated in the expungement hearing.

The Arbitrator reviewed Claimant's initial BrokerCheck® Report and updated BrokerCheck® Report.

The Arbitrator found that Occurrence Number [redacted] did not involve a settlement. Accordingly, the Arbitrator did not review any settlement documents with respect to Occurrence Number [redacted]

With respect to Occurrence Number [redacted] the Arbitrator found that this matter related to a FINRA Arbitration that resulted in a settlement. On the record at the hearing on Claimant's expungement request, the Arbitrator ordered Claimant to submit a copy of the settlement agreement for the Arbitrator to review as a post-hearing submission. Claimant filed a post-hearing submission, citing Respondent's objections to Claimant's request for the settlement documents and indicating that, due to the parties' agreement, Claimant would not pursue a motion to compel to obtain the documents. The Arbitrator has determined as follows:

> I am not persuaded there was good cause for not producing [the settlement agreement]. Claimant's counsel did request a copy of the agreement in discovery. That request was objected to on the grounds that the agreement was protected by a confidentiality agreement and the attorney-client and work product privileges. Claimant's counsel did not make a motion to compel, but rather accepted the assertions of confidentiality and privilege. Knowing that the FINRA Rules require the production of any settlement agreement in a proceeding seeking expungement, counsel's failure to pursue the issue is inexplicable. This is particularly so since the parties entered into a confidentiality agreement, which would have protected the confidentiality of the settlement agreement if produced, and required any party seeking greater protection than that provided by the parties' agreement to seek an order from the Arbitrator to provide additional protection. Further, the assertion by Claimant's counsel that the settlement agreement was beyond reach and not available for review in this case is belied by the fact that the settlement agreement apparently was produced in the related expungement case brought by AW, a case in which AW was represented by the same counsel who represents Claimant in this case. It is troublesome to say the least that counsel failed to produce the settlement agreement and thereby risked having Claimant's expungement case dismissed on procedural grounds for failure to comply with Rule 13805 of the Code of Arbitration Procedure ("the Code"). That said, I am not recommending dismissal of this case because the evidence indicates Claimant was not a party to the settlement agreement, did not participate in the negotiation of its terms, and did not contribute to the settlement. It was Respondent's agreement alone, and whatever issues there may be with the agreement would be solely Respondent's responsibility. Further, at my request Claimant's counsel produced the Award in the AW case and it is clear that the arbitrator there was satisfied the settlement agreement did not contain conditions in violation of FINRA Rule 2081. I am willing to accept that finding in this case.

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

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's initial BrokerCheck® Report and updated BrokerCheck® Report, Claimant's exhibits 2-5, and all of the exhibits filed with Claimant's post-hearing submission.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing, and the post-hearing submission, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

The Arbitrator recommends the expungement of all references to Occurrence Number [redacted] and Occurrence Number [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.

With respect to Occurrence Number [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 factually impossible or clearly erroneous.

With respect to Occurrence Number [redacted] the Arbitrator has made the above Rule 2080 finding based on the following reasons:

According to the testimony of Claimant, which was credible throughout, the son of the customer called Claimant after business hours sometime in the fall of 2010 and left a voicemail message regarding the account of his mother, the customer, in which he asked who had authorized certain bond purchases in his mother's account. The son had no authority over his mother's account. The customer made all the trading decisions for the account, although Claimant understood that the customer often consulted with her son before making trades. There was no follow-up to the voicemail by either the son or the customer. The customer did not make a written or oral complaint or demand any compensation for losses in her account. After the voicemail, the customer continued to do business with Claimant for two more years. Respondent, Claimant's firm at the time, at first did not regard the telephone message as a customer complaint. Only after a FINRA examiner advised the firm to do so, was the voicemail reported as a customer complaint. Claimant testified the substance of the voicemail was a question, not a complaint. Moreover, according to FINRA's Form U4 and Form U5 Interpretive Questions and Answers, "an oral complaint by itself is not reportable under Question 14I(3)". Based on the entirety of Claimant's testimony and FINRA's Form U4 and Form U5 Interpretive Questions and Answers, the message left by the customer's son on Claimant's voicemail was not a reportable complaint and, therefore, the information reported to the CRD regarding the voicemail was "clearly erroneous."

With respect to Occurrence Number [redacted] pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

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

With respect to Occurrence Number [redacted] the Arbitrator has made the above Rule 2080 finding based on the following reasons:

According to the testimony of Claimant, which was credible throughout, the husband and wife (collectively "customers") opened an account with Claimant at Respondent in 1996. At the time, the customers were high net worth clients and their risk tolerance was high. Claimant was the representative for their account until 1997, when he went into management at Respondent. At that time, the customers' account was transferred to AW, another representative at Respondent. While the account was being handled exclusively by AW, the customers began investing in Erickson Retirement Communities STAMPS ("Erickson"), a completely subordinated and unsecured debt security. Claimant, because he was in management at the time, was not involved with the customers' first two purchases of these securities in 2003 and 2005, both of which paid interest in full and were redeemed at maturity. In 2006, Claimant left management and returned to representing Respondent's customers, going into partnership with AW. AW's book, at the time, included the customers (as well as others that Claimant serviced prior to becoming management). When Claimant partnered with AW, AW continued to be the representative primarily servicing the customers' account. In 2007, working only with AW, the customers reinvested in Erickson and increased their commitment from $100,000.00 to $200,000.00, which was about 3.4% of their portfolio. In 2009, the Erickson bonds defaulted and the customers lost their entire investment. In late 2012, the customers filed an arbitration claim against Respondent alone, claiming the Erickson investment was unsuitable for them. Neither Claimant nor AW was named as a respondent in the arbitration case. The arbitration claim was for $1,400,000.00, and ultimately was settled by Respondent for $90,000.00 and paid solely by Respondent. Claimant was not involved in the settlement negotiations and was not made a party to the settlement. Although there was credible evidence, by way of Claimant's testimony and some documentation, that the customers had a high net worth, at least a moderate tolerance for risk, and extensive investment experience, all of which could support the conclusion that the Erickson investment was suitable for them, I do not think a suitability determination can be made in this case where the issue was not, and could not be, fully tried. However, the evidence does support the conclusion that Claimant was not involved in the initial introduction of the Erickson securities to the customers or their decision to invest further in these securities in 2007. Although he was AW's partner, if there was a sales practice violation in the case of the customers' investment in Erickson, Claimant was not the violator.

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 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

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

February 19, 2019 postponement by Claimant	=$ 50.00
Total Postponement Fees	=$ 50.00

The Arbitrator has assessed $50.00 of the postponement fees to Claimant.

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 @ $50.00/session			=$ 50.00
Pre-hearing conference:	January 3, 2019	1 session	
One (1) hearing session on expungement request @ $50.00/session			=$ 50.00
Hearing Date:	March 6, 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

David J. Hase - 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

David J. Hase
Sole Public Arbitrator

May 16, 2019
Signature Date

05/16/19
Date of Service (For FINRA Office of Dispute Resolution office use only)