

**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: Cincinnati, Ohio

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant ██████████ Michael Bessette, Esq., HLBS Law, Westminster, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"): W. Preston Martin, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: May 24, 2018.

██████████ signed the Submission Agreement: May 24, 2018.

Statement of Answer filed by Respondent on or about: August 8, 2018.

MLPFS signed the Submission Agreement: August 8, 2018.

**CASE SUMMARY**

Claimant asserted the cause of action of inaccurate reporting on his Central Registration Depository ("CRD") records. The cause of action relates to three (3) customer complaints reflected as Occurrence Nos. ██████████ ██████████, and ██████████ (the "Occurrences") on Claimant's CRD records.

In the Statement of Answer, Respondent stated that it took no position on Claimant's request for expungement, and asserted that Claimant's request for compensatory damages was unfounded.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested a recommendation of expungement of all references to the customer complaints from Claimant's CRD record, and compensatory damages in the amount of \$1.00.

In the Statement of Answer, Respondent did not delineate a specific relief request.

At the outset of 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.

Claimant provided notice of the hearing to each of the customers whose complaints presently appear as occurrences on Claimant's CRD record and which are the subject of Claimant's Statement of Claim. Affidavits of service, reflecting that copies of the Statement of Claim and notice of the expungement hearing dates had been mailed to each of the customers by certified mail on December 10, 2018, and have been made part of the record in this matter. A second mailing was made on January 2, 2019, to inform the customers of a change in the time and date of the expungement hearing.

The Arbitrator conducted a recorded telephonic hearing on January 30, 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 underlying customers did not participate in the expungement hearing and did not contest the request for expungement.

On or about March 7, 2019, Claimant filed with FINRA Office of Dispute Resolution correspondence reflecting Claimant's counsel's unsuccessful attempts to receive a copy of the settlement agreement for Occurrence No. [REDACTED] for the Arbitrator's review and consideration. The Arbitrator found these efforts to be sufficient for purposes of making a final determination in this proceeding.

The Arbitrator reviewed the BrokerCheck® Report for Claimant dated May 24, 2018, the CRD Individual Snapshot Report dated March 26, 2018, and the terms of the settlement only through the BrokerCheck® Report and CRD Individual Snapshot for the only occurrence which settled, Occurrence No. [REDACTED], considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement reflected in the BrokerCheck® Report and CRD Individual Snapshot. The Arbitrator noted, as testified during the expungement hearing, that the settlement for Occurrence No. [REDACTED] was not conditioned on the underlying customers not opposing the request for expungement. The Arbitrator further noted that, as testified during the expungement hearing and reflected in the BrokerCheck® Report and CRD Individual Snapshot, Claimant did not contribute to the settlement amount and that Claimant had not previously filed a claim requesting expungement of the same disclosures in the CRD.

In recommending expungement, the Arbitrator relied upon the testimony of Claimant, which was credible and detailed as to all matters, as well as the pleadings and hearing exhibits.

## AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, 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 Occurrences from registration records maintained by the CRD, for Claimant [REDACTED] (CRD # [REDACTED]), with the understanding that, pursuant to Notice to Members 04-16, Claimant 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 (the "Code"), the Arbitrator has made one or more of the following Rule 2080 affirmative findings of fact, as reflected in the explanation for each occurrence:

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; and

The claim, allegation, or information is false.

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

Currently, and at all times material to this matter, Claimant is and was registered with Respondent, a securities broker-dealer, investment adviser firm, and a FINRA member firm.

During the January 30, 2019, hearing, Claimant testified in detail and credibly regarding the allegations made in each complaint. The entire hearing was recorded. Claimant testified under oath and was the sole witness.

### **Occurrence No. [REDACTED]**

The record establishes that the customer complaint was clearly erroneous and that the Claimant was not involved in the alleged investment-related sales practice violation or other alleged misconduct.

As summarized in Respondent's Answer, a customer complaint submitted in December 2002 involved allegations of unsuitability relating to the customers' portfolio. Specifically, it was alleged that investments made in the account had not been in line with the customers' retirement objective. After conducting an investigation, Respondent denied the complaint, noting that, during a period of

severe decline in the overall market, this portfolio had performed better than the average and that the investments had been consistent with the customers' stated investment objectives and risk tolerances. The claim was denied in mediation. The customers did not pursue the matter further.

**Occurrence No. [REDACTED]**

The testimony and evidence presented as to this occurrence confirm that Claimant was not involved in the alleged misconduct, and the allegations made against the Claimant were false.

The second complaint which Claimant seeks to have expunged involved allegations made in February 2003 that Claimant had participated in the forgery of a letter of authorization and conspired to misappropriate funds from an account. Following an investigation, the allegations were determined to be unfounded. Respondent denied the customer's claim and the matter was not pursued further by the customer. The matter was closed in December 2004 with no action having been taken against the Claimant.

**Occurrence No. [REDACTED]**

Claimant testified in detail and credibly and presented evidence reflecting that the allegations as to this Occurrence made against Claimant were clearly erroneous and false.

The third complaint occurred in March 2005 and involved allegations related to the surrender of an annuity and investment of the proceeds in the same mutual funds that the customer was using in her accounts. Upon investigation, it was determined that, despite inquiry, the customer had not disclosed prior IRS §1035 exchanges. Claimant made appropriate inquiries regarding any prior exchanges; had instructed the customer that Claimant was not an accountant and had confirmed that the client had an accountant. Respondent initially denied the complaint but ultimately settled with the customer for an amount which was less than the costs of defense. Claimant did not contribute to the settlement. Claimant testified in detail and convincingly regarding allegations related to a letter of authorization. The allegations were determined to be unfounded. Respondent determined that the complaint was unfounded, and the complaint was abandoned by the customer.

Based upon all that was presented by way of testimony and exhibits, the finding in this matter is that the information set forth at Claimant's active CRD Number as Occurrence No. [REDACTED] Occurrence No. [REDACTED] and Occurrence No. [REDACTED] was clearly erroneous or false or that the Claimant was not involved in the alleged investment-related sales practice violation or other alleged misconduct, as explained above. For these reasons, the expungement of such occurrences from Claimant's CRD record is appropriate.

**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 MLPFS is assessed the following:

Member Surcharge = \$ 150.00

**Postponement Fees**

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

January 10, 2019, postponement by Claimant = WAIVED

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Total Postponement Fee = WAIVED

The Arbitrator has waived the postponement fee.

**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: October 9, 2018 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00  
Hearing Date: January 30, 2019 1 session

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Total Hearing Session Fees = \$ 100.00

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

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

**ARBITRATOR**

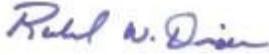
Richard W. Dissen

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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**



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Richard W. Dissen  
Sole Public Arbitrator

March 12, 2019

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Signature Date

MARCH 12, 2019

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