

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

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In the Matter of the Arbitration Between:

Claimant

Case Number: [REDACTED]

vs.

Respondent

Hearing Site: Tampa, Florida

Merrill Lynch, Pierce, Fenner & Smith Incorporated

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Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant [REDACTED] ("Claimant"): Harris Freedman, Esq., HLBS Law, Westminster, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated. ("Respondent"): Joel M. Everest, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: January 4, 2019.  
Amended Statement of Claim filed on or about: March 13, 2019.  
Claimant signed the Submission Agreement: January 4, 2019.

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

**CASE SUMMARY**

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

In the Statement of Answer, Respondent took no position with respect to Claimant's request for expungement but asserted various affirmative defenses.

**RELIEF REQUESTED**

In the Statement of Claim and Amended Statement of Claim, Claimant requested expungement of Occurrence Numbers [REDACTED] [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 equitable.

In the Statement of Answer, Respondent objected to Claimant's request for \$1.00 in compensatory damages.

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 May 8, 2019, Claimant submitted copies of the notices sent to the customers related to Occurrence Numbers [REDACTED] [REDACTED], and [REDACTED], providing the customers with copies of the Amended Statement of Claim, notice of the expungement hearing date and time and notice of the option to participate in the expungement hearing .

On or about May 15, 2019, Claimant submitted an affidavit of service to the customers involved in Occurrence Numbers [REDACTED] [REDACTED] and [REDACTED]

On or about June 11, 2019, Claimant submitted updated notices of the expungement hearing sent to the customers, advising them of the opportunity to participate in the rescheduled expungement hearing.

The Arbitrator conducted a recorded, telephonic hearing on June 14, 2019, 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 related to the Occurrence Numbers [REDACTED] [REDACTED] and [REDACTED] participated in the expungement hearing.

The Arbitrator noted that, at the hearing, Claimant presented letters from the customers related to Occurrence Numbers [REDACTED] and [REDACTED] in which the customers expressed support Claimant's expungement request.

On or about June 17, 2019, Claimant submitted an affidavit of service of the updated notices sent to the customers involved in Occurrence Numbers [REDACTED] [REDACTED] and [REDACTED]

The Arbitrator reviewed the BrokerCheck® Report for Claimant and the settlement documents related to Occurrence [REDACTED] considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on the customer not opposing the request for expungement. The Arbitrator also noted that Claimant did not contribute to the settlement amount.

The Arbitrator noted that the Occurrence Numbers [REDACTED] and [REDACTED] did not involve settlements. Accordingly, the Arbitrator did not review settlement agreements with respect to those occurrences.

The Arbitrator noted 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 testimony and Exhibits 1-11, which included internal review communications to the customers related to Occurrence Numbers [REDACTED] and [REDACTED] and a letter of support for the expungement from the customer related to Occurrence Number [REDACTED]

### **AWARD**

After considering the pleadings, the testimony and 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:

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

#### **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.

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

The dispute was about a loss in a 401k account. This account was transferred to Respondent and contained a John Hancock Annuity. The rollover instructions stated that John Hancock, not Respondent, maintained control. The transfer was strictly a change of custodian. Accordingly, the allegation that Claimant was responsible for the loss in the annuity is clearly erroneous.

#### **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 false.

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

The dispute was about an excessive withdrawal from a John Hancock annuity. The annuity represented approximately 5% of the customer's net worth. The customer had a number of business interests, and she had a cash flow problem in 2008. Claimant advised her that a withdrawal from the annuity would trigger penalties, both contractual and monetary. The customer understood the ramifications and went ahead with the withdrawal, but still filed a complaint. The complaint was settled by Respondent and John Hancock for the monetary withdrawal penalty. Regardless of the settlement, the allegation against Claimant is false.

### **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 false.

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

According to the letter from Respondent's Compliance VP to the customers, the dispute is twofold. Part one is related to the sale of stock, and part two is related to alleged unauthorized trades. Claimant confirmed that, at the time of the stock purchase, Respondent did not follow or recommend low priced stocks and that the stock was highly speculative and did not match the risk profile on the account. The purchase was executed on an unsolicited basis. If the customers wanted to get out of this stock, a specific sell order would be required at the time of the transaction. The customers' account was in the "Fund Dividend Portfolio Program" which meant it was subject to quarterly rebalancing to keep the account in line with the investors' original intent. Both aspects of the dispute, the sale of stock and the rebalancing (constituting the alleged unauthorized trades), occurred after Claimant had left the employment of Respondent. Therefore, the allegations against Claimant are false.

2. Any and all claims for relief not specifically addressed herein are denied.

### **FEES**

Pursuant to the Code of Arbitration Procedure, 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 persons 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:

June 11, 2019, postponement by Claimant = \$ 50.00

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Total Postponement Fees = \$ 50.00

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

**Last Minute Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within ten calendar days before the start of a scheduled hearing session:

June 11, 2019, postponement requested by Claimant = \$ 600.00

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Total Last Minute Cancellation Fees = \$ 600.00

The Arbitrator has assessed \$600.00 of the last minute cancellation 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: April 26, 2019 1 session

One (1) hearing session @ \$50.00/session = \$ 50.00  
Hearing Date: June 14, 2019 1 session

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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**

Martin M. Van Luven

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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**

*Martin M Van Luven*

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Martin M. Van Luven  
Sole Public Arbitrator

7-8-2019

\_\_\_\_\_  
Signature Date

July 9, 2019

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