

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant

████████████████████

Case Number: ██████████

vs.

Respondent

Merrill Lynch, Pierce, Fenner & Smith Inc.

Hearing Site: Charlotte, North Carolina

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant ██████████ ("Claimant"): Doctor Kennedy, MBA, J.D. and Erica Harris, Esq., AdvisorLaw, LLC, Westminster, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: January 3, 2019.

Claimant signed the Submission Agreement: January 3, 2019.

Statement of Answer filed by Respondent on or about: March 8, 2019

Respondent signed the Submission Agreement: March 8, 2019.

CASE SUMMARY

Claimant asserted a claim seeking expungement of two customer complaints, occurrence numbers ██████████ and ██████████ and a FINRA Arbitration case, occurrence number ██████████ ("Underlying Claims"), from his Central Registration Depository ("CRD") records.

In the Statement of Answer, Respondent advised that it took no position with respect to Claimant's requests for expungement and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Claims 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 Claims from his CRD records pursuant to FINRA Rule 2080(b)(1)(C), as the claim, allegation, or information is false;
3. 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 Statement of Answer, Respondent objected to Claimant's request for \$1.00 in damages.

At the hearing, Claimant withdrew his request for \$1.00 in damages from Respondent.

OTHER ISSUES CONSIDERED AND DECIDED

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

On June 11, 2019, Claimant provided notice that the Statement of Claim and notice of the expungement hearing had been served on: the underlying customer in occurrence number [REDACTED] ("Mr. B"), the underlying customer in occurrence number [REDACTED] ("Mr. F"), and the underlying customer in occurrence number [REDACTED] ("Mr. M"). Hereinafter, Mr. B, Mr. F and Mr. M are collectively referred to as the "Customers".

On June 17, 2019, Claimant filed an Affidavit of Service, signed by Claimant's counsel, advising that the Customers had been served with a copy of the Statement of Claim.

The Arbitrator conducted a recorded telephonic hearing on July 16, 2019 so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and, as stated in the Statement of Answer, did not oppose the request for expungement. The Customers did not participate in the expungement hearing. The Arbitrator found that the Customers had notice of the hearing.

The Arbitrator reviewed Claimant's BrokerCheck® Report.

The Arbitrator noted that the underlying complaint for occurrence number [REDACTED] was listed as "No Action" on Claimant's BrokerCheck®. Claimant testified that the Respondent denied the claim as without merit and that the customer took no further action. Accordingly, the Arbitrator found that there were no settlement documents to review.

The Arbitrator reviewed the settlement documents for occurrence number [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 Mr. F not opposing the request for expungement. The Arbitrator also noted that Claimant did not contribute to the settlement amounts.

The Arbitrator did not review the settlement documents for occurrence number [REDACTED] and was unable to make any assertions or findings regarding the terms of the settlement, including whether there was a condition that Mr. M not oppose expungement. The Arbitrator noted that Claimant testified that he attempted to secure the settlement documents from Respondent, but was unable to do so. The Arbitrator is satisfied with Claimant's good faith efforts to obtain the settlement documents. Based on Claimant's testimony and Claimant's BrokerCheck® Report, the Arbitrator noted that Respondent and Mr. M settled the complaint for \$75,000.00 (of the alleged \$300,000.00 damages) and that Claimant did not contribute to the settlement amount.

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: Statement of Claim; Statement of Answer; Claimant's testimony; Exhibit 1 – General Release between Mr. F and Respondent dated May 19, 2006; Exhibit 2 – [REDACTED] Memorandum: Action Items for Mr. M dated September 4, 2002; Exhibit 3 – Merrill Lynch Response Ltr to Mr. M re complaint; Exhibit 4 – Claimant Response Memorandum: Mr. B's Complaint; Exhibit 5 – Claimant Response Letter to NASD Re Mr. B's Complaint; Exhibit 6 – Claimant Response Letter to Mr. F's Complaint; Exhibit 7 – Merrill Lynch Financial Foundation (R) Retirement Builder (sm) Analysis Especially prepared for Mr. and Mrs. M prepared by Claimant May 1999; Exhibit 8 – Considerations: Mr. and Mrs. M; Exhibit 9 – Mr. M Update email to Claimant dated September 27, 2010; and Exhibit 10 – Merrill Lynch Private Client Group: The Investment Process for Mr. M.

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 the Underlying Claims, occurrence numbers [REDACTED], [REDACTED] and [REDACTED] from registration records maintained by 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 of Arbitration Procedure ("Code"), the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous.

The claim, allegation, or information is false.

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

The Arbitrator found that in each case the Claimant obtained proper client information, gave good advice, performed due diligence, and maintained good customer contact.

Occurrence number [REDACTED] (in which Mr. B is the underlying customer)

Mr. B claimed damages of \$40,895.67 for unsuitable investment advice. Claimant testified as to his many interactions with Mr. B and his evaluation of Mr. B's investor profile, risk tolerance and investment time-table. Mr. B agreed with the investment goals and with the split of 40% equities and 60% mutual fund investments. Mr. B was advised of all information on the funds orally and in writing and ultimately invested \$300,000.00 in 1999. Mr. B's investment did well until spring of 2004 when Mr. B voiced concerns about volatility problems. Claimant made no recommendations to make any changes in funds or investments and discussed the possibility of investing in annuities with Mr. B. Despite the discussion, Mr. B changed his portfolio to 60% of his investments in equities. Mr. B had made no customer complaints until after Claimant left Respondent in September 2004. In November of 2004, Claimant got notice of Mr. B's complaint. Respondent investigated the complaint and, as shown in Exhibit 3, advised Mr. B that it believed Claimant "...made an informed decision to purchase and keep the Contract." Mr. B took no further action after being informed of Respondent's finding that he made an "informed decision." Claimant had given good advice as to suitable investments within an acceptable to risk tolerance, used top fund managers, and maintained constant communication with Mr. B. (See Exhibit 4 and Exhibit 5).

Occurrence number [REDACTED] (in which Mr. F is the underlying customer)

Mr. F claimed damages of \$8,000.00 for unsuitable investment advice. Respondent decided to settle the matter for \$4,000.00. In the settlement agreement, Respondent admitted no fault and Claimant took no part in the agreement or made any contribution to the amount.

Mr. F became a customer of Claimant when he was assigned to his team by Respondent. Claimant treated Mr. F as a new client even though he was an established customer, profiling him, his goals, his risk tolerance, discussing all investment options and researching all investment decisions. Claimant had four discussions with Mr. F on investment risks. Because of their size, all investments were reviewed by a manager for approval. Mr. F completed and signed subscription and disclosure documents, as well as received the prospectus as stated in Exhibit 6 and the Claimant's testimony. The fund Mr. F ultimately invested in performed well in the 6% to 8% range and Mr. F never complained

about his investments. In 2004, Claimant left Respondent and in July 2006 got notice of Mr. F's complaint. Claimant testified he was shocked that Mr. F filed a complaint. Respondent reviewed the complaint (See Exhibit 1 and Exhibit 6) and decided Claimant was not at fault. Claimant testified that he believes the case settled based on the cost of litigation.

Occurrence number [REDACTED] (in which Mr. M is the underlying customer)

Mr. M claimed damages of \$300,000.00 for an unsuitable investment and misrepresentation. Respondent settled for \$75,000.00. Claimant testified that he took no part in the settlement agreement and did not make any contribution to it.

Mr. M became a customer of Claimant in 1999, after being referred by an existing client. At the initial meeting, Claimant did an investor profile and understood Mr. M needed comprehensive advice. Mr. M wanted aggressive growth within ten plus years. Claimant matched the risk to the investor profile and recommended an all equity profile of \$200,000.00 variable annuity and \$200,000.00 to \$250,000.00 blended mutual fund. Claimant had four separate personal meetings with Mr. M and gave him all the written disclosures with a ten-day free look period. Claimant testified that Mr. M was satisfied and made no complaints. On October 18, 2000, Mr. M started taking large amounts out of the annuity, which Claimant advised him against as it was hurting his investments. After Mr. M ignored Claimant's advice, Claimant informed Mr. M he was not going to handle the account and transferred it to another financial adviser. In August 2002, Claimant was informed of the complaint by Mr. M. After its investigation, Respondent found the claim without merit and that Claimant had given Mr. M good advice. (See Exhibit 2; Exhibit 3; Exhibit; Exhibit 8; Exhibit 9; and Exhibit 10). Seven years later in 2009, Mr. M filed a claim in arbitration. Respondent settled the case for significantly less than the amount claimed. The investment advice given to Mr. M by Claimant was suitable given Mr. M's goals and investment risk tolerance. Mr. M chose to split his assets between an annuity and a diversified pool of mutual funds. The Claimant did not make any misrepresentations and fully explained the investments to Mr. M.

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

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: April 26, 2019 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$50.00
Hearing Date: July 16, 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

Michael J. Ahlstrom

-

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



Michael J. Ahlstrom
Sole Public Arbitrator

8-8-19

Signature Date

August 9, 2019

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