

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Mark H. Berens

Case Number: 19-02344

vs.

Respondent
Morgan Stanley

Hearing Site: Chicago, Illinois

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customer vs. Member

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimant Mark H. Berens (“Claimant”): Brian E. Martin, Esq. and John C. Barlow, Esq., Stamos & Trucco LLP, Chicago, Illinois and John C. Barlow, Esq., Chicago, Illinois.

For Respondent Morgan Stanley (“Respondent”): Esther E. Cho, Esq. and Cheryl S. Chang, Esq., Keesal, Young & Logan, PC, Long Beach, California.

CASE INFORMATION

Statement of Claim filed on or about: August 19, 2019.

Amended Statement of Claim filed on or about: April 22, 2020.

Second Amended Statement of Claim filed on or about: September 15, 2020.

Claimant signed the Submission Agreement: August 16, 2019.

Statement of Answer filed on or about: November 5, 2019.

Answer to Amended Statement of Claim filed on or about: July 1, 2020.

Answer to Second Amended Statement of Claim filed on or about: November 24, 2020.

Respondent signed the Submission Agreement: November 4, 2019.

CASE SUMMARY

In the Statement of Claim, as amended, Claimant asserted the following cause of action: failure to exercise remedies as a secured party in a commercially reasonable manner. The causes of action related to allegations that Respondent failed to inform Claimant that a Depository Trust Company transfer typically takes several days to complete, that it would not wait for the

transfers to be completed before selling shares in Claimant's collateral account, and that he could, alternatively, transfer cash to cover collateral calls.

Unless specifically admitted in the Answer to the Statement of Claim, as amended, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, as amended, Claimant requested actual and anticipated damages in excess of \$500,000.00 together with interest wrongfully charged by Respondent from December 13, 2018 through January 4, 2019; punitive damages, including attorneys' fees and costs as additional punitive damages; or, in the alternative to an award of damages, rescission of the forced sale of the securities at issue, costs, and interest on these damages from the date these damages were incurred.

In the Answer to the Statement of Claim, as amended, Respondent requested that the Panel deny the Claim in its entirety, enter an award in favor of Respondent, and grant such further relief as the Panel deems just and proper.

Respondent filed a request for expungement on behalf of Unnamed Party Scott Allen Davis, of all references to this matter from Central Registration Depository ("CRD") registration records. Please see the Other Issues Considered and Decided section of this Award for more information.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On April 22, 2020, Claimant filed a Motion for Leave to File Amended Statement of Claim ("First Motion for Leave to Amend"). On May 4, 2020, Respondent filed a Response to the First Motion for Leave to Amend. In an Order dated June 9, 2020, the Panel granted the First Motion for Leave to Amend.

On September 15, 2020, Claimant filed a Motion for Leave to Amend Statement of Claim ("Second Motion for Leave to Amend"), to which no response was filed. In an Order dated November 2, 2020, the Panel granted the Second Motion for Leave to Amend.

On August 28, 2021, Respondent filed a Request for Expungement on behalf of Unnamed Party Scott Allen Davis ("Davis").

At the evidentiary hearing, Respondent moved for a directed verdict on the grounds that Respondent did nothing wrong according to applicable law. Claimant opposed the motion. The Panel denied the motion.

Also, at the evidentiary hearing, Respondent reasserted its request for expungement on behalf of Davis. Claimant supported the request for expungement.

The Panel reviewed Davis' BrokerCheck® Report. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrence in the CRD.

The Panel noted that there was no settlement in this case and, therefore, there was no settlement documentation to review.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Respondent's Pre-Hearing Brief and Request for Expungement, Respondent's closing argument, Davis' testimony, and the parties' agreement that Davis' record should be expunged.

The Award in this matter may be executed in counterpart copies.

AWARD

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

1. Claimant's claims are denied in their entirety.
2. The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2044186) from registration records maintained by the CRD for Unnamed Party Scott Allen Davis (CRD Number 2421403) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Scott Allen Davis 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 12805 of the Code of Arbitration Procedure ("Code"), the Panel has made the following Rule 2080 affirmative findings 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; and

The claim, allegation, or information is false.

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

Davis inherited Claimant's account after the dispute began. He was not involved in the dispute. It was only reported on Davis' record because his name was attached to the account. Additionally, there was an allegation of a sales practice violation in the initial Statement of Claim, which was a reportable event, but the allegation was removed by Claimant in the Amended Statement of Claim. The allegation was also not included in the Second Amended Statement of Claim.

Further, counsel indicated during closing arguments that the parties had conferred and agreed that Davis' record should be expunged.

3. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 2,000.00

**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 = \$ 3,025.00
Member Process Fee = \$ 6,175.00

Discovery-Related Motion Fees

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with one (1) Arbitrator @ \$200.00/decision = \$ 200.00

Respondent submitted one (1) discovery-related motion

Total Discovery-Related Motion Fees = \$ 200.00

The Panel has assessed \$100.00 of the discovery-related motion fees to Claimant.

The Panel has assessed \$100.00 of the discovery-related motion fees to Respondent.

Contested Motion for Issuance of Subpoena Fees

Fees apply for each decision on a contested motion for the issuance of a subpoena.

One (1) decision on a contested motion for the issuance of a subpoena with one Arbitrator @ \$200.00 = \$ 200.00

Total Contested Motion for Issuance of Subpoena Fees = \$ 200.00

The Panel has assessed \$100.00 of the contested motion for issuance of subpoena to Claimant.

The Panel has assessed \$100.00 of the contested motion for issuance of subpoena fees to Respondent.

Hearing Session Fees and Assessments

The Panel 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), which lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with a single Arbitrator @ \$450.00/session Pre-Hearing Conference: August 16, 2021	1 session	= \$	450.00
One (1) pre-hearing session with the Panel @ \$1,400.00/session Pre-Hearing Conferences: December 12, 2019	1 session	= \$	1,400.00
Two (2) pre-hearing sessions with the Panel @ \$1,300.00/session Pre-Hearing Conferences: June 16, 2020 September 14, 2020	1 session 1 session	= \$	2,600.00
Nine (9) hearing sessions @ \$1,300.00/session Hearings: September 13, 2021 September 14, 2021 September 15, 2021 September 16, 2021 September 17, 2021	2 sessions 2 sessions 2 sessions 2 sessions 1 session	= \$	11,700.00
<hr/> Total Hearing Session Fees		= \$	16,150.00

The Panel has assessed \$8,075.00 of the hearing session fees to Claimant.

The Panel has assessed \$8,075.00 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

Dianne Marie Onichimowski	-	Public Arbitrator, Presiding Chairperson
Theresa A. Gillerlain	-	Public Arbitrator
Thomas Michael Genovese	-	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.

Concurring Arbitrators' Signatures

Dianne Marie Onichimowski

Dianne Marie Onichimowski
Public Arbitrator, Presiding Chairperson

10/19/2021

Signature Date

Theresa A Gillerlain

Theresa A. Gillerlain
Public Arbitrator

10/20/2021

Signature Date

Thomas Michael Genovese

Thomas Michael Genovese
Public Arbitrator

10/19/2021

Signature Date

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

October 20, 2021

Date of Service (For FINRA Dispute Resolution Services use only)