

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Jeffrey Mogensen
Rhonda Mogensen

Case Number: 19-02604

vs.

Respondent

LPL Financial LLC

Hearing Site: Salt Lake City, Utah

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: Customers vs. Member

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimants Jeffrey Mogensen, and Rhonda Mogensen (“Claimants”): Stephan Louviere, Esq., Wolper Law Firm, P.A., Plantation, Florida.*

For Respondent LPL Financial LLC (“Respondent”): Jon D. Kaplon, LPL Financial LLC, Boston, Massachusetts.

*FINRA recorded the appearance of Claimants’ counsel at the time of filing of the Statement of Claim. Counsel’s representation of Claimants may have ended with the parties’ settlement. Please see the Other Issues Considered and Decided section of this Award for information on whether Claimants’ counsel appeared at the expungement hearing.

CASE INFORMATION

Statement of Claim filed on or about: August 28, 2019.

Claimants signed the Submission Agreement: August 28, 2019.

Statement of Answer filed by Respondent(s) on or about: November 12, 2019.

Respondent signed the Submission Agreement: November 12, 2019.

CASE SUMMARY

Claimants asserted the following causes of action: unsuitability; breach of fiduciary duty; negligence; negligent representation; negligent supervision; and breach of contract. The causes of action relate to alleged over-concentrated sales of non-traded real estate investment trusts (“Non-Traded REITs”) in Claimants’ joint account maintained at Respondent.

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

RELIEF REQUESTED

In the Statement of Claim, Claimants requested:

1. Compensatory damages in an amount of approximately \$50,000.00 to \$100,000.00;
2. Interests, costs, forum fees, rescission and underperformance damages; and
3. Punitive damages.

In the Statement of Answer, Respondent requested that:

1. All causes of action be dismissed against Respondent in their entirety;
2. Claimants take nothing by way of their Statement of Claim;
3. Respondent’s portion of the forum fees be assessed against Claimants;
4. Expungement of this Claim from Jordan Boyle’s industry record; and
5. Any other relief that the Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

On August 31, 2020 Claimants filed a notice of settlement. Therefore, the Arbitrator made no determination with respect to any of the relief requests contained in the Statement of Claim.

On September 15, 2020, Respondent filed a Motion for Expungement, to which no response was filed. In the motion for expungement, Unnamed Party Jordan John Boyle (“Boyle”) requested expungement of all references to Occurrence Number 2045249, from his Central Registration Depository (“CRD”) records.

The Arbitrator conducted a recorded hearing by videoconference on December 21, 2020 so the parties could present oral argument and evidence on the request for expungement. Boyle’s Motion for Expungement was the sole issue considered and decided. At this hearing, the Arbitrator ordered Boyle to file a Motion to Intervene as he was a non-party in the underlying customer case. On the same day, Boyle filed a Motion to Intervene. The Arbitrator granted the motion and Boyle was included as an Intervenor Party.

Claimants did not participate in the expungement hearing.

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

The Arbitrator also reviewed the settlement documents, considered the amount of payments made to any party to the settlement, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on any party to the settlement not opposing the request for expungement and that Boyle did not contribute to the settlement amount.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: the pleadings with exhibits; Boyle's testimony; and the written and oral arguments of his counsel.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and any 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 Occurrence Number 2045249 from registration records maintained by the CRD for Unnamed Party Jordan John Boyle (CRD Number 5197202) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Jordan John Boyle 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 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:

In the underlying arbitration case, Claimants' Statement of Claim factually alleges:

- A. Claimants carefully saved for their retirement with the hope and expectation that their financial advisor would recommend suitable investments that would safely generate income and preserve their capital. The money invested represented a substantial portion of Claimants' retirement nest egg.
- B. Respondent recommended unlawful investment in two high commission, illiquid and speculative Non-Traded REITs and reinvested all their dividends effectively upping their total investment and over-concentrated positions in these speculative alternative investments in direct contrast to Claimants' stated objectives.

- C. The commissions generated on Non-Traded REITs were higher than the industry norm and the investments themselves may be subject to extreme volatility due to the associated risk factors. Non-Traded REITs are only suitable for investors with long-term investment horizon who are willing to accept higher levels of risk in their investments. Claimants, as recent retirees, did not fall into this category. The collective illiquidity of these investments was unsuitable for investors of Claimants' age and retirement status.
- D. At the time of purchase, Boyle described the Non-Traded REITs as safe, income producing investments. He represented to Claimants that the Non-Traded REITs would double with no risk of principal, and that they could sell at a minimum of \$9 a share if they ever wanted to liquidate.
- E. At no time did Boyle explain the mechanics of these investments, the risks associated with the investments nor the exorbitant commissions he would receive. Moreover, Claimants did not have an appreciation for the illiquidity associated with these investments.
- F. In December 2017, one of the Non-Traded REITs ("NS REITs") reduced its distribution rate from 6.67% to 3.31%. and in February 2019, suspended the monthly distributions entirely, which events significantly impacted the stated value of Claimants' investments.
- G. After purchase, Boyle continued to tout the NS REITs, as evidenced by a number of emails which are quite telling of the manner in which he sold the investments to Claimants.
- H. Boyle made no attempt to diversify Claimants' account. Indeed, he recommended a 100% over-concentrated position in the two REITs. Finally, Boyle stated in an email, "over time it will work out." This is yet another tacit hold recommendation.
- I. Claimants' account statements state a present value for their Non-Traded REITs. However, those values are misleading and not true representations because there is virtually no market for the REITs, making it nearly impossible for Claimants to sell. Thus, they are forced to hold these illiquid securities for an indefinite period of time.

On review, it is noted that evidentiary documents made and signed by Claimants contain information that undercuts the credibility of several of Claimants' key factual allegations:

- A. On their September 2014 new brokerage Account Application Form for Institutional Services - Non-Retirement, Section II, Investment Objective and Risk Tolerance Claimants selected "Growth with Income. Emphasis is placed on modest capital growth with some focus on generation of current income." and did not choose or select a lower category of risk for safety and preservation available on this form.
- B. On their September 2014 new brokerage Account Application Form, Section III, Account Holder Information, Claimants stated primary account holder Claimant Jeffery Mogensen was a Partner employed at Reliance Resources, Moab UT.
- C. On their September 2014 new brokerage Account Application Form, Section IV Financial Information and Experience Claimants show (1) annual income of "\$750,000 to

\$999,999", (2) both net worth and liquid net worth being "\$1,000,00 and over", (3) approximate account value of "\$50,000 to \$99,999", (4) employment income in 38% tax bracket, (5) investment experience of 6-10 years, (6) assets in mutual funds (75%) stocks (24%) and alternative investments (1%), (7) on the time horizon for the account 5-10 years, (8) if there were liquidity needs in this account — the answer was "no". (9) The Investment Technique(s)/Strategy(ies) selected for the account was "Non-Correlated Asset Investing-Purchasing assets that tend to change in value independent of the core financial markets such as stocks and bonds. Alternative investments and precious metals are examples of assets that can be used in a non-correlated investment strategy in an attempt to counter the price movements of a traditional investment portfolio." and (10) acknowledgement that "[p]urchasing securities involves investment risk including possible loss of principal".

- D. On their September 2014 Subscription Agreement, Claimants selected the Distribution Reinvestment Plan (DRP) for dividends on their \$100,000 investment.
- E. Prior to investing in Approved Alternative Investment Programs such as Non-Traded REITS, as required for Respondent's prior approval, in September 2014 Claimants submitted their Alternative Investment Purchase form for real estate asset (APD) for the two NS REITs \$100,000 investment stating a liquid net worth of \$1,087,425.00, a net worth of \$1,000,000, an annual income of \$32,000, and disclosed currently holding another NS REIT investment of \$12,575 outside of Respondent, and calculated current Alternative Investment holdings at 11%. Claimants had identified 1955 as their birth years and appeared to comply with Respondent's stated Guidelines of LNW asset for investment in Alternative Investment Purchase form for customers such as Claimants.
- F. The Alternative Investment Purchase form contains a series of specific questions related to suitability concerns, such as: if the Claimants' experience level with investing in this category asset was less than 2 years; if the Claimants' time horizon was less than 3 years; if the Claimants will have liquidity needs for funds in the account within 3 years; if the Claimants' financials have changed substantially in the last 2 years; if the Claimants' investment objective has changed in the last 2 years; and if the order was beyond the LPL Alternative Guidelines and exemption was requested. The Claimants' individual answer to each and every individual question was "no".
- G. The Alternative Investment Purchase form also included several substantive statements of understanding regarding purchase of REITs as alternative investments and their dividends signed by the Claimants.
- H. The October 2014 confirmation of solicited trade buy, with prospectus under separate cover, of 10,000 shares at \$10/share (\$100,000) of NS REIT showed no commission or service charges. The offering prospectus described in some the detail risk factors related to the investment.
- I. The January, April and July 2018 confirmations of solicited trade sales/redemptions of 4715.337 shares at \$7.65/share (\$36,072.33), 956.647 shares at \$7.65/share (\$7,318.35) and 568 shares at \$7.65/share (\$4,080.14) of NS REIT do not show commission or service charges. The 2018 redemption request was reviewed by Respondent.

- J. The July 2018 confirmation of solicited trade sale of 568 shares of Colony Credit Real Estate shows commission (reduced), service and settlement charges.
- K. Finally, an investment ledger document from September 2014 to July 2019 evidenced trade investment gain/loss, income, net and percent return figures. Claimants' investment in Northstar REITs of \$100,000 received approximately \$31,000 in dividends, received back approximately \$47,470 in 2018 redemptions, and at time of claim, held roughly 6,700 shares. The report estimated damages from the NS REIT investment to be approximately \$4,000 on -3.4% return.

Recognizing the frequent absence of Claimants in post-settlement expungement proceedings such as here, Boyle becomes the sole source of testimony at hearing. Boyle's credible testimony under oath confirms Claimants' documentary information and adds relevant personal insight:

- A. The Claimants were not inexperienced investors, had 2011 previously purchased REIT non-traded investments that were an illiquid, had long-term real estate investment, and have shown increased interest in products such as asset-backed securities.
- B. Claimant Jeffrey Mogensen, was not retired, actively owned and operated a uranium mine in Moab, Utah, and was earning a significant annual salary.
- C. The 2014 Non-Traded REITs purchase was consistent with Claimants' investment strategy at the time, Claimants were knowledgeable and fully informed of risk by the Non-Traded REITs prospectus and open to the idea as prior Non-Traded REIT investment generated high dividend income, and when redeemed, was sold at a gain.
- D. Boyle's motive for the Non-Traded REIT recommendation was not to generate high commissions, as Claimants paid no commission for the Non-Traded REIT purchase and his own revenues from the sale were relatively modest, and there was no pressure put on Claimants to purchase the NS REIT.
- E. The claims of unsuitability, overconcentration, liquidity, and time horizon are belied and not supported by Claimants proffered documentation of financial profile, needs and asset portfolio.
- F. Claimants were informed and aware of the investment risks and Boyle kept regular contact and communication with Claimants on the Non-Traded REIT investments, the annual appraisals, dividend payment reinvestment and reductions, the right of redemption.
- G. Claimants' damages are overstated and value of asset retained is not clear.

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 = \$ 975.00

**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 = \$ 1,100.00
Member Process Fee = \$ 2,250.00

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, including a pre-hearing conference with the Arbitrator, 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 = \$ 450.00
Pre-hearing Conference: December 18, 2019 1 session = \$ 450.00
One (1) hearing session on expungement request @ \$450.00/session
Hearing Date: December 21, 2020 1 session

Total Hearing Session Fees = \$ 900.00

The Arbitrator has assessed \$450.00 of the hearing session fees to Respondent.

The Arbitrator has assessed \$450.00 of the hearing session fees to Boyle.

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

ARBITRATOR

Paul H. Lamboley

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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

Paul H. Lamboley

Paul H. Lamboley
Sole Public Arbitrator

01/29/2021

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.

January 29, 2021

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