

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant

Judith Adriana Thumann

Case Number: 19-02885

vs.

Respondents

Cetera Advisors LLC

Marcelino Alicea

Kimberley Ann Holweger

Kevin James Larson

Financial Fidelity Services, Inc.

Hearing Site: Atlanta, Georgia

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, Associated Persons, and Non-Member

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimant Judith Adriana Thumann (“Claimant”): John Da Grosa Smith, Esq., Smith LLC, Atlanta, Georgia.

For Respondents Cetera Advisors LLC (“Cetera”), Marcelino Alicea (“Alicea”), Kimberley Ann Holweger (“Holweger”), Kevin James Larson (“Larson”), and Financial Fidelity Services, Inc. (“Financial Fidelity”): W. Preston Martin, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

Hereinafter Cetera, Alicea, Holweger, Larson, and Financial Fidelity are collectively referred to as (“Respondents”).

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

CASE INFORMATION

Statement of Claim filed on or about: September 25, 2019.

Claimant signed the Submission Agreement: September 6, 2019.

Statement of Answer filed by Respondents on or about: January 8, 2020.
Holweger signed the Submission Agreement: December 18, 2019.
Alicea, Financial Fidelity, and Larson signed the Submission Agreement: December 19, 2019.
Cetera signed the Submission Agreement: December 20, 2019.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty and duty of good faith and fair dealing; suitability; failure to supervise; and unauthorized exercise of authority and discretion. The causes of action relate to Respondents alleged mismanagement of Claimant's Voya annuity held in an IRA, by directing Claimant to liquidate the Voya annuity.

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

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Unspecified compensatory damages;
2. Punitive damages;
3. Pre-judgement interest, attorneys' fees, and costs in an amount to be later determined;
4. Other and further relief as the Panel deems just and proper; and
5. A referral to FINRA for disciplinary investigation, if appropriate pursuant to FINRA Rule 12104(b).

In the Statement of Answer, Respondents requested:

1. Claimant's Statement of Claim be rejected in its entirety; and
2. The Panel make specific findings to allow the expungement of any record of this arbitration from the Central Registration Depository ("CRD") records of Respondents Alicea, Holweger, Larson, and any other affected Cetera personnel.

OTHER ISSUES CONSIDERED AND DECIDED

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

On October 8, 2020, Claimant filed a notice of final settlement with Respondents. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On October 8, 2020, Holweger and Larson filed a Petition For Expungement of Customer Complaints, requesting expungement of all references to Occurrence Numbers 2052369 and 2052373, respectively, from their CRD records. No response was filed. Alicea did not pursue the request for expungement, and the Panel made no substantive determination regarding that request.

The Panel conducted a recorded, telephonic hearing on December 11, 2020 so the parties could present oral argument and evidence on Respondents Holweger and Larson's requests for

expungement. Claimant did not participate in the expungement hearing and did not oppose the request for expungement.

The Panel reviewed the BrokerCheck® Reports for Holweger and Larson. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrences in the CRD.

The Panel 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 Panel noted that the settlement was not conditioned on any party to the settlement not opposing the request for expungement, and that Holweger and Larson did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: BrokerCheck® Reports for Holweger and Larson; the settlement agreement included in the Motion for Expungement; and testimony of Holweger and Larson.

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. The Panel recommends the expungement of all references to the above-captioned arbitration, Occurrence Number 2052369 from registration records maintained by the CRD for Respondent Kimberley Ann Holweger (CRD Number 1572778) and Occurrence Number 2052373 from registration records maintained by the CRD for Respondent Kevin James Larson (CRD Number 3067781) with the understanding that, pursuant to Notice to Members 04-16, Respondent Kimberley Ann Holweger and Respondent Kevin James Larson 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, the Panel has made the following Rule 2080 affirmative finding of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

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

The Panel concluded that the evidence supported expungement under FINRA Rule 2080(b)(1)(B). Neither Claimant nor her counsel opposed the Motion for Expungement or participated in the telephonic hearing. The undisputed evidence showed that neither

Holweger nor Larson was registered with Cetera at the time the events alleged in the Statement of Claim occurred or had any supervisory responsibilities over Claimant's financial advisor. The evidence showed that they did not know or talk with either Claimant or her financial advisor. Neither Holweger nor Larson participated in the negotiation of the settlement agreement or contributed any funds towards the settlement.

2. Any and all claims for relief not specifically addressed herein, including any requests for punitive 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 = \$ 1,575.00

**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, Cetera is assessed the following:

Member Surcharge = \$ 1,900.00

Member Process Fee = \$ 3,750.00

Late Pre-hearing Cancellation Fees

Fees apply when a pre-hearing conference is cancelled within three business days of the scheduled conference:

August 25, 2020, cancellation requested by parties = \$ 300.00

Total Last-Minute Pre-hearing Cancellation Fees = \$ 300.00

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees to Claimant.

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees jointly and severally to Respondents.

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 Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with the Panel @ \$1,125.00/session = \$ 2,250.00

Pre-hearing Conferences: January 21, 2020 1 session

July 24, 2020 1 session

One (1) hearing session on expungement request @ \$1,125.00/session			
Hearing Date:	December 11, 2020	1 session	= \$ 1,125.00
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Total Hearing Session Fees			= \$ 3,375.00

The Panel has assessed \$1,125.00 of the hearing session fees to Claimant.

The Panel has assessed \$1,125.00 of the hearing session fees jointly and severally to Respondents.

The Panel has assessed \$1,125.00 of the hearing session fees jointly and severally for the December 11, 2020 expungement hearing to Holweger and Larson.

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

ARBITRATION PANEL

George Pinckney Shingler	-	Public Arbitrator, Presiding Chairperson
Michael J. Ahlstrom	-	Public Arbitrator
Alan C. Granath	-	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

George Pinckney Shingler

George Pinckney Shingler
Public Arbitrator, Presiding Chairperson

01/07/2021

Signature Date

Michael J. Ahlstrom

Michael J. Ahlstrom
Public Arbitrator

01/06/2021

Signature Date

Alan C. Granath

Alan C. Granath
Public Arbitrator

01/05/2021

Signature Date

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January 07, 2021

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