

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Howard R. Merrill TTEE,
Howard Merrill Rev Living Tr U/A 2/9/15,
and Howard R. Merrill

Case Number: 20-00636

vs.

Respondents

National Securities Corporation and
Thomas Edison Kelly, Jr.

Hearing Site: Minneapolis, Minnesota

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 and Associated Person

This case was administered under the Special Proceeding option for simplified cases.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimants Howard Merrill Rev Living Tr U/A 2/9/15, Howard R. Merrill TTEE, and Howard R. Merrill (“Claimants”): Daniel D’Costa, Esq., D’Costa Law P.C., Hicksville, New York.*

For Respondent National Securities Corporation (“NSC”): Fred N. Knopf, Esq. and Emily A. Hayes, Esq., National Holdings Corporation, New York, New York.

For Respondent Thomas Edison Kelly, Jr. (“Kelly”): Robert M. Bursky, Esq., Melville, New York.

NSC and Kelly are, collectively, referred to herein as “Respondents.”

*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: February 25, 2020.

Claimants signed the Submission Agreement: February 24, 2020.

Statement of Answer filed by NSC on or about: April 15, 2020.
NSC signed the Submission Agreement: April 15, 2020.

Statement of Answer filed by Kelly on or about: December 1, 2020.
Kelly signed the Submission Agreement: December 7, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: financial exploitation of specified adults (violation of FINRA Rule 2165), negligence and quantitative unsuitability, failure to supervise, breach of fiduciary duty, breach of contract, and negligent misrepresentation and omissions. The causes of action related to Claimants' allegation that, under Kelly's management of his account, he was charged excessive commissions.

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

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

RELIEF REQUESTED

In the Statement of Claim, Claimants requested an award against Respondents, jointly and severally, ordering disgorgement of \$33,127.00 in commissions and fees, of costs associated with bringing this action against Respondents, of all forum fees, and any other damages determined during the arbitration process as deemed appropriate by the Arbitrator.

In the Statement of Answer, NSC requested that the Arbitrator dismiss the Statement of Claim in its entirety; award the costs and expenses of this arbitration, including forum fees and reasonable attorneys' fees; and award any additional relief that is just and proper.

In the Statement of Answer, Kelly requested that the Arbitrator dismiss the Statement of Claim with prejudice; Claimants be assessed all forum fees and other FINRA charges; Claimants pay reasonable attorneys' fees and expenses incurred in this arbitration; the Arbitrator recommend expungement of all references to this matter from registration records maintained by the Central Registration Depository ("CRD"); and the Arbitrator grant such other and further relief as is permitted by law and is deemed just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

On April 6, 2021, Claimants filed a notice of settlement and dismissal with prejudice. Therefore, the Arbitrator made no determination with respect to any of the relief requests contained in the Statement of Claim.

On May 26, 2021, Kelly filed a Motion for Expungement, to which no response was filed.

The Arbitrator conducted a recorded hearing by videoconference on September 21, 2021, so the parties could present oral argument and evidence on Kelly's request for expungement.

Neither Claimants nor Claimants' counsel participated in the expungement hearing.

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. Kelly's request for expungement of the above-captioned arbitration (Occurrence Number 2065483) from registration records maintained by the CRD is denied.
2. 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 of Arbitration Procedure, the following fees are assessed:

Filing Fees

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

| | | |
|--------------------------|------|--------|
| Initial Claim Filing Fee | = \$ | 600.00 |
|--------------------------|------|--------|

**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, NSC is assessed the following:

| | | |
|--------------------|------|----------|
| Member Surcharge | = \$ | 750.00 |
| Member Process Fee | = \$ | 1,750.00 |

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

| | | |
|--|------|--------|
| July 29, 2021, postponement requested by Kelly | = \$ | 450.00 |
|--|------|--------|

| | | |
|-------------------------|------|--------|
| Total Postponement Fees | = \$ | 450.00 |
|-------------------------|------|--------|

The Arbitrator has assessed the total postponement fees to Kelly.

Last-Minute Cancellation Fees

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

| | | |
|--|------|--------|
| July 29, 2021, cancellation requested by Kelly | = \$ | 600.00 |
| <hr/> | | |
| Total Last-Minute Cancellation Fees | = \$ | 600.00 |

The Arbitrator has assessed the total last-minute cancellation fees to Kelly.

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 @ \$450.00/session | = \$ | 450.00 |
| Pre-Hearing Conference: June 4, 2020 | 1 session | |
| One (1) hearing session on expungement request @ \$450.00/session | = \$ | 450.00 |
| Hearing: September 21, 2021 | 1 session | |
| <hr/> | | |
| Total Hearing Session Fees | = \$ | 900.00 |

The Arbitrator has assessed \$225.00 of the hearing session fees jointly and severally to Claimants.

The Arbitrator has assessed \$225.00 of the hearing session fees jointly and severally to NSC and Kelly.

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

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

ARBITRATOR

Steven M. Bialick

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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

Steven M. Bialick

Steven M. Bialick
Sole Public Arbitrator

10/15/2021

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 15, 2021

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