

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Edward L. Caruth

Case Number: 20-00807

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Inc.

Hearing Site: Philadelphia, Pennsylvania

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: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant Edward L. Caruth: Dochter Kennedy, MBA, J.D. and Chelsea Masters, Esq., AdvisorLaw LLC, Westminster, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: March 10, 2020.
Amended Statement of Claim filed on or about: November 23, 2020.
Edward L. Caruth signed the Submission Agreement: March 10, 2020.

Statement of Answer filed by Respondent on or about: April 30, 2020.
Merrill Lynch Pierce Fenner & Smith Inc. signed the Submission Agreement: April 30, 2020.

CASE SUMMARY

In the Amended Statement of Claim, Claimant asserted a claim seeking expungement of customer dispute information from registration records maintained by the Central Registration Depository (“CRD”).

In the Statement of Answer, Respondent took no position on Claimant’s expungement request.

RELIEF REQUESTED

In the Amended Statement of Claim, Claimant requested: expungement of Occurrence Numbers 1667262 and 1956772; compensatory damages in the amount of \$1.00 from Respondent; and 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 compensatory damages.

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

OTHER ISSUES CONSIDERED AND DECIDED

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

On November 23, 2020, Claimant filed a Motion to Amend the Statement of Claim. Respondent did not file a response. By Order dated December 10, 2020, the Arbitrator granted Claimant's Motion to Amend the Statement of Claim.

On December 17, 2020, Claimant advised that the customers in Occurrence Numbers 1667262 and 1956772 were served with the Statement of Claim and notice of the date and time of the expungement hearing. On December 22, 2020, Claimant filed an Affidavit confirming that the customers were served with the Statement of Claim and notice of the date and time of the expungement hearing.

The Arbitrator conducted a recorded, telephonic hearing on February 3, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and did not oppose the request for expungement.

The customers for Occurrence Numbers 1667262 and 1956772 did not participate in the expungement hearing. The Arbitrator found that the customers had notice of the expungement request and hearing.

On February 4, 2021, the Arbitrator issued an order giving the customers in Occurrence Number 1956772 time to file a written statement which the customers did on February 11, 2021 opposing Claimant's request for expungement and which was accepted into evidence.

The Arbitrator reviewed Claimant's BrokerCheck® Report. The Arbitrator noted that a prior arbitration panel or court did not previously rule on expungement of the same occurrences in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Number 1667262, considered the amount of payment 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 expungement request and that Claimant did not contribute to the settlement amount.

The Arbitrator noted that the dispute related to Occurrence Number 1956772 was not settled and, therefore, there was no settlement document to review.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: the pleadings; Claimant's testimony; Claimant's BrokerCheck® Report; the settlement agreement; the customers in Occurrence Number 1956772 letter dated February 11, 2021; and other exhibits.

AWARD

After considering the pleadings, the testimony and evidence presented at the expungement 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 1667262 from registration records maintained by the CRD for Claimant Edward L. Caruth (CRD Number 5556104) with the understanding that, pursuant to Notice to Members 04-16, Claimant Edward L. Caruth 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 finding of fact:

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

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

The customers alleged "unsuitable investment recommendations from October 2009 to July 2013...". The customers became clients of Claimant in mid-2009. In October of 2009, Claimant, based on the customers' investor profile and investment objectives, recommended a variety of diverse investments including the ML SRN, which would be issued by Respondent in October 2010. The customers purchased the ML SRN on October 5, 2010 and the value of the ML SRN initially increased. At the time of the purchase neither Claimant nor the customers knew that the ML SRN was not properly structured and could decline to zero in value over time. However, eventually the value began to decrease and when the ML SRN matured in October 2015, the customers investment had lost approximately 97% of its value. During the time the customers owned the ML SRN, they were given opportunities to return the ML SRN to Respondent at the current value, but they declined to do so.

The customers entered into a General Release and Settlement Agreement dated August 12, 2013 with Respondent. Claimant was not involved with the agreement. The suitability of the ML SRN investment was based on information provided to Claimant by the customers and on the customers' investor profile. Also, despite the loss in value in the ML SRN, the customers' account was profitable overall.

The customers' allegation of unsuitability is clearly erroneous because the suitability of an investment is determined at the time the investment is made and the ML SRN was suitable when it was purchased in October 2010. Neither Claimant nor Respondent knew that the ML SRN was improperly structured.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1956772 from registration records maintained by the CRD for Claimant Edward L. Caruth (CRD Number 5556104) with the understanding that, pursuant to Notice to Members 04-16, Claimant Edward L. Caruth 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; and the claim, allegation, or information is false.

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

The customers alleged "unsuitable investment recommendations, failure to follow instructions, misrepresentation and omission of material facts from February 2009 to July 2016...". The customers became clients of Claimant in February 2009. The customers had extensive investment experience; they had invested in equities for nine years prior to opening their account with Respondent. In addition, they stated in 2010 that they desired to buy options as well as to write covered calls and puts.

Based on the customers' investor profile and investment objectives, Claimant recommended a variety of diverse investments as part of a diversified portfolio. This included purchase of the ML SRN after Claimant explained it would be a hedge against market volatility. Neither Claimant nor the customers knew that the ML SRN was not properly structured and could decline to zero in value over time. In their letter dated February 11, 2021, the customers alleged that Claimant introduced the ETF-Pro shares Ultra Short S&P 500 ("ETF") product to them and that the ETF was not a suitable investment for the customers.

During his testimony, Claimant testified that the customers introduced the ETF to Claimant, that the customers believed the market would collapse again as it did in 2008 and that the customers wanted to use the ETF to bet against the market. Claimant further testified that he had never heard of the ETF prior to the customers' introduction of it to him and that he never recommended the ETF to any of his other clients.

Additionally, Claimant in his pleadings, stated that the ETF was on Respondent's "Restricted List" of securities which meant that no financial advisor could execute a trade in the ETF without prior approval from Respondent's Compliance Department. Claimant

was not permitted to recommend this ETF or solicit trades in this ETF. In order for the customers to be able to purchase this ETF, Respondent's Compliance Department became directly involved. Although, the customers were notified in writing concerning the high risk involved in trading leveraged products such as the ETF, the customers decided to proceed with the purchase of the ETF. As the customers continued to add to their ETF position, Claimant repeatedly cautioned the customers about the high risks involved. The customers continued to believe that the market would collapse and did not heed Claimant's advice.

The customers allegations of unsuitability are clearly erroneous regarding the purchase of the ML SRN since suitability of an investment is determined at the time it is made and the ML SRN was suitable for the customers when it was made; and clearly erroneous and false regarding the purchase of the ETF since Claimant did not recommend the purchase of the ETF. Furthermore, since the ETF was on Respondent's "Restricted List", Claimant was not permitted to recommend or execute a trade in the ETFs without prior approval from Respondent's Compliance Department. Also, all of the ETF trades in the customers' accounts were marked "unsolicited".

The customers allegations of "failure to follow instructions" are clearly erroneous since no evidence of Claimant's failure to follow instructions was introduced into evidence, or even mentioned, during the hearing.

The customers allegation of "misrepresentation and omission of material facts" is clearly false regarding the purchase of the ML SRN since Claimant provided the customers with all of the information that was available regarding the ML SRN at the time of the purchase ; and clearly false and erroneous regarding the purchase of the ETF since Claimant did not recommended the purchase of the ETF and both Claimant and Respondent's Compliance Department warned the customers of the high risks involved with such an investment.

3. 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 Dispute Resolution Services 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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is assessed the following:

Member Surcharge = \$ 150.00

Postponement Fees

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

November 10, 2020, postponement requested by the parties = \$ 50.00

Total Postponement Fees = \$ 50.00

The Arbitrator has assessed the total postponement fees to Claimant.

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 @ \$50.00/session = \$ 50.00
Pre-Hearing Conference: June 16, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing: February 3, 2021 1 session

Total Hearing Session Fees = \$ 100.00

The Arbitrator has assessed the total hearing session fees to Claimant.

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

ARBITRATOR

John J. Jordan

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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

John J. Jordan

John J. Jordan
Sole Public Arbitrator

03/16/2021

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.

March 16, 2021

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