

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Estate of Thomas Ward
Joan Highsmith
Lutricia Ward

Case Number: 20-00862

vs.

Respondents

Fidelity Brokerage Services LLC
Fidelity Personal and Workplace Advisors
Jennifer Joan DeHart
Nassim H. Elias
Eric Uhl McSwain
Anthony Mesquit

Hearing Site: New Orleans, Louisiana

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 and Non-Member vs. Member, Associated Persons, and Non-Member

This case was decided by a majority-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimants Estate of Thomas Ward (“Estate of Thomas Ward”), Joan Highsmith (“Highsmith”), and Lutricia Ward (“Lutricia Ward”): Alex S. Aughtry, Esq., Reasonover & Berg, LLC, New Orleans, Louisiana.*

Hereinafter, Estate of Thomas Ward, Highsmith and Lutricia Ward are collectively referred to as “Claimants”.

For Respondents Jennifer Joan DeHart (“DeHart”), Nassim H. Elias (“Elias”), Fidelity Brokerage Services LLC (“Fidelity Brokerage”), Fidelity Personal and Workplace Advisors (“Fidelity Advisors”), Eric Uhl McSwain (“McSwain”), and Anthony Mesquit (“Mesquit”): W. Preston Martin, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

Hereinafter, DeHart, Elias, Fidelity Brokerage, Fidelity Advisors, McSwain and Mesquit are collectively referred to 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: March 13, 2020.
Claimants signed the Submission Agreement: March 13, 2020.

Statement of Answer filed by Respondents on or about: July 1, 2020.
Respondents signed the Submission Agreement: July 1, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: breach of fiduciary duty; violation of FINRA rules and regulations; fraud; misrepresentations; non-disclosures; omission of facts; suitability; violation of Blue Sky Laws; tortious misconduct; contractual breach; failure to supervise; and unjust enrichment. The causes of action relate to Fidelity Charitable Gift Fund, Retirement Reserves Annuity (“RR Annuity”), Fidelity Personal Retirement Annuities, Highsmith’s Fidelity Account, Thomas Ward’s Individual Retirement Account (“IRA”), and Lutricia Ward’s IRA.

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, Claimants requested:

1. An award of pecuniary and non-pecuniary damages;
2. Statutory penalties;
3. Punitive damages;
4. Treble damages;
5. Costs and attorneys’ fees; and
6. Any other relief that may be deemed appropriate by the Panel.

In the Statement of Answer, Respondents requested:

1. Rejection of Claimants’ Statement of Claim in its entirety; and
2. Specific findings made by the Panel to allow the expungement of any record of this arbitration from the Central Registration Depository (“CRD”) records of Elias, Mesquit, DeHart, McSwain and any other affected Fidelity personnel.

OTHER ISSUES CONSIDERED AND DECIDED

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

On August 2, 2021, Claimants filed a notice of settlement and release of all claims asserted against Respondents with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On August 18, 2021, Elias filed a Motion for Expungement. That same day, DeHart, Mesquit and McSwain filed a Motion for Expungement. On September 6, 2021, Claimants filed an opposition to the Motions for Expungement. On September 20, 2021, Elias, DeHart, Mesquit and McSwain filed a reply in support of the Motions for Expungement.

The Panel conducted a recorded hearing by videoconference on February 9, 2022, so the parties could present oral argument and evidence on DeHart, Elias, McSwain and Mesquit's requests for expungement.

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

The Panel reviewed DeHart, Elias, McSwain and Mesquit's BrokerCheck® Reports. 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 documentation, considered the amount of payment 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 DeHart, Elias, McSwain and Mesquit did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: DeHart, Elias, McSwain and Mesquit's BrokerCheck® Reports; the individual testimonies of DeHart, Elias, McSwain and Mesquit; and the Motions for Expungement.

AWARD

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

The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2072469) from registration records maintained by the CRD for Respondent Nassim H. Elias (CRD Number 4067199) with the understanding that, pursuant to Notice to Members 04-16, Respondent Nassim H. Elias must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2072470) from registration records maintained by the CRD for Respondent Jennifer Joan DeHart (CRD Number 4761452) with the understanding that, pursuant to Notice to Members 04-16, Respondent Jennifer Joan DeHart must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2072382) from registration records maintained by the CRD for Respondent Anthony Mesquit (CRD Number 5210309) with the understanding that, pursuant to Notice to Members 04-16, Respondent Anthony Mesquit must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

The Panel also recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2072869) from registration records maintained by the CRD for Respondent Eric Uhl McSwain (CRD Number 5257287) with the understanding that, pursuant to Notice to Members 04-16, Respondent Eric Uhl McSwain 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.

The claim, allegation, or information is false.

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

The preponderance of the evidence at the expungement hearing led the Panel to believe three of the Associated persons had no involvement in the alleged sales practice violation.

In 2014-2015, when the alleged violation occurred, DeHart worked in a different branch and state from the Jacksonville, Florida branch. She had no involvement in Claimants’ beneficiary designation executed in 2014. She did not begin supervising Elias until March 2018, as the Jacksonville Branch Manager.

Mesquit, financial consultant, assisted the Estate of Thomas Ward and Lutricia Ward (collectively referred to as the “Wards”) with their three advisory accounts, the first of which was opened in December 2017. He had no involvement in the Wards’ designation of Fidelity Charitable Giving Fund as the beneficiary of their accounts, the subject of the claim.

McSwain, supervised Mesquit, who handled the above advisory accounts beginning in 2017. He had no direct contact with the Wards.

The Panel recommends DeHart, Mesquit and McSwain expungement based upon Rule 2080(b)(1)(B): “The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds”.

Elias was Claimants’ Fidelity financial consultant for the remaining accounts, one of which was the RR Annuity, the basis of the settlement. Evidence was presented that Elias believed that the language of the form indicated that the surviving spouse was the beneficiary of the account and the Fidelity Charitable Giving Fund was a contingent beneficiary after the death of both parties. Fidelity Annuity reached out to Claimants in 2015, spoke to Lutricia Ward, and explained that under the unusual rules of this 1995 annuity, the funds would go straight to the Fidelity Charitable Giving Fund, and not the surviving spouse. Fidelity sent her a beneficiary form to change the beneficiary designation, which Claimants did not return. Elias was unaware of this rule and did not receive notice that Fidelity Annuity had contacted Claimants to correct the beneficiary form. Upon Thomas Ward’s death, the issue became known.

Evidence indicated that Claimants wished to leave their monies to charity. Elias testified that he had multiple conversations with them regarding this intention, and the Wards chose the Fidelity Charitable Giving Fund as a beneficiary. The alleged sales practice violation states: “Claimants allege the registered representative made an inappropriate recommendation to name a donor advised fund as the beneficiary of their accounts”. Registered representative Elias followed the Wards’ directive. The Panel finds the claim or allegation is clearly erroneous and false.

The Panel recommends Elias expungement based on Rule 2080(b)(1)(A): “The claim, allegation, or information is factually impossible or clearly erroneous” and Rule 2080(b)(1)(C): “The claim, allegation, or information is false”. Similarly, the Panel recommends expungement for DeHart, Mesquit and McSwain based on these grounds as well as Rule 2080(b)(1)(B).

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, Fidelity Brokerage is assessed the following:

Member Surcharge = \$ 1,900.00
Member Process Fee = \$ 3,750.00

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:

| | | |
|---|-----------|----------|
| Five (5) pre-hearing sessions with the Panel @ \$1,125.00/session | = \$ | 5,625.00 |
| Pre-Hearing Conferences: July 22, 2020 | 1 session | |
| December 18, 2020 | 1 session | |
| January 5, 2021 | 1 session | |
| March 15, 2021 | 1 session | |
| November 8, 2021 | 1 session | |

| | | |
|---|------------|----------|
| Four (4) hearing sessions on expungement request @ \$1,125.00/session | = \$ | 4,500.00 |
| Hearings: February 9, 2022 | 2 sessions | |
| February 10, 2022 | 2 sessions | |

| | | |
|----------------------------|------|-----------|
| Total Hearing Session Fees | = \$ | 10,125.00 |
|----------------------------|------|-----------|

The Panel has assessed \$2,250.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$3,375.00 of the hearing session fees jointly and severally to Respondents.

The Panel has assessed \$4,500.00 of the hearing session fees jointly and severally to DeHart, Elias, McSwain and Mesquit.

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

ARBITRATION PANEL

| | | |
|------------------------|---|--|
| Barbara L. Edin | - | Public Arbitrator, Presiding Chairperson |
| Arlene Denise Knighten | - | Public Arbitrator |
| Keith E. Robinson | - | Non-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

Barbara L. Edin

Barbara L. Edin
Public Arbitrator, Presiding Chairperson

03/10/2022

Signature Date

Arlene Denise Knighten

Arlene Denise Knighten
Public Arbitrator

03/10/2022

Signature Date

Keith E. Robinson

Keith E. Robinson
Non-Public Arbitrator

03/10/2022

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 10, 2022

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