

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
David Mark Ellowitch

Case Number: 20-01624

vs.

Respondent
Lincoln Financial Advisors Corporation

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

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant David Mark Ellowitch: Paula D. Shaffner, Esq., Stradley Ronon Stevens & Young, LLP, Philadelphia, Pennsylvania.

For Respondent Lincoln Financial Advisors Corporation: Michael W. Arnold, Esq., Lincoln Financial Advisors Corporation, Fort Wayne, Indiana.

CASE INFORMATION

Statement of Claim filed on or about: May 21, 2020.

David Mark Ellowitch signed the Submission Agreement: May 21, 2020.

Statement of Answer filed by Respondent on or about: June 17, 2020.

Lincoln Financial Advisors Corporation signed the Submission Agreement: June 17, 2020.

CASE SUMMARY

In the 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 supported Claimant’s expungement request.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Number 2045638; 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 requested that the Arbitrator deny Claimant's request for compensatory damages and assess forum fees against Claimant.

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 December 31, 2020, Claimant advised that the customers in Occurrence Number 2045638 ("customer") were served with the Statement of Claim and notice of the date and time of the expungement hearing.

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

Respondent participated in the expungement hearing and, as stated in the Statement of Answer, did not oppose the request for expungement.

The customers also participated in the expungement hearing and opposed the expungement request.

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 occurrence in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Number 2045638, 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.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: pleadings, exhibits, Claimant's testimony, and Claimant's BrokerCheck® Report.

AWARD

After considering the pleadings, the testimony and evidence presented at the expungement hearing, 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 2045638 from registration records maintained by the CRD for Claimant David Mark Ellowitch (CRD Number 3102817) with the understanding that, pursuant to Notice to Members 04-16, Claimant David Mark Ellowitch 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:

It is recommended that Claimant be granted an expungement regarding the customer complaint relating to Occurrence Number 2045638. The public customers (husband and wife) made an appearance. The wife testified on behalf of the couple at the hearing. Her testimony was concise, clear, and credible. In addition, the customers submitted a letter for the Arbitrator’s consideration. It is important to note that the customers exercised all of their rights as customers to speak against the expungement matter. The customers’ complaint was focused on their understanding that Claimant did not communicate with them in a timely matter regarding when to move back into the market following the election of the president in 2016. By way of background, prior to the election of the president in 2016, the customers contacted Claimant about moving their portfolio into cash because of their concern for their portfolio if a particular candidate was elected. After a discussion in which Claimant listened to their concerns, the customers decided to move into a cash position. Both Claimant and the customers testified and concurred on this point. The movement into cash is not in dispute. According to Claimant, he further suggested that when they return to the market, they consider dollar cost averaging as a way to manage the risk of returning to the market. The customers testified that they repeatedly called Claimant about re-entering the market beginning in December of 2016 and continuing through 2017 and 2018. The wife’s testimony was not contradicted by Claimant. Claimant’s BrokerCheck Report lists one customer complaint and the basis for that complaint is found in the customers’ Statement of Claim in Arbitration Case Number 19-02331. When comparing the Statement of Claim to the customer’s testimony I can not find any evidence that Claimant committed a sales practice violation. That is to say there was no evidence of misrepresentation, that the customers were not suitable for the investment decisions they made with Claimant’s assistance or that Claimant engaged in deceptive conduct. Counsel for Respondent Lincoln Financial Advisors represented that Claimant should be absolved of any wrongdoing in this matter. Respondent’s counsel further represented that the settlement of the underlying arbitration did not in any way involve Claimant and that the sole reason Respondent Lincoln Financial Advisors settled the matter was to avoid the costs of litigation. I find the testimony of the Claimant was credible. Specifically, Claimant was forthright, direct, and answered all of the questions posed by his attorney, the customers, and the undersigned. There was no dispute that he had conversations with the customers

about returning to the market and getting out of their all cash position. He noted and provided evidence that had they remained in the market, their overall portfolio would be approximately \$11,000 higher than the all cash position. This is the rare case where it is clear that the dispute between the customers and the broker is clearly not about the sales practices of the broker but it is equally clear that there is a service practice failure. The public record only references the sales practice issue. Therefore, based on the foregoing, the Arbitrator finds the complaint as listed on Claimant's BrokerCheck Report to be erroneous and recommends expungement.

2. 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 Lincoln Financial Advisors Corporation is assessed the following:

Member Surcharge = \$ 150.00

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 @ \$50.00/session = \$ 50.00
Pre-hearing Conference: September 24, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing Date: January 21, 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

Jim Geiger

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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

Jim Geiger

Jim Geiger
Sole Public Arbitrator

02/12/2021

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.

February 12, 2021

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