Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Estate of George F. Kalil

vs.

Respondent
Wells Fargo Advisors Financial Network

Case Number: 20-01698

Hearing Site: Tuscon, Arizona

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

This case was decided by a majority-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant Estate of George F. Kalil ("Claimant"): Tom Slutes, Esq., Slutes, Sakrison, & Rogers, P.C., Tucson, Arizona.

For Respondent Wells Fargo Advisors Financial Network ("Respondent"): Paul Yarns, Esq., Wells Fargo Legal Department, St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed on or about: May 29, 2020.
Claimant signed the Submission Agreement: May 29, 2020.

Statement of Answer filed by Respondent on or about: August 6, 2020.
Respondent signed the Submission Agreement: August 6, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: fraud and misrepresentation. The causes of action relate to alleged fraudulent misrepresentations to the decedent, George F. Kalil's ("Kalil") agreement with Respondent involving six stock holdings of AT&T, Apple, Ford Motor Company, Microsoft, Monster Beverage, and Verizon Corporation and the manner in which the fees were charged after Kalil's death.

In the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. $132,374.67 in compensatory damages;
2. Reasonable interest on the above amount from the date of the transaction;
3. Attorneys' fees;
4. Costs; and
5. Punitive damages.

In the Statement of Answer, Respondent requested:

1. Claimant's allegations be denied with prejudice;
2. Costs be assessed against Claimant; and
3. Any further relief as the Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

On January 11, 2021, Respondent filed a Motion for Expungement on behalf of Unnamed Party Tiffany S. Callahan ("Callahan"), requesting that the above-captioned arbitration (Occurrence Number 2079117) be expunged from Callahan's Central Registration Depository ("CRD") records. No response was filed to the motion.

The Panel conducted a recorded hearing by videoconference on January 11, 2021, so the parties could present oral argument and evidence on the merits of the evidentiary hearing as well as Callahan's request for expungement.

All parties participated in the evidentiary and expungement hearing, including Kalil's brother, who is Claimant's personal representative and executor ("Kalil's brother"). Claimant opposed Callahan's request for expungement.

The Panel reviewed Callahan's BrokerCheck® Report. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrence in the CRD.

The Panel noted that the dispute related to Occurrence Number 2079117 was not settled and, therefore, there was no settlement document to review.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Claimant's Statement of Claim; Respondent's Statement of Answer; Callahan's Motion for Expungement; and Callahan's BrokerCheck® Report.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the

majority of the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are denied in their entirety.

2. The majority of the Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2079117) from registration records maintained by the CRD for Unnamed Party Tiffany S. Callahan (CRD Number 5145572) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Tiffany S. Callahan 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 majority of the Panel has made the following Rule 2080 affirmative finding of fact:

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

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

   > Pursuant to subsection (a) of Rule 2080, Arbitrators Lebhar and Kalish recommend expungement of the allegation in Callahan's U-4 and BrokerCheck Report that reads, "Claimant alleges fraudulent misrepresentation regarding fees that were charged for account transactions." The evidence presented at the hearing failed to prove that Callahan made any misrepresentation, let alone one that was fraudulent, about the fees. Claimant argued that Kalil was promised a discounted commission on an order to liquidate equity positions. The evidence clearly established that Kalil did receive a discount from the commission that Callahan would normally charge. That normal commission was between 2-4% according to Callahan, which was corroborated by the testimony of her supervisor. Callahan promised and represented that she would cap the commission at 1.25%, a discount from her normal commission rate, which made her representation and promise true when it was made. Ultimately, Kalil was charged a commission of only 0.7%, an even greater discount than promised by Callahan. Although Claimant's expert contended, based solely on hearsay evidence, that the discounted commission was no discount in reality because it ended up being what Respondent would normally charge for transactions such as those at issue, it was clear from the evidence that Callahan did not know, before receiving the trade confirmations, what commission Respondent would charge and she was surprised and pleased to learn that it was well below the 1.25% maximum rate that she had promised. For these reasons, Arbitrators Lebhar and Kalish conclude that the allegation of fraudulent misrepresentation was clearly erroneous and recommend it be expunged from Callahan's U-4 and BrokerCheck Report.

3. Any and all claims for relief not specifically addressed herein, including any requests for attorneys' fees and punitive damages, are denied.

Dissent of Chairperson Jay Lawrence Witkin

I respectfully dissent from the majority's determination (a) to dismiss the claim in its entirety and (b) to grant the motion for expungement.

Discussion of the Claim

With respect to (a), I find dispositive evidence and legal authority to support the conclusions (1) that Respondent breached its oral agreement to charge Kalil a commission of 5 cents per share on the sale of the six stocks at issue; (2) that, contrary to Respondent's contention, this contract survived Kalil's death and remained binding on Respondent notwithstanding the opening of an estate account with Respondent; (3) that Respondent violated FINRA Rule 2121, which requires that the commission charged to a customer be "fair in light of all relevant circumstances"; and 4) that Respondent violated other critical FINRA rules and policies which require brokers to put the interest of customers first, as well as to ensure fair treatment of seniors. As a result, I conclude that Claimant should have been awarded a refund of the difference between the $163,189.57 in commissions it was actually charged, and the $30,814.90 that Respondent should have charged under the contract.

The genesis of this case lies in an oral contract that financial advisor, Callahan, entered into with Kalil in 2015 in order to induce him to follow her from Morgan Stanley to Respondent. Under its terms, the customer was to pay 5 cents per share to buy or sell stock. That low rate essentially reflected the fact that Kalil did not want or need a full-service brokerage; that he actively traded on his own in large blocks of stock at a time; and that he essentially only needed Respondent to place trades (and occasionally provide research). It is thus abundantly clear that had Kalil decided to liquidate any or all of the six stocks at issue here during his remaining lifetime, he would have been obligated to pay a commission of just 5 cents per share regardless of any existing Respondent commission rate schedules in effect at the time.

In 2018, Kalil became ill and sharply reduced his trading. He ultimately passed away in 2019. Shortly after his passing, and the appointment of his brother as personal representative of the estate, the six stocks (along with all other positions and mutual funds) were, pursuant to Arizona probate procedures, transferred from Kalil's individual account with Respondent into a new estate account at Respondent. See generally FINRA, "When A Brokerage Account Holders Dies-- What Comes Next?" For the next 9 months or so, trading in the estate account (other than to generate funds to pay taxes or for other purposes) essentially came to a halt while the grieving beneficiaries pondered what they wished to do with these stocks. Ultimately, the heirs decided to sell the shares immediately, and asked Kalil's brother to instruct Respondent to liquidate them.

In March 2020, Kalil placed an oral liquidation order with Callahan. In response, Callahan verbally provided a range of what the commissions could be. No mention was made of the above described oral contract during that discussion. After liquidation, Callahan sent Kalil an email stating that the liquidation had been made, and that confirmations would be sent. She further stated that commissions were normally in the 2 to 4% range; that she had earlier told him she would discount them to 1.25%, and that she'd ultimately obtained a final commission of about .75% (For purposes of this case, Respondent characterizes these commissions as "discounts" and thus "reasonable". Claimant's expert testified that the

commissions were not "discounted" and perhaps high when compared to institutional trades of the same size. See Cl. Ex. 13.)

Notwithstanding Callahan's "discount" characterization, the personal representative became distraught after reviewing the actual confirmations. In fact, he had been told by his brother of the 5 cents per share agreement. In essence, at that point, Kalil came to realize that the alleged "discounted" commissions actually charged were almost 6 times higher than they would have been had they been sold at the previously agreed cost of 5 cents per share. In response, he sent an email to the Respondent branch manager asking about the degree of supervision of Callahan's handling of the liquidation, and more importantly, why his late brother's agreement rate had not been applied. As he put it, was it Respondent's contention that the long standing 5 cent agreement had "died with George"? For his part, the branch manager never directly provided an answer to those questions to Kalil either orally or in writing. Instead, he forwarded the complaint to Respondent's legal department. Ultimately unable to get any satisfaction even after hiring an attorney to pursue the matter, the estate then commenced this arbitration.

Respondent's principal position throughout this case has been that the establishment of the separate estate account extinguished the 2015 contract as a matter of law. Thus, it contends, Callahan was under no obligation to offer or even discuss that 5 cent rate with the personal representative at the time of the order. Significantly, though, it does not submit any legal authority or FINRA rule to support that contention. That is not surprising. As Arizona case authority submitted into the record makes clear, it is settled law that the executor "stands in the shoes" of the decedent. See Waugh v. Lennard, 69 Ariz. 214,227 (S.Ct. 1949), citing Re Brandt's Estate, 67 Ariz. 42.

When a customer dies, the establishment of an estate account within the same brokerage may essentially be nothing more than the administrative equivalent of pouring old wine into new bottles. See FINRA, "When A Brokerage Account Holders Dies-- What Comes Next?" That was clearly the situation here. It is undisputed that the six securities at issue were in Kalil's individual account at the time of his passing, and transferred intact into the estate account. To be sure, an estate account will be assigned a new account number, and the executor will be required to obtain an Employment Identification Number ("EIN") from the IRS. Significantly, Respondent has produced no authority to substantiate its claim that the routine assignment of an EIN to an estate account for tax purposes as well as issuance of a new account number by a brokerage are legally fatal to any existing contractual rights that the decedent held at the time of death.

Finally, even assuming the contract could be found to have survived the death of Kalil, Respondent argues that the personal representative in any event waived his rights to enforce his brother's agreement because he did not object at the time Callahan orally gave him a range of possible commission charges. In effect, the theory runs, silence became acquiescence.

That argument, too, must fail on legal and regulatory grounds. Callahan testified that she has considerable experience with servicing estate accounts. That said, and knowing full well of the commission agreement she had made years earlier with the decedent, it also follows that she either knew, or should have known, that the executor stood in the shoes of his late brother for purposes of the applicable commission rate agreement. Tellingly, Respondent has

produced no authority for its view that Callahan had a right to unilaterally terminate that contract without also making clear to Kalil that she was doing so-- and why. Rather, in the interests of transparency and fairness, it follows that this explanation needed to be forthcoming prior to her execution of the order. More to the point, given the vigor of Kalil's written protest after diligently examining the trade confirmations, only one reasonable inference can be drawn: Kalil did not knowingly intend to forfeit his brother's rights at the time of placing the order, and further, that he had not been given enough information by Callahan to make an informed decision one way or the other.

Perhaps most troubling of all, Respondent's entire defense fails to take into full and proper account other relevant FINRA regulatory standards, in addition to Rule 2121, that are triggered by the facts in this case. A suitable starting point is FINRA's "Obligations to Your Customers":

"The foundation of the securities industry is fair dealing with customers. Whether your work is with individuals, institutions or business entities, your obligation in this profession is to serve your customers with honesty and integrity by putting their interests first." (emphasis added). See also FINRA Rule 2121(c) (4) quoted above, with respect to assessment of fair commissions based on all the circumstances.

Plainly, in these circumstances, putting the customer's interest first required Callahan at a minimum to undertake certain steps prior to filling the order. To ensure transparency, the first order of business should have been to disclose to Kalil’s brother the existence of the agreement with his brother, even if she then followed it by an explanation of why Respondent believed it did not apply to the estate. To condone her silence would in effect allow Respondent to be its own judge and jury on the most important legal issue in this case—whether the agreement remained binding-- without even communicating its existence to the opposite party. Next, to avoid what the expert witness characterized as "apples and oranges" confusion between expression of a commission as a range of percentages versus a fixed price per share, Callahan had a duty to explain how the commissions expressed in the range would compare in actual dollars to what the commission would be in actual dollars under the 5 cents a share agreement. And finally, after giving Kalil the aforesaid information critical to making an informed decision, she should have carefully outlined other options, regardless of whether he posed an objection at that moment. As Claimant's expert also testified, those options could include transfer to another Respondent lower cost product or even to another lower cost brokerage. (And, it must be said, even if Kalil’s brother is assumed to be an experienced investor, it strains common sense to presume he is also an expert on Respondent commission rates--especially as Respondent rates do not appear to be readily available in written form to be either customers or the general public, and were never placed in the record.)

Lastly, Respondent's conduct must be evaluated under FINRA Rule 2010, which requires that all industry members conduct business with high standards of commercial honor and that they maintain just and equitable principles of trade. In my view, those criteria were not close to being met in this case, thus leaving the estate and its 80-year-old executor unnecessarily vulnerable to exactly what transpired. Let us review. In addition to Respondent's deliberate silence on the 5-cent agreement, no effort was made to ensure that the personal representative was given sufficient facts on which to evaluate the reasonableness of the proffered higher commissions. Nor, as the expert explained, was he given any notice as to

other options to help preserve the estate's assets, such as transferring the account to a less costly account within Respondent, or to transfer to a lower cost brokerage. Equally troubling, Respondent's supervisors did not directly respond to Claimant's prompt and reasonable complaint, thereby necessitating Claimant to hire an attorney (with the attendant expense) just to get an answer to his legitimate concerns expressed in Kalil's brother's capacity as the estate's fiduciary. That non-responsiveness was also less than honorable. A customer should be never be left with no recourse but to hire counsel in order to be heard.

Discussion of the Expungement Motion

There remains the issue of expungement under Rule 2080. As FINRA has formulated the relevant standard in this regard:

"Expungement is an extraordinary remedy that arbitrators should recommend only under appropriate circumstances. Arbitrators should recommend expungement of customer dispute information only when it has no meaningful investor protection or regulatory value." See FINRA Updated Notice on Expungement, September 2017.

Equally relevant, given the fact that Kalil's brother is approximately 80 years of age, FINRA's commitment to seniors must also come into play:

[T]he fact that FINRA identifies senior investor protection as a priority may help firms concentrate their attention on their policies and procedures relating to senior investors . . . Where appropriate, FINRA also brings disciplinary action against firms or registered representatives for misconduct against senior investors.

Applying those principles here, it is clear to me that the claim here should remain on the CRD. Given the findings outlined above, it is vital that potential investors perusing the CRD should be aware of this claim as part of their decision-making process on whether to open an account with Respondent. As this case also teaches, many potential customers, especially (often elderly) personal representatives who are first becoming familiar with a decedent's securities accounts and holdings, should be able to presume that a broker will honor previous agreements, and that necessary disclosures will be made that always put the customer's interest first.

In light of the above, I would deny the extraordinary remedy of expungement on two grounds. The first flows from my view that the record supports an overcharge claim based both on contract law and FINRA Rules. Further, I conclude that denial is warranted to meet FINRA's overarching interests of investor protection, particularly as to seniors.

Accordingly, I conclude that granting the expungement motion would not serve investor protection or regulatory values.

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	=$	1,425.00

**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, Respondent is assessed the following:

Member Surcharge	=$	1,700.00
Member Process Fee	=$	3,250.00

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:

One (1) pre-hearing session with a single Arbitrator @ $450.00/session			=$	450.00
Pre-Hearing Conference:	December 21, 2020	1 session		
Two (2) pre-hearing sessions with the Panel @ $1,125.00/session			=$	2,250.00
Pre-Hearing Conferences:	October 9, 2020	1 session		
	December 9, 2020	1 session		
Two (2) hearing sessions @ $1,125.00/session			=$	2,250.00
Hearing:	January 11, 2021	2 sessions		
Total Hearing Session Fees			=$	4,950.00

The Panel has assessed $2,475.00 of the hearing session fees to Claimant.

The Panel has assessed $2,475.00 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

Jay Lawrence Witkin	-	Public Arbitrator, Presiding Chairperson
Marc Kalish	-	Public Arbitrator
Stephanie P. Lebhar	-	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.

Dissenting Arbitrator's Signature

Jay Lawrence Witkin — **02/19/2021**

Jay Lawrence Witkin — Signature Date
Public Arbitrator, Presiding Chairperson

Concurring Arbitrators' Signatures

Marc Kalish — **02/19/2021**

Marc Kalish — Signature Date
Public Arbitrator

Stephanie P. Lebhar — **02/19/2021**

Stephanie P. Lebhar — Signature Date
Non-Public Arbitrator

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February 19, 2021
Date of Service (For FINRA Dispute Resolution Services use only)