Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
John William Swaine

Case Number: 20-02024

vs.

Respondent
Morgan Stanley

Hearing Site: Boca Raton, Florida

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 John William Swaine: Robert W. Pearce, Esq., Robert Wayne Pearce, P.A., Boca Raton, Florida.

For Respondent Morgan Stanley: Jeremy S. Winer, Esq., Morgan Stanley, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: June 26, 2020.
John William Swaine signed the Submission Agreement: June 25, 2020.

Statement of Answer filed by Respondent on or about: August 17, 2020.
Morgan Stanley signed the Submission Agreement: July 10, 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 took no position on Claimant’s expungement request, and denied any wrongdoing in connection with fulfilling its regulatory duties in submitting the required regulatory filing.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Number 1489149; 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 any award of damages against Respondent for submitting the required regulatory filing.

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 February 19, 2021, Claimant advised that, on December 10, 2020, the customer in Occurrence Number 1489149 ("Customer") was served with the Statement of Claim and notice of the date and time of the expungement hearing, and that on February 2, 2021, the Customer responded to Claimant's counsel with the following:

"I have no objection to having Mr. Swaine's record expunged of my prior complaint (over 10 years ago). Although his former employer Morgan Stanley "denied" the complaint, they paid me [settlement amount] to settle the matter.

I believe that Mr. Swaine is a very nice man. I am sure that he has learned much in the time since the complaint and deserves every opportunity to move ahead in his career."

The Arbitrator conducted a recorded, telephonic hearing on February 26, 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 took no position on the request for expungement.

The Customer did not participate in the expungement hearing. The Arbitrator found that the Customer had notice of the expungement request and hearing.

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 1489149, 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: the pleadings filed; FINRA inquiry documentation dated February 25, 2009; Respondent Morgan Stanley's Detail Case Report; Respondent Morgan Stanley's Letter to

Claimant dated January 20, 2010, with the August 15, 2009, Manager's Account Questionnaire/response; Respondent Morgan Stanley's letter to the Customer dated December 15, 2009; a typed translation of the Customer's complaint; FINRA's inquiry letter dated February 25, 2009; Response to FINRA's inquiry dated March 23, 2010; Smith Barney IRA Account Application; IRA Client Agreement; Auto RMD; Guided Portfolio Management Agreement with approval; confidential client information with investment questionnaire; settlement release; and, the Customer's response dated February 2, 2021.

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 1489149 from registration records maintained by the CRD for Claimant John William Swaine (CRD Number 4072112) with the understanding that, pursuant to Notice to Members 04-16, Claimant 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:

   As adduced from Claimant's testimony and admitted exhibits, Claimant began his career in 1999, as stockbroker/investment advisor with Non-Party Edward Jones. In 2003, he continued in that capacity with Non-Party Citigroup, and then Respondent.

   On February 7, 2005, the Customer opened a trust account and IRA with Respondent. Claimant was listed as her financial consultant. The Customer's stated investment objective for the IRA account was "growth through investment primarily in large and medium capitalization dividend paying equities (equity income) with an account that can tolerate one year or more of negative absolute returns through difficult phases in the market cycle over a five to ten year period."

   Claimant met with the Customer on several occasions and spoke with her frequently and gleaned that she relied upon her trust account to fund her long-term healthcare expenses, as necessary. Except for required mandatory distributions the Customer's IRA account saw very few trades.

Some two months after opening her account with Claimant, on April 8, 2005, the Customer entered into a discretionary trading agreement with Respondent known as the Smith Barney Morgan Stanley "Guided Portfolio Management Program" ("GPM"). According to Claimant, that program would periodically adjust the Customer's account portfolio, including the IRA, in accordance with the Customer's investment objectives. The GPM manager would obtain the Customer's investment objectives via an annual questionnaire. The GPM agreement provided that the Guided Portfolio Manager "will be primarily responsible for making investment management decisions for the Account within guidelines set forth by GPM and, for the most part, based upon the commendations of the Research Department of SB." The Customer agreed to pay an annual fee for this service. The fee was determined by a percentage of the market value of her account based on a set fee schedule contained in the agreement.

On September 12, 2009, almost four and a half years after the Customer entered into the discretionary managed account, the Customer completed Respondent's annual 2009 questionnaire and indicated a dissatisfaction with her account's managed performance and a desire to restrict certain investments[1]. The Customer returned the Manage Account Annual Questionnaire directly to Respondent, bypassing Claimant who is now identified as the Account's "Financial Advisor."

On September 18, 2009, some six days after the Customer returned the Questionnaire to Respondent, Claimant voluntarily left Respondent and became associated with another brokerage firm. At that time, Claimant was unaware of the Customer's 2009-questionnaire responses, including any complaint or any requested restrictions for her GPM-managed assets.

On September 25, 2009, Respondent "clocked in" the Customer's 2009 Questionnaire as containing a formal written complaint. Respondent's follow-up internal case report described the Customer's complaint as: "[Customer] completed the Managed Account Questionnaire and complained about the performance of their [sic] GPM account."

In October 2009, Respondent notified Claimant of the Customer's complaint and reported the following on Claimant's CRD Form U4:

"[Customer] alleged that the investments purchased in her account were unsuitable. Damages unspecified. 2007-2009"

On January 11, 2010, Respondent settled the complaint with the Customer for an amount which, the Claimant contends represented a refund of Respondent's GPM management fees. Respondent also expressly denied liability for any of the Customer's alleged losses.

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[1] She included the following on the questionnaire: "Do you wish to impose any reasonable restrictions (e.g. the designation of particular securities or types of securities that should not be purchased for the account(s) on the management of your account(s)?" "CDSwaps, Derivative" - Also included in the Questionnaire was the following note:"I was very disappointed in the % plunge of my IRA account in the "recession." Every questionnaire I answered that my 1st priority was to "preserve my capital" as I am 74 years old and am on a waiting list for a lifecare community which requires a showing of substantial assets to enter. The last time I met with my broker, he said "we'll make it back for you." So far, my account has lagged the % increase in the stock market since its lowest point. Please give some priority to my account so that it at least mirrors the market. I have paid goodly sums to you to "manage" my account. I would like to see a return on that "investment.""

Claimant did not participate in the settlement, nor was he asked to contribute to the settlement, nor did he contribute to the settlement.

Nine days after Respondent's settlement with the Customer, on January 20, 2010, Respondent formally notified Claimant that it was settling the matter with the Customer.

On February 25, 2010, FINRA notified Claimant that he was the subject of an inquiry into the customer complaint. Claimant denied any misconduct or any FINRA Code of Conduct violation and argued that the Customer's so-called complaint was concerned with the account's performance during the 2007-2009 recession as opposed to a claim about the portfolio's suitability.

DISCUSSION

The Customer's 2009-Questionnaire responses raised both performance and suitability questions. The Customer's original investment questionnaire identified her investment objectives as Equity Income with an account that can tolerate one year or more of negative absolute returns through difficult phases in the market cycle over a five to ten-year period. By September 2009, some two years into a volatile market, The Customer's investment objective evolved from the stated objective of equity income into preservation of capital. ["my 1st priority was to "preserve my capital."][2] It is without question that the years 2007-2009 represented a volatile period in the market.

Respondent characterized the Customer's "complaint" in its "Detail Case Report" as one of performance of the GPM account. Yet, for reasons unclear, Claimant's CRD Form U4 identifies the same Customer's complaint as one based upon suitability for recommendations made between 2007-2009. By 2007, the account in question was ostensibly controlled and managed in-house in accordance with Respondent's GPM service agreement. According to the GPM agreement, "[t]he GPM Guided Portfolio Manager . . . will be primarily responsible for making investment management decisions for the Account within guidelines set forth by GPM and, for the most part, based upon the recommendation of the Research Departments of Smith Barney." In fact, the Customer was contractually obligated to pay Smith Barney a service fee for which GPM agreed to be primarily responsible for making investment management decisions for the Account.

While Claimant was designated the Financial Consultant initially and then Financial Advisor for this Customer, Respondent contractually maintained control of the account and ultimately, the burden for the portfolio's performance or suitability when it supplanted Claimant as the Customer's de facto financial advisor. This is somewhat borne out by the settlement itself. The original complaint was directed to Respondent. Whether the complaint is to be characterized as one of a failure of performance or one of suitability, Respondent unilaterally resolved the complaint with no input or participation from Claimant. The testimony described the settlement funds paid by Respondent in settlement of this customer complaint as a return of Respondent's management fees. This would appear consistent with

[2] Claimant's BrokerCheck® response to the complaint notes that "Client states that she notified management in 2007 that she no longer wanted a growth account. Client never informed me of any desire to change her account then, nor did she bring it up at any time during the following 2 years that account was managed." (emphasis added)

a finding that Respondent bore the responsibility for the portfolio's performance, or lack thereof.

The record is unequivocal that on April 8, 2005, the Customer entered into a managed discretionary trading agreement that virtually terminated Claimant's continuing responsibility for or active participation in management decisions regarding the Customer's investments. The evidence is clear that the GPM, of which the Customer was critical or "disappointed," was an investment program "guided" by a portfolio manager. Whether the portfolio manager consisted of a single individual or a management team, there is no evidence, whatsoever, that Claimant was the portfolio manager or a management team member, who directly controlled or otherwise influenced the Customer's investments. Nor is there any evidence presented that might reasonably allow for a finding that Claimant had superior or coextensive managerial authority regarding the Customer's investments from April 8, 2005, the inception of the managed discretionary account - through September 18, 2009, when Claimant ended his employment with Respondent. Parenthetically, it is entirely understandable that the Customer would express "disappointment" with her GPM managed account during the financial crisis of 2007 through 2009. Whether any specific loss was due to investments that were reasonably unsuitable for her, considering her stated investment objectives and station in life - or due to unforeseeable market conditions - is unknown. Respondent's settlement of the Customer's claim for such a low amount, suggests that Respondent believed the Customer's claim was primarily an economic decision. Similarly, a colorable argument might be made that the Customer's "complaint" regarding the suitability and poor performance of her GPM account contains some plausible indicia of truth regarding Claimant, especially if he was responsible for steering her toward the GPM product. However, the undisputed fact that the Customer had her GPM discretionary account managed by an independent portfolio manager for at least two years without any known formal expression of dissatisfaction belies this notion. Moreover, it seems fair to conclude from the Customer's comments included on her 2009-Annual Questionnaire that she monitored the value of her managed portfolio, regardless of who managed the account and that she was evidently satisfied with the portfolio's performance until the unusual events described as the 2007-2009 financial crisis.

To reiterate, even if the Customer's complaint alleging that her account consisted of unsuitable investments and suffered from poor performance - had merit - Claimant was not responsible for making investment decisions regarding this particular account nor was he in a position to otherwise control or influence the account. While Claimant may have had a continuing responsibility to "know his customer" and gauge any significant changes in the customer's financial needs, investment objectives and risk tolerance - it is unassailable that very same task was performed by the routine annual questionnaires the Customer submitted (or completed) since entering into the GPM arrangement. Under the circumstances, the Customer's "claim, allegation or information," as it is applied to Claimant, is patently false, and it would be unfair to report this occurrence on Claimant's CRD records.

Although BrokerCheck® identifies other unrelated regulatory issues that are not the subject of this proceeding, expungement of this reported occurrence would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements. To the contrary, the claim as described could easily lead to an unfounded and inaccurate perception.

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(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 =$ 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: October 15, 2020 1 session

One (1) hearing session on expungement request @ $50.00/session =$ 50.00
Hearing: February 26, 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

Seth L. Finkel - 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

Seth L. Finkel **03/11/2021**

Seth L. Finkel
Sole Public Arbitrator

Signature Date

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March 11, 2021
Date of Service (For FINRA Dispute Resolution Services use only)