

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Phillips M. Huffman

Case Number: 20-02207

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Inc.

Hearing Site: Los Angeles, California

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 Phillips M. Huffman (“Claimant”): Ryan S. Lean, Esq., Keesal, Young & Logan, Long Beach, California.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. (“Respondent”): Patrick J. Mulligan, Esq., Bressler & Amery & Ross, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: July 13, 2020.
Claimant signed the Submission Agreement: July 12, 2020.

Statement of Answer filed by Respondent on or about: September 23, 2020.
Respondent signed the Submission Agreement: September 23, 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.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of a customer complaint (“Underlying Complaint”), Occurrence Number 1093359, from Claimant’s CRD records, including, without limitation, his Forms U-4 and U-5; and
2. Compensatory damages in the amount of \$1.00 from Respondent.

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 compensatory damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

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. Claimant’s request for expungement of the Underlying Complaint, Occurrence Number 1093359, from his CRD records is denied.

FINDINGS

In September 2000, Claimant solicited the subject investment in an internet start-up for his clients, the customers of Occurrence Number 1093359 (“Mr. K and Mrs. K” or collectively “Customers”), based solely on strong buy recommendations and guidance from Respondent’s research department, led by Mr. B. Claimant said he might have done some outside reading on the internet start-up “at some point” but not before he recommended it to the Customers. Claimant placed other clients into the internet start-up based on the same internal guidance. Had Respondent and Claimant made full and honest disclosures and assuming the Customers would have still purchased, this speculative investment would have been suitable for the Customers. This conclusion is based on Claimant’s testimony and Mr. K’s admissions in his draft statement of the claim. There, Mr. K alleged that he was comfortable with and had some history of interest and investing in “dot.com” stocks.

Mr. B and his colleagues had undisclosed conflicts of interest and severe doubts about the internet start-ups that they shared amongst themselves well before September 2002 when Claimant recommended the purchase. They hid these conflicts and reservations from the Respondent’s line brokers. Respondent was investigated and “busted” by the New York attorney general and regulators and paid over \$100 million in fines and settlements for these sales practice violations.

Respondent paid Mr. K \$50,000.00 on a \$70,000.00 claim. Claimant stated he did not contribute but the settlement agreement was no longer available. Claimant testified that when the claim was made, Claimant asked a compliance officer to remove the complaint from his records and she said, “I will try”. But it is not clear whether such a request reached either the settlement negotiations or the settlement agreement in a form of a condition that may have violated Rule

2081 had it then been adopted by FINRA. The Customers' counsel, Mr. E, said in the letters attached to his declaration that the Customers did not fault Claimant, but no witness could testify for certain, including Mr. E, whether the non-opposition to expungement was discussed or made a part of the settlement agreement. Respondent did not oppose the expungement at the hearing or in the papers. Mr. E testified that despite his and his clients' vocal support for expungement, Mr. E would not as a matter of principle or practice have made such a request or participated in a settlement with a non-opposition condition. Based on the Arbitrator's perception of Claimant's and Mr. E's honesty, the Arbitrator accepted as true that Claimant did not participate in the settlement payment and the settlement was not conditioned on a request for, or Respondent's actual non-opposition to expungement. Rule 2081 considerations are not the obstacle to expungement.

In the Arbitrator's view, since the allegations in the draft Statement of Claim on which the Customers' complaint and the settlement were based, are clearly not false or impossible, the only possible expungement ground is Rule 2080(b)(1)(B). But this exception contemplates a situation of *actual* non-involvement; akin to mistaken identity. It is undisputed that Claimant was involved in the "sales practice violation." He solicited, strongly recommended, and sold the Customers' the internet start-up's securities. Claimant argued that since he was not involved in the research, developing the recommendations, or covering up the conflict of interest and fraudulent and inflated the internet start-up's financials, he was "not involved" at all. The fact that Claimant did not do the research or cover up the conflicts and obvious financial irregularities does not vitiate where he enthusiastically hyped the stock "sight unseen" and closed the deal. Accordingly, Claimant was involved in the trade practice violations as detailed by Mr. K in his formal complaint.

Claimant argued creatively that Rule 2080(b)(2) – which recites the considerations of whether the expungement claim is otherwise meritorious and would have no material adverse effect on investor protection and system integrity – provides a *fourth* alternative ground for expungement, one without standards. That is neither so, nor possible.

While Rule 2080(b)(2) suggests an arbitrator or judge can recommend expungement on grounds *other* than those numerated in 2080(b)(1) (A)-(C), the rule is merely procedural. Under the sub-parts A and B, FINRA is permitted to conclude that expungement would not be appropriate if the arbitrator made no Rule 2080(b)(1) findings and FINRA decides to oppose the proposed expungement in court. The sub-sections A and B are not separate grounds for an arbitral finding. Without the three stringent requirements imposed on arbitrators under Rule 2080(b)(1) (A)-(C), arbitrators would be free to apply their own criteria and the policy behind Rule 2080 would be compromised.

The Arbitrator was impressed with Claimant's obvious honesty, integrity, and otherwise spotless public record during a long career. The claim is old. But regrettably, the claim may not properly be expunged.

FEES

Pursuant to the Code of Arbitration Procedure ("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: November 3, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing Date: December 12, 2020 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

Thomas E. Shuck

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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

Thomas E Shuck

Thomas E. Shuck
Sole Public Arbitrator

01/26/2021

Signature Date

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January 26, 2021

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