

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Jon Lowther

Case Number: 20-02322

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Inc.

Hearing Site: Tampa, 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 Jon Lowther (“Claimant”): Jonathan C. Schwartz, Esq., Schwartz Legal, PLLC, Plantation, Florida.

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 23, 2020.
Claimant signed the Submission Agreement: July 23, 2020.

Statement of Answer filed on or about: September 2, 2020.
Respondent signed the Submission Agreement: September 2, 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 Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of Occurrence Numbers 1289761, 1462076, 1641260, and 1657565 and an award of compensatory damages in the amount of \$1.00.

In the Statement of Answer, Respondent opposed Claimant's request for 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.

On January 26, 2021, Claimant advised that the customer in Occurrence Number 1462076 ("Customer") was served with the Statement of Claim via email ("Notice") and that the customers in Occurrence Numbers 1289761, 1657565, and 1641260 were deceased.

On March 11, 2021, Claimant filed a copy of a screenshot of a text message exchange with the Customer, indicating that the Customer took no position on the expungement request.

The Arbitrator conducted a recorded, telephonic hearing on March 16, 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.

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 occurrences in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Numbers 1641260 and 1657565, considered the amount of payment made to any party to the settlements, and considered other relevant terms and conditions of the settlements. The Arbitrator noted that the settlements were not conditioned on any party to the settlements not opposing the expungement request and that Claimant did not contribute to the settlement amounts.

The Arbitrator noted that the disputes related to Occurrence Numbers 1289761 and 1462076 were not settled and, therefore, there was no settlement documentation to review.

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

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:

The Arbitrator recommends the expungement of all references to Occurrence Numbers 1289761, 1462076, 1641260, and 1657565 from registration records maintained by the CRD for Claimant Jon Scott Lowther (CRD Number 2885442) with the understanding that, pursuant to Notice to Members 04-16, Claimant Jon Scott Lowther 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:

With respect to Occurrence Number 1289761, the customer advised Claimant that she had a universal life policy with a cash surrender value that provided for her security. As a longtime client of Claimant, the customer consistently sought investments with a high yield. The bond purchases involved in this complaint were made at the customer’s request, as was the mutual fund purchase. These purchases were suitable for the customer, at the time they were made, as part of the customer’s diversified portfolio and were consistent with her risk tolerance and desire for yield. The customer’s complaint was made during the initial stages of the financial crises and, although the value of the investments deteriorated, they continued to pay interest. The customer did not pursue arbitration and Respondent denied the complaint.

With respect to Occurrence Number 1462076, the Customer had a short term need for cash and withdrew funds from an annuity held in his retirement account. The Customer wanted to return the funds within 60 days to avoid tax liability and advised Claimant that he wanted to withdraw funds on a monthly basis in the future. The Customer assumed that the replacement funds would be returned to his annuity. However, Claimant advised him that if the funds were added back to the annuity then monthly withdrawals would be subject to a surrender charge. Claimant advised him to instead hold the funds in the cash portion of his retirement account to avoid surrender charges on the monthly withdrawals. The Customer agreed to this arrangement, but later complained and did not recall the conversation. Respondent denied the complaint, and the Customer did not pursue arbitration.

With respect to Occurrence Number 1641260, the customer had an annuity that guaranteed a return of premium, regardless of the underlying value of the sub accounts due to market fluctuations. The customer, an elderly widow, had her adult son participate in all investment discussions and decisions. She began making withdrawals from the annuity for her living expenses and gifts for some of her children. Her son and Claimant advised her against taking large withdrawals from the annuity, as doing so reduced the

income guarantee. Claimant recommended a 1035 exchange into an annuity with a lifetime income guarantee for as long as she lived, regardless of the value of the underlying annuity. The customer and her son agreed that the exchange was in her best interest. Unfortunately, her son died unexpectedly. The customer's daughter, who was not a recipient of the previous gifts, blamed Claimant for not preventing her mother from making the withdrawals. However, Claimant's advice was in the customer's best interests, under the circumstances.

With respect to Occurrence Number 1657565, the customer filed a complaint letter with Respondent and, later, a Statement of Claim in arbitration that were inconsistent. The customer retired early and, despite previously indicating he was going to return to work, began withdrawing money from his annuity. The customer's complaint letter stated that he was not aware that he was surrendering his annuity to purchase preferred stock, while the Statement of Claim asserted that Claimant recommended that he sell the annuity to purchase those shares. Contrary to both allegations, the evidence indicates that the customer acted, in this transaction, against Claimant's advice.

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
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**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 firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge Fee	= \$	150.00
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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 @ \$50.00/session	= \$	50.00
Pre-Hearing Conference: November 11, 2020	1 session	
One (1) hearing session on expungement request @ \$50.00/session	= \$	50.00
Hearing: March 16, 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

Richard S. Zaifert

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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

Richard S. Zaifert

Richard S. Zaifert
Sole Public Arbitrator

03/19/2021

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.

March 19, 2021

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