

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

George D. Ewins, Jr.
Richard J. Kowalski

Case Number: 20-02408

vs.

Respondent

Raymond, James & Associates, Inc.

Hearing Site: Montpelier, Vermont

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 Persons vs. Member

This case was administered under the Special Proceeding option for simplified cases.

REPRESENTATION OF PARTIES

For Claimants George D. Ewins, Jr. (“Ewins”) and Richard J. Kowalski (“Kowalski”): Robert J. Moses, Esq., Lax & Neville LLP, New York, New York.

For Respondent Raymond, James & Associates, Inc.: Robert M. Rudnicki, Esq., Assistant General Counsel, Litigation, Raymond, James & Associates, Inc., St. Petersburg, Florida.

CASE INFORMATION

Statement of Claim filed on or about: July 28, 2020.

George D. Ewins, Jr. signed the Submission Agreement: July 28, 2020.

Richard J. Kowalski signed the Submission Agreement: July 28, 2020.

Statement of Answer filed by Respondent on or about: August 6, 2020.

Raymond, James & Associates, Inc. signed the Submission Agreement: August 6, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants 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 stated that it does not oppose Claimants' expungement requests and does not plan to participate in this proceeding or attend the expungement hearing.

RELIEF REQUESTED

In the Statement of Claim, Claimant Ewins requested expungement of Occurrence Number 1701409 and Claimant Kowalski requested expungement of Occurrence Number 1686414, both of which relate to the same underlying arbitration; and Claimants jointly requested compensatory damages in the amount of \$1.00 from Respondent.

In the Statement of Answer, Respondent did not delineate any specific relief request.

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 9, 2021, Claimant advised that the customers in Occurrence Numbers 1701409 and 1686414 ("Customer A and Customer B") were served on December 22, 2020, with the Statement of Claim and notice of the date and time of the expungement hearing, as well as of their right to participate therein. Claimants further provided a copy of the computerized UPS delivery receipt reflecting that the package was left at the Customers' front door on December 23, 2020 at 3:22 pm.

On March 1, 2021, the Customer filed the following in response to Claimants' request for expungement:

"To whom it concerns,

I would like to provide the following comments on the above mentioned case as well as the Petition for Expungement provided in this case.

I offer these comments through my involvement in the FINRA Arbitration Claim (Arbitration # 14-01255) made by my wife and myself against the petitioners in this expungement hearing.

I would like to make clear I personally do not have a problem with a potential expungement of the petitioner's record if they have met the burden for their record to be cleared. The petitioners are not victims here they were participants in this matter with certain responsibilities and obligations through the positions they held and the job/services they provided. It is understood they were agents for Merrill Lynch but as licensed professionals there are responsibilities and obligations that come with that as well. I do feel there are misstatements and inaccuracies with the filed petition which I will mention and cover below. Again I do not have a personal problem with the expungement of the petitioners record if it is currently causing harm to them as long as the burden for that expungement has been met which [the Arbitrator] the hearing officer will decide.

That said on the filed petition and my perceived misstatements/inaccuracies; I do understand how and why the petition is written and presented as it is. It should be pointed out as it is on

page 12 # 56 which states that the petitioners had very little involvement and or files/correspondence related to the original claim filed (14-01255) that the petition may be based on. This is their own acknowledgement. My comments will be in chronological order per page and numerical section within the petition in the hopes that it is clear and orderly.

P1 #1: The petitioners/advisors brought to us the proposed SRN (Strategic Return Note) to invest in as well as recommended the amount and size of the investment. This was not an unsolicited investment but one that was recommended. What supports the erroneous claim within this besides this just being a statement?

P2 #10: [Customer B] was an employee of a company that was being sold it was not her company being sold unfortunately.

P4 #15: It should be noted that the [Customers'] account position was largely in cash as a percentage so it was not at risk or exposed to the market at this time.

P4 #17: The petitioners/advisors brought and recommend the purchase of the SNR as a product that their firm Merrill Lynch was recommending.

P5 #25: This is inaccurate the petitioners/advisors called and recommended the purchase of the SRN with a decision needing to be made that day on the SNR with a recommendation of a purchase level (\$200,000.00) that represented (as mentioned on page 7 #33) an 11% of our net worth including cash and personal property when the intent of the SNR was to hedge equities, not new worth, especially cash. The recommended purchase represented over 40% of the equity position and value which is a very high hedge position but that was the recommendation to us.

P6 #27: Comment shows our concern for risk and being adverse to undue exposure whether this is considered dragging ones feet or being conservative we will leave for the hearing officer to decide.

P6 #28: Petitioners/advisors supported further investment into the SNR and never advised to sell or decrease this position.

P6 #30: Because of the large percentage loss within the SNR as well as the size of the recommended investment, yes we were concerned and we questioned the petitioners/advisors about this product and holding. We received no resolve or recommendation on how to address this issue.

P6 #31: The intent of the SNR was to hedge our equity position which represents over 40% as mentioned above not 11% of our total net worth. If we had in fact held a position of 11% against our equity position our investment in the SNR would have been \$180,000.00 less and our disenchantment as pointed out in this filing would have been different.

P7 #32: This is a statement with no supportive information or facts to back it.

P9 #37-39: These are accurate statements.

P10 #42: Exhibit G is a letter of inquiry to one of the petitioners in which the

responses/answers are not provided, it is assumed the hearing officer has access to this information and the ability to validate this statement.

P10 #44: Merrill Lynch and Bank of America were the originators of the SRN but do their agents/advisors hold any responsibility or are they exempt as it relates to the sale of this investment and related defects that were in the SNR?

P12 #50: How were the petitioners/advisors misled and to what degree lays their responsibility in this matter?

P12 #55: It should be noted that the [Customers] filed a notice to dismiss further investigation to the claim brought. No action/investigation was further taken because of this request.

P15 #69: As spelled out in #69 the three circumstances that need to be present for the ability of an expungement to occur. Of course the final determination is left to the hearing officer to determine.

A: I do not believe the initial claim made as it relates to this expungement request to be erroneous at all.

B: Were the petitioners/advisors involved in the company's sales practices that created a sales practice violation or were they following company directives and not involved in the developed practices? They were clearly involved in the sale of the product. The remaining criterion is not applicable in this matter.

C: The claim and filed allegation I believe are true and not false as stated in this petition.

P15 #70: From the comments above I do not believe that all three circumstances exist as stated in the petition filing so I disagree with this statement.

P16 #75: Is a self-serving statement which I do not believe all three criteria have been met as I mention above.

Again I would like to make clear I personally do not have a problem with a potential expungement of the petitioner's record if they have met the burden for their record to be cleared. What I have provided in my comments I believe to be truthful and accurate.

Thank you for allowing me to comment and participate in this matter.

[Customer A]"

The Arbitrator conducted a recorded, telephonic hearing on March 2, 2021, so the parties could present oral argument and evidence on Claimants' requests for expungement.

Respondent did not participate in the expungement hearing.

The Customers participated in the expungement hearing and stated that they did not oppose the Claimants' expungement request, so long as they could meet their burden of proof.

The Arbitrator reviewed Claimants' respective BrokerCheck® Reports. 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 1701409 and 1686414, 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 requests and that Claimants did not contribute to the settlement amount.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: research from Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") concerning the Strategic Return Notes; a prospectus for the Strategic Return Notes; other materials approved by Merrill Lynch for use in selling the Strategic Return Notes; e-mails between the Customers and Claimants Ewins and Kowalski concerning the Customers investing in the Strategic Return Notes; correspondence between the Customers and Merrill Lynch concerning the Customers' complaint about the performance of the Strategic Return Notes; the Customers' Statement of Claim from the underlying arbitration; correspondence from FINRA with respect to an investigation of the Customers' complaint; the SEC Order penalizing Merrill Lynch; the FINRA Acceptance Waiver and Consent with Merrill Lynch; a Consent Order between the State of Vermont and Merrill Lynch; an article from the Wall Street Journal; a settlement agreement titled "General Release", and Claimants Ewins' and Kowalski's respective BrokerCheck® reports. The Arbitrator also reviewed correspondence from the Customers.

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 1701409 from registration records maintained by the CRD for Claimant George D. Ewins, Jr. (CRD Number 2460452), and Occurrence Number 1686414 from registration records maintained by the CRD for Claimant Richard J. Kowalski (CRD Number 1558602) with the understanding that, pursuant to Notice to Members 04-16, Claimants George D. Ewins, Jr. and Richard J. Kowalski 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 false.

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

Claimants Ewins and Kowalski filed this case seeking expungement of one customer complaint from each of their respective CRD reports (Occurrence Number 1701409 from Claimant Ewins' CRD and Occurrence Number 1686414 from Claimant Kowalski's CRD). The Arbitrator recommends that the customer complaint be expunged from Claimants Ewins' CRD and Kowalski's respective CRD records based upon the fact that the allegations are false (FINRA Rule 2080(b)(1)(C)).

The complaint at issue related to an arbitration case (FINRA Arbitration No. 14-01255) filed against Claimants Ewins, Kowalski, and their former employers Merrill Lynch and Bank of America ("BOA"). The Customers claimed that a Merrill Lynch proprietary volatility index linked to structured notes known as Strategic Return Notes were not suitable for the Customers' investment objectives. Ultimately, Merrill Lynch settled the claim for a portion of the amount in relief requested, and BOA paid an additional amount which resulted in the Customers' not having any out-of-pocket losses.

Neither Claimants Ewins nor Kowalski personally contributed any amount to the settlements with the Customers. There was no provision in the settlement prohibiting or limiting the customers (or their representative) from testifying about Ewins or Kowalski or the settlement. In fact, the customers submitted a detailed letter to the Arbitrator in advance of the expungement hearing and participated in the entire expungement hearing (through the husband).

The underlying arbitration Statement of Claim was properly reported on both Ewins' and Kowalski's respective CRD reports by their subsequent firm, Respondent Raymond James & Associates, Inc., which affirmatively supported their applications for expungement.

Both Ewins and Kowalski testified at the hearing. The Arbitrator also reviewed numerous documents in connection with Ewins' and Kowalski's applications, as set forth in the Other Issues Considered section above.

Customer A testified that he "personally do[es] not have a problem with a potential expungement of the petitioner[s]' record[s] if they have met the burden for their record to be cleared." The customer confirmed that between the settlement with Merrill Lynch and the settlement with BOA, the customers had recouped their out-of-pocket losses. The customer also explained that the customers did not want Ewins and Kowalski to have adverse consequences from having the disclosures on their CRD reports. The customer's primary concern, in substance, was whether Ewins and Kowalski should bear any responsibility for the erroneous information disseminated by Merrill Lynch.

It appears that the securities were suitable for the customers within the context of their overall portfolio based upon the testimonial and documentary evidence presented at the hearing. It appears that the Strategic Return Notes would have been suitable for the customers and consistent with the customers' investment objectives had the securities been as represented by Merrill Lynch and BOA. The customers were educated and experienced investors. The customers reviewed and relied upon the offering materials and related information that they were provided concerning the Strategic Return Notes.

Importantly, in June 2016, Merrill Lynch agreed to pay a \$10 million penalty to settle charges by the SEC that Merrill Lynch violated Section 17(a)(2) of the Securities Act of 1933 and was responsible for misleading statements in offering materials provided to retail investors for structured notes linked to a proprietary volatility index. In short, the offering materials were found to have failed to adequately disclose a significant cost included in the volatility index known as the “execution factor” that imposed a cost of 1.5 percent of the index value each quarter. The notes were issued by Merrill Lynch’s parent company, BOA, and Merrill Lynch had principal responsibility for drafting and reviewing the retail pricing supplements. As a result of the failure to disclose this material information concerning the fixed costs associated with the Strategic Return Notes, the offering materials provided by Merrill Lynch and BOA were materially misleading. At or about the same time, Merrill Lynch agreed to a Letter of Acceptance, Waiver and Consent with FINRA in connection with the same disclosure violations.

Expungement is an extraordinary remedy. The Arbitrator concludes that the allegations against Ewins in Occurrence Number 1701409, and against Kowalski in Occurrence Number 1686414 were false. FINRA Rule 2080(b)(1)(C). This conclusion is based upon the fact that neither Ewins nor Kowalski was responsible for the failure of Merrill Lynch and BOA to make the requisite disclosures concerning the fixed costs associated with the Strategic Return Notes. Both Ewins and Kowalski testified credibly that they performed necessary due diligence before they recommended the Strategic Return Notes for the customers. There is no reason to conclude that either Ewins or Kowalski could have reasonably questioned the validity, accuracy and completeness of the Strategic Return Notes offering materials prior to the SEC and FINRA actions. The Arbitrator further concludes that expungement of these customer complaints will not have a material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements. Thus, the Arbitrator recommends that these customer complaints be expunged from Ewin’s CRD and Kowalski’s CRD based upon the fact that the customers’ allegations in that arbitration are false (FINRA Rule 2080 (b)(1)(C)).

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.

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 23, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session	= \$ 50.00
Hearing: March 2, 2021 1 session	

Total Hearing Session Fees	= \$ 100.00
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The Arbitrator has assessed the total hearing session fees jointly and severally to Claimants.
All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATOR

Louis H Miron

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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

Louis H Miron

Louis H Miron
Sole Public Arbitrator

03/11/2021

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 11, 2021

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