

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
David W. Nethery

Case Number: 20-02842

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Incorporated

Hearing Site: Dallas, Texas

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 David W. Nethery (“Claimant”): Harris Freedman, Esq. and Dochter Kennedy, Esq., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Respondent”): W. Preston Martin, Esq., Bressler, Amery & Ross P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: August 28, 2020.
Amended Statement of Claim filed on or about: December 14, 2020.
Claimant signed the Submission Agreement: August 27, 2020.

Statement of Answer filed on or about: October 16, 2020.
Respondent signed the Submission Agreement: October 16, 2020.

CASE SUMMARY

In the Statement of Claim, as amended, 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 asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, as amended, Claimant requested expungement of Occurrence Numbers 1092740 and 1435382, compensatory damages in the amount of \$1.00, and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested that any monetary relief be denied.

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 December 14, 2020, Claimant filed a Motion to Amend the Statement of Claim, to which no response was filed. In an Order dated December 28, 2020, the Arbitrator granted Claimant's Motion to Amend the Statement of Claim.

On March 17, 2021, Claimant advised that the customers in Occurrence Numbers 1092740 and 1435382 ("Customers") were served with the Amended Statement of Claim and notice of the date and time of the expungement hearing ("Notices"). On March 22, 2021, Claimant filed an Affidavit confirming that the Customers were served with the Notices. Claimant also filed a copy of the FedEx tracking information available online for the Notices.

The Arbitrator conducted a recorded, telephonic hearing on April 27, 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 Customers did not participate in the expungement hearing. The Arbitrator found that the Customers 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 occurrences in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Number 1435382, 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.

The Arbitrator noted that the dispute related to Occurrence Number 1092740 was 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 testimony and Claimant's Exhibits.

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 Numbers 1092740 and 1435382 from registration records maintained by the CRD for Claimant David W. Nethery (CRD Number 2179423) with the understanding that, pursuant to Notice to Members 04-16, Claimant David W. Nethery 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 for Occurrence Numbers 1092740 and 1435382:

The claim, allegation, or information is false.

For Occurrence Number 1092740, the Arbitrator has made the above Rule 2080 finding based on the following reasons:

Claimant testified that the customers had a non-discretionary account, and they authorized the three applicable stock purchases. Claimant further testified that it was Respondent's standard procedure to send trade confirmations to customers after any purchase and the customers received trade confirmations for all of the purchases in their account.

For Occurrence Number 1435382, the Arbitrator has made the above Rule 2080 finding based on the following reasons:

The transaction met the sophisticated customer's objectives. Claimant had several meetings with the customer. The customer was knowledgeable about market conditions, and the fees were discussed with the customer. Claimant testified that he provided the customer with illustrations of annuities that were in line with the customer's goals and that trade confirmations were sent to the customer. The 1035 exchange was in line with minimizing taxes. Further, the customer kept the annuity, despite the annuity's free-look period.

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 @ \$50.00/session = \$ 50.00
Pre-Hearing Conference: December 22, 2020 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing: April 27, 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

Frances Johnson Wright

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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

Frances Johnson Wright

Frances Johnson Wright
Sole Public Arbitrator

05/06/2021

Signature Date

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May 07, 2021

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