Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

<u>Claimant</u>
Michael Fasciglione

vs.

<u>Respondents</u>
National Securities Corporation
First Montauk Securities Corp.

<u>Case Number</u>: 20-03119

<u>Hearing Site</u>: New York, New York

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. Members

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

REPRESENTATION OF PARTIES

For Claimant Michael Fasciglione: Tosh Grebenik, Esq., Judex Law LLC, Broomfield, Colorado.

For Respondent National Securities Corporation: Emily A. Hayes, Esq., National Securities Corporation, New York, New York.

Respondent First Montauk Securities Corp. did not enter an appearance in this matter.

CASE INFORMATION

Statement of Claim filed on or about: September 10, 2020.
Michael Fasciglione signed the Submission Agreement: September 10, 2020.

Statement of Answer filed by Respondent National Securities Corporation on or about: November 4, 2020.
National Securities Corporation signed the Submission Agreement: November 4, 2020.

First Montauk Securities Corp. did not file a Statement of Answer or sign the Submission Agreement.

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 National Securities Corporation took no position on Claimant's expungement request.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Numbers 1455686, 1614435 and 1703546; and compensatory damages in the amount of $1.00 from each Respondent.

In the Statement of Answer, Respondent National Securities Corporation requested that Claimant pay all forum fees and costs, including any member surcharges, incurred in this proceeding.

At the hearing, Claimant withdrew the request for $1.00 in damages from each Respondent.

OTHER ISSUES CONSIDERED AND DECIDED

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

Respondent First Montauk Securities Corp. did not file a Statement of Answer or a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and is bound by the determination of the Arbitrator on all issues submitted.

On March 3, 2021, Claimant advised that the customers in Occurrence Numbers 1455686, 1614435 and 1703546 were served with the Statement of Claim and notice of the date and time of the expungement hearing.

The Arbitrator conducted a recorded, telephonic hearing on September 7, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent National Securities Corporation participated in the expungement hearing and as stated in the Statement of Answer, did not oppose the request for expungement.

Respondent First Montauk Securities Corp. did not participate in the expungement hearing.

The customers in Occurrence Numbers 1455686, 1614435 and 1703546 did not participate in the expungement hearing. The Arbitrator found that the customers and one customer's estate 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 was unable to review the settlement documentation related to Occurrence Number 1455686 due to the age of the occurrence. The Arbitrator considered the amount of payment made to any party to the settlement. Based on Claimant's testimony, 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 reviewed the settlement documentation related to Occurrence Numbers 1614435 and 1703546, considered the amounts of payments 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. Although Claimant contributed to the settlement amounts, the Arbitrator still recommends expungement since Claimant's contributions were paid pursuant to an agreement between Respondent and its insurance company that required Claimant to pay a deductible for each claim.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: the pleadings; Claimant's testimony; Claimant's BrokerCheck® Report; settlement agreements; and the exhibits.

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. The Arbitrator recommends the expungement of all references to Occurrence Number 1455686 from registration records maintained by the CRD for Claimant Michael Fasciglione (CRD Number 1806486) with the understanding that, pursuant to Notice to Members 04-16, Claimant Michael Fasciglione 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:

   > According to Claimant, the customers were accredited investors who had been clients of his since 1999. Although the account was jointly owned by a husband and wife, Claimant testified that the wife was not an active participant in trading securities in the account. They moved with Claimant when he transferred from another brokerage firm to Respondent brokerage firm. Claimant testified that the husband customer was one of the most sophisticated investors within his clientele. He had forty (40) years' investment experience and was, according to Claimant, "super-knowledgeable". Claimant testified that the customers were extremely wealthy individuals who employed "very sophisticated investment strategies". The customers had an option account, which operated as a margin account. According to the Claimant, the customers signed a margin agreement. The husband customer usually covered his positions with options. Claimant testified that the customers received documentation including trade confirmations, monthly statements

(which included fees and commissions), annual account statements, and activity letters as well as calls from Respondent's branch manager in addition to his phone conversations.

At the hearing, Claimant credibly testified that the customers had a non-discretionary account which necessarily required them to approve each transaction. In other words, Claimant could not execute a trade without their approval. Claimant recalled that "every single transaction in the account was unsolicited". The customers were provided activity letters, which they returned. Claimant testified that he would have three (3) to four (4) calls per day with the husband customer to make option trades over sixteen (16) years. The husband customer never complained during the 16-year relationship.

According to the Statement of Claim, in January 2007, the customers' account was worth approximately $500,000. During the "Great Recession" in 2007, the customers' accounts declined in value. Claimant testified that while the husband was "not frustrated" and "was trying to make it back," his wife and son began to get involved.

In April 2009, shortly after the market "bottomed out" in March 2009, as Claimant testified, the customers filed a FINRA arbitration. The dispute was settled in 2009 at mediation by Respondent First Montauk for $150,000. Claimant's testimony that he did not contribute toward the settlement is substantiated by Claimant's BrokerCheck® Report.

Claimant maintained that the customers' allegations were baseless. Based on the testimonial evidence, the Arbitrator agrees. Claimant's credible testimony establishes that the husband customer was a very sophisticated investor.

There is no evidence that Claimant made false statements, or omissions of material fact to the customers. There is no evidence that Claimant engaged in commission motivated excessive trading. In this regard, there is no evidence that Claimant controlled the customers' account and over-traded it to generate commissions. On the contrary, Claimant testified that all the transactions were unsolicited.

As such, the Arbitrator finds that the allegations on Claimant's BrokerCheck® Report are "clearly erroneous" within the meaning of FINRA Rule 2080. This customer dispute information has no regulatory or investor protection value. Under these circumstances and in equity and fairness, the Arbitrator recommends the expungement of this customer dispute information from Claimant's Central Registration Depository (CRD) record.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1614435 from registration records maintained by the CRD for Claimant Michael Fasciglione (CRD Number 1806486) with the understanding that, pursuant to Notice to Members 04-16, Claimant Michael Fasciglione 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:

According to Claimant, the customer was an accredited investor who held multiple accounts with various other broker-dealers. He testified that she was very knowledgeable and sophisticated. The customer became his client in 1999 when Claimant's business partner passed away. Claimant testified that each time he moved brokerage firms, the customer followed him to the new brokerage firm. Claimant had a 13-year relationship with the customer.

The documents, including a Subscription Agreement and the New Account Form, introduced into evidence by Claimant at the hearing established that the customer acknowledged receipt of the prospectus and clearly stated that the shares she purchased were "not liquid". According to the New Account Form, the customer had thirty (30) years' experience in stocks, bonds, options, variable annuities, and other types of investments. Her investment time horizon was five (5) to ten (10) years. She documented her net worth of $1.5 million and her annual income of $125,000. Her stated account objectives were (1) growth and income and (2) income. The customer also signed an "Alternative Investment" agreement, which was introduced into evidence by Claimant, wherein she acknowledged the alternative nature of her investment.

At the hearing, Claimant credibly testified that the customer became interested in a NYC REIT when she asked him what he was working on that kept him so busy. Claimant testified that, at her request, he sent her private placement memoranda (PPMs) for her and her son (a physician) to review. He also sent her a prospectus which advised that the REIT would be an illiquid investment. The customer ultimately invested $110,000 in the REIT and municipal bond ETFs. Claimant testified that this figure represented 7.3% of her portfolio.

Claimant testified that the customer held a non-discretionary account and, as such, was required to approve each transaction. In other words, Claimant could not make a transaction in her account without her authorization. In addition, the customer received monthly account statements, trade confirmations on each transaction, and activity letters form Compliance, which she routinely signed and returned. The customer's son also received copies of all her account paperwork and was involved in making decisions on her account. Claimant testified that he spoke with the customer very often. Claimant also testified that he executed multiple transactions in her account free of charge.

Unfortunately, the bond market crashed from November to December 2011. Claimant testified that he was "shocked" when the customer transferred her account after their 13-year business relationship on April 23, 2012. She had not previously complained. The customer filed a written complaint on May 17, 2012.

On September 28, 2012, Respondent brokerage firm settled the dispute for $80,000, of which Claimant paid the full amount pursuant to an agreement between Respondent and its insurance company to pay the deductible.

Claimant maintained that the customer's investments were suitable for her based on her financial status and investment objectives at the time, and that there was no churning. Based on the testimonial and documentary evidence, the Arbitrator agrees.

Claimant's credible testimony established that he provided the customer with the relevant risk disclosures. Based on their business relationship of 13 years, Claimant reasonably believed that the customer possessed sufficient knowledge and experience in financial matters to be capable of evaluating the investments' risks. Furthermore, the investments at issue represented a small percentage of the customer's portfolio.

There is no evidence that Claimant engaged in commission-motivated excessive trading. In this regard, there no evidence that Claimant controlled the customer's account and over-traded it to generate commissions. On the contrary, given that the customer's account was non-discretionary, all transactions were necessarily approved by the customer. Claimant also executed some transactions free of charge. Finally, market conditions shortly after the time of the customer's investments were unfavorable.

As such, the Arbitrator finds that the allegations on Claimant's BrokerCheck® Report are "false" within the meaning of FINRA Rules. This customer dispute information has no regulatory or investor protection value. Under these circumstances and in equity and fairness, the Arbitrator recommends the expungement of this customer dispute information from Claimant's Central Registration Depository (CRD) record.

3. The Arbitrator recommends the expungement of all references to Occurrence Number 1703546 from registration records maintained by the CRD for Claimant Michael Fasciglione (CRD Number 1806486) with the understanding that, pursuant to Notice to Members 04-16, Claimant Michael Fasciglione 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:

   Claimant testified that the customer was an accredited investor with a net worth of $3 million and an income of six to seven figures. Claimant testified that the customer's investment goal was to defer tax liability arising from the sale, at a significant profit, of NYC real estate. Thus, the customer had prior experience investing in real estate.

At the hearing, Claimant credibly testified that the customer contacted him at the suggestion of her accountant. She had sold a property in NYC and was seeking to reinvest in other real estate to avoid paying capital gains tax. Claimant eventually attended a meeting with the customer, her brother-in-law, and her certified public accountant to discuss a 1031 exchange into a TIC. He had numerous conference calls with the customer too. He explained to the customer that although a 1031 exchange would allow the customer to defer her tax liability as she wished, as well as other advantages, it also had disadvantages, including that many decisions would require unanimous agreement of the property owners.

Claimant also testified that given the disadvantages of owing TIC properties, he also discussed with the customer investment alternatives, including a NYC municipal bonds portfolio, which she declined because it would not allow her to defer paying the tax. Eventually, the customer and her accountant decided that she would invest in TIC properties.

Claimant testified that he arranged and paid for, and visited potential investment properties in-person with her in Virginia, Pennsylvania, Ohio and elsewhere beforehand. Claimant testified that he provided her with private placement memoranda (PPMs), approved by Respondent, which described the features and risks of investing in TIC properties. The customer's attorney also reviewed the PPMs. Furthermore, he testified that the customer also performed her own due diligence, including looking into the surrounding demographics of the properties and even the nature of the soil on which one of the properties was built. According to Claimant, when Claimant met with the customer's attorney, the latter questioned his fees and Claimant agreed to reduce his commission.

The customer ultimately made four real estate investments totaling $1.7 million between April and July 2008. To do so, she signed numerous disclosure forms. Claimant testified that the TICs were a suitable investment for the customer at the time given her net worth, her income, her level of sophistication and her previous experience in investing in real estate. Claimant also testified that each of the four properties in which the customer invested required multiple approvals - the customer's, Claimant's branch manager's, Respondent's alternative investments division's and the 1031 exchange companies.

Unfortunately, the stock market crashed on September 29, 2008, shortly after the customer invested in TICs. The housing bubble collapsed, significantly impacting real estate. Claimant testified that the TICs were forced to make concessions on rent and eventually stopped making monthly distributions to investors, including the customer.

The customer never complained to Claimant or Respondent. Claimant first learned of her dissatisfaction when she filed a FINRA arbitration against Respondent and Claimant in 2014, approximately six years later, seeking the full amount of her investment - $1.7 million.

Despite Claimant's desire not to settle, Respondent settled with the customer at mediation. The customer insisted that Claimant give up his commission on the sale. Accordingly, Claimant contributed approximately $82,000 toward the settlement. As of

the time the Settlement Agreement was entered into, the customer still owned the TIC properties.

Claimant maintained that "he did everything he possibly could for" the customer. Based on the testimonial evidence, the Arbitrator agrees. There is no evidence that Claimant misled the customer. The TIC investments were suitable at the time for this customer's financial status and consistent with her objective to defer paying taxes. Claimant disclosed the risks of investing in TICs with the customer through the offering documents and during meetings and conference calls. Claimant also scheduled meetings for the customer to meet with representatives of the TIC sponsor companies. Claimant offered the customer the alternative of investing in bond portfolios. Furthermore, the customer had the benefit of consulting with several independent professionals. Ultimately, the investments were approved by the customer, the customer's professionals, Respondent's employees, and the TIC representatives. Finally, the customer's investments were made shortly before the stock market and the real estate market collapsed. As such, the Arbitrator finds that the allegations on Claimant's BrokerCheck® Report are "clearly erroneous" and "False" within the meaning of FINRA Rules. This customer dispute information has no regulatory or investor protection value. Under these circumstances and in equity and fairness, the Arbitrator recommends the expungement of this customer dispute information from Claimant's Central Registration Depository (CRD) record.

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 firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents are each 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: January 12, 2021 1 session

One (1) hearing session on expungement request @ $50.00/session =$ 50.00
Hearing: September 7, 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

Annamaria Boccia Smith - Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

Annamaria Boccia Smith
Annamaria Boccia Smith
Sole Public Arbitrator

09/15/2021
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.

September 16, 2021
Date of Service (For FINRA Dispute Resolution Services use only)