Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Mitchell Dean Horst

Case Number: 20-03136

vs.

Respondent
Morgan Stanley

Hearing Site: Las Vegas, Nevada

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

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

REPRESENTATION OF PARTIES

For Claimant Mitchell Dean Horst ("Claimant"): Brian R. Luther, Esq., FA Expungement, LLC, Denver, Colorado.

For Respondent Morgan Stanley ("Respondent"): Jeffrey P. Palmer, Esq., Greenberg Traurig, LLP, East Palo Alto, California.

CASE INFORMATION

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

Statement of Answer filed by Respondent on or about: November 9, 2020.
Respondent signed the Submission Agreement: November 10, 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 denied the allegations made in the Statement of Claim, did not oppose Claimant's expungement request, and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of Occurrence Numbers 1458533 and 1498940 from Claimant's CRD records, pursuant to FINRA Rile 2080(b)(1)(A), as the claims, allegations, or information are factually impossible and clearly erroneous;
2. Expungement of Occurrence Numbers 1458533 and 1498940 from Claimant's CRD record, pursuant to FINRA Rule (2080(b)(1)(C), as the claims, allegations, or information are false; and
3. Compensatory damages in the amount of $1.00 from Respondent.

In the Statement of Answer, Respondent requested:

1. Claimant take nothing from Respondent by reason of the Statement of Claim; and
2. Relief the Arbitrator may deem appropriate.

At the hearing, Claimant withdrew his 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 1, 2021, Claimant filed a letter confirming that the customer in Occurrence Number 1458533 ("Mr. G") and the customers in Occurrence Number 1498940 ("Mr. & Mrs. K") were served with the Statement of Claim and notice of the date and time of the expungement hearing.

Hereinafter, Mr. G and Mr. & Mrs. K are collectively referred to as "Customers".

On February 21, 2021, Claimant filed copies of the certified mail delivery confirmations confirming that the Customers 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 March 25, 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, did not oppose 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 has not previously ruled on expungement of the same occurrences in the CRD.

The Arbitrator noted that the disputes related to Occurrence Numbers 1458533 and 1498940 were not settled and, therefore, there were no settlement documents to review.

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

AWARD

After considering the pleadings, the testimony and evidence presented at the 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 1498940 from registration records maintained by the CRD for Claimant Mitchell Dean Horst (CRD Number 4935063) with the understanding that, pursuant to Notice to Members 04-16, Claimant Mitchell Dean Horst 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

   The claim, allegation, or information is false.

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

   Occurrence Number 1498940

   Mr. & Mrs. K were introduced to Claimant in March 2009. They were in their early 70's and got their main income from a $5,000,000 bond fund managed elsewhere. Mr. & Mrs. K told Claimant that they previously lost $1,000,000 in the stock market and had negative experiences with two past advisors. They met with Claimant and his co-advisor/partner ("Mr. G") several times before they signed on to a non-discretionary transaction-based account. Mr. & Mrs. K did not want a fee account and were vociferously adverse to paying commissions. Claimant and Mr. G designed a balanced equity/bonds investment plan based on Mr. & Mrs. K's investor profile. Claimant testified that he and Mr. G calculated and then told Mr. & Mrs. K that commissions to create a portfolio would be about $17,000 and the maintenance fee would be about $7,000 to $10,000 per year. Claimant said Mr. & Mrs. K understood and were in agreement. Mr. & Mrs. K decided to go home and think about it. On April 3, 2010, Mr. & Mrs. K signed the account agreement and instructed Claimant and Mr. G to proceed. In the ensuing months, Mr. & Mrs. K praised Claimant and Mr. G repeatedly and gave them gifts. Mr. & Mrs. K contrasted the results that Claimant achieved against the inferior results from their other investment professionals. Approximately eight months after Claimant and Mr. G managed Mr. & Mrs. K's portfolio, it increased in value by $450,000 to $500,000. There were no complaints about suitability, but only about the commissions. Mr. K approved or rejected every investment beforehand. Mr. & Mrs. K received monthly statements and accessed the account online. In meetings, they complained about the commissions. In the face of what they believed was assiduous and dedicated work, Claimant and Mr. G grew tired of these complaints and asked Mr. & Mrs. K to find another investment advisor. Mr. & Mrs. K reluctantly agreed and took their account

elsewhere. In parting, Mr. & Mrs. K sent an email (not in evidence) saying that they would miss Claimant and Mr. G.

Mr. & Mrs. K's claim or allegation in the occurrence was: "Clients claimed that their instructions were not followed with regard to their asset allocation". The complaint was received by Respondent on February 2, 2010. This was a few months after Mr. & Mrs. K moved their account. The pleadings and exhibits included three contemporaneously written statements—two of them which were by Mrs. K--that showed the allegation of misallocation was clearly erroneous or false. A letter dated March 26, 2010 confirming Respondent meeting with Mr. & Mrs. K on February 24, 2010 mentioned only their complaint about the commissions. There was no mention of the asset allocation concerns. This was at least three months after Mr. & Mrs. K moved the account from Claimant and Mr. G. The next is an email from Mrs. K dated July 24, 2010. Again, there was no mention of asset allocation grievances. Mrs. K sent this email at least seven months after the account moved. The third is a demand letter dated July 28, 2010 from Mrs. K to Mr. G only. Claimant testified that he only saw it when Mr. G showed it to him. This letter is detailed, and again, only mentions alleged misrepresented commissions, not misallocation. Mrs. K demanded $8,000 in reimbursement for the commissions. She threatened to go to court.

It was only after Respondent formally rejected these commission claims on September 3, 2010 through a letter that--consistently--only discusses the commission claims, Mr. & Mrs. K concocted a new grievance: that Claimant "purchased bonds or bond funds against their instructions". This new charge is stated in Respondent's December 16, 2010 response letter to FINRA's lengthy inquiry letter at section 1(e), p. 3. Claimant's detailed response to this new charge--which is the one that reached his CRD records as a claim of misallocation--eviscerates Mr. & Mrs. K's newly minted claim especially when read in conjunction with the three other writings discussed above--that only mention commissions, and not suitability--along with other substantial evidence in the exhibits and in the oral testimony. Accordingly, expungement is recommended for Occurrence Number 1498940.

2. Claimant's request for expungement of Occurrence Number 1458533 from his registration records maintained by the CRD is denied:

Occurrence Number 1458533

Claimant met Mr. G at a networking event in February 2009. They met twice again and then based on Claimant's recommendation, Mr. G invested about $80,000 in three closed-end bond funds through a non-discretionary fixed fee "Advisory Program" account held at Respondent. Claimant characterized the investments as "investment grade" suitable for either novices or experienced investors. It appears undisputed that before Mr. G invested, Claimant gave Mr. G and discussed with him to some extent the performance histories that may have included charts on all the funds. Claimant said the charts were Morningstar, but the sample included in exhibits was dated March 31, 2009, which was over a month after Mr. G invested so that chart was not the one Claimant gave to Mr. G. The investments were placed in the account of Mr. G's closely held business brokerage corporation.

The funds' values immediately declined by about $5,000. Mr. G met with Claimant to express his dismay and surprise, but declined to sell the funds. Mr. G made written complaints to the Nevada Secretary of State which forwarded them to Respondent for its response. Mr. G's

written allegations, the competing Respondent and Claimant's exchanges, and related correspondence were included in the exhibits. Among these exchanges was Mr. G's April 2009 response letter to Respondent with a detailed statement of Mr. G's grievances. The gist is that Claimant misrepresented to Mr. G that the investments "would not move up or down more than one cent" and "would perform closely in line with a CD". The funds declined more than that fairly quickly and according to Mr. G, they were unsuitable. Mr. G also alleged that Claimant misstated Mr. G's investment experience. There was a dispute about whether Mr. G told Claimant that Mr. G needed the invested money in short order for a real estate investment. That does not really matter as the fund was liquid. So, the question is whether Claimant made a false oral representation that the return on his funds would be essentially static, like a CD. The Arbitrator questioned Claimant about the letters and the allegations and reviewed the documents in the exhibits again after the hearing.

Despite the doubtful nature of Mr. G's assertion, the evidence does not support a finding that the claim and allegation that Claimant misrepresented the funds' volatility is "factually impossible or clearly erroneous" under FINRA Rule 2080(b)(1)(A). It is not possible to conclude with the required degree of certainty from the exhibits and Claimant's testimony that Claimant never made the representation, thereby making the claim of non-volatility false under FINA Rule 2080 (b)(1)(c). Accordingly, expungement of Occurrence Number 1458533 is denied.

3. 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 that employed the associated person at the time of the events 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: January 14, 2021 1 session		

One (1) hearing session on expungement request @ $50.00/session	=$	50.00
Hearing: March 25, 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

Thomas E. Shuck - 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 **04/08/2021**

Thomas E Shuck
Sole Public Arbitrator

Signature Date

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April 08, 2021
Date of Service (For FINRA Dispute Resolution Services use only)