Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Michael Fasciglione

vs.

Respondents
National Securities Corporation
Oppenheimer & Co., Inc.

Case Number: 20-03148

Hearing Site: 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, J.D., Judex Law LLC, Broomfield, Colorado.

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

For Respondent Oppenheimer & Co., Inc.: Nicola Anne Murphy, Esq., Oppenheimer & Co. Inc, New York, New York.

CASE INFORMATION

Amended Statement of Claim filed on or about: September 27, 2020.
Michael Fasciglione signed the Submission Agreement: September 10, 2020.

Statement of Answer filed by Respondent National Securities Corporation on or about: November 13, 2020.
National Securities Corporation signed the Submission Agreement: November 13, 2020.

Statement of Answer filed by Respondent Oppenheimer & Co., Inc on or about: November 17, 2020.
Oppenheimer & Co., Inc. signed the Submission Agreement: November 17, 2020.

CASE SUMMARY

In the Amended Statement of Claim, Claimant asserted a claim seeking expungement of customer dispute information from his 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.

In the Statement of Answer, Respondent Oppenheimer & Co., Inc. denied the allegations made in the Statement of Claim, but stated that it did not oppose Claimant's expungement request.

RELIEF REQUESTED

In the Amended Statement of Claim, Claimant requested: expungement of Occurrence Numbers 1053337 and 1971132 and compensatory damages in the amount of $1.00 from Respondents.

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

In the Statement of Answer, Respondent Oppenheimer & Co., Inc. did not set forth a specific relief request.

OTHER ISSUES CONSIDERED AND DECIDED

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

A Statement of Claim was filed on September 10, 2020. It was not served on Respondents and not considered by the Arbitrator.

On March 3, 2021, Claimant advised that the customers in Occurrence Numbers 1053337 and 1971132 were served with the Statement of Claim and notice of the date and time of the expungement hearing.

The Arbitrator conducted recorded, telephonic hearings on August 17, 2021 and September 14, 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. Respondent Oppenheimer & Co., Inc. did not participate in the expungement hearing.

The customers also 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 1971132, 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 1053337 was not settled and, therefore, there was no settlement document to review.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's testimony; pleadings; Claimant's BrokerCheck® Report; 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. Claimant's claim for $1.00 in compensatory damages is denied.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1053337 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 registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

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

   > This incident involved a complaint by customers against Josephthal & Co., Inc. for transactions alleged to have taken place in 2001 through 2002. Josephthal & Co., Inc. was subsequently acquired by Oppenheimer and Co. and is no longer in operation. In the Statement of Claim, NASD Arbitration (Case No. 01-04996), the customers alleged suitability, churning, switching, breach of contract, negligence, breach of fiduciary duty, and fraud. Claimant was also named in the complaint, as was the broker of record. The panel in the arbitration proceeding made the following awards:1) Respondent Josephthal & Co., Inc. is liable to and shall pay Claimant the Stanley Kudla IRA the sum of $22,776.00 in compensatory damages. 2) Respondent Josephthal & Co., Inc. is liable to

and shall pay Claimant the Jeff J. Kudla SEP IRA the sum of $9,006.00 in compensatory damages. 3) Respondent Josephthal & Co., Inc. is liable to and shall pay Claimant Jeff J. Kudla, an individual, the sum of $64,413.90 in compensatory damages. 4) Respondent Josephthal & Co., Inc. is liable to and shall pay Claimant Jon Kudla, an individual, the sum of $34,634.25 in compensatory damages. 5) This Award shall bear interest at the rate of 10% per annum on any balance that remains unpaid thirty (30) days after receipt hereof, unless a motion to vacate has been filed with a court of competent jurisdiction. If this award is the subject of a motion to vacate that is subsequently denied, this award shall bear interest at the rate of 10% per annum on any balance that remains unpaid from date of the court's order denying said motion to vacate. 6) The parties shall bear their respective costs, including attorney's fees. 7) All other relief requested and not expressly granted is denied. The second relevant document which was considered was Claimant's Archived Disclosures, insofar as this incident is not found on Claimant's BrokerCheck report. According to Claimant, this information is not available to the general public, but it is available to regulatory agencies and to compliance officers.

The noteworthy comments in this report are that for Occurrence Number 1053337, NASD-DR 01-04996, the disposition is "denied," and the comment is "CLAIMANT'S CLAIMS WERE DENIED BY THE ARBITRATION PANEL." Claimant testified in relevant part, that for a brief period of time, January 2000, to May 2000, he was the branch manager where, the broker of record for the customers worked. He never met the customers and never made any transactions on their behalf. The customers' accounts were non-discretionary, and all transactions must be approved on the phone or in person. Trade confirmations are made by the clearing agency, not the brokers. The customers received statements providing information such as balances dividends or other information. The broker cannot modify the statement, either. As a manager, Claimant would have been able to see the account, but once he was no longer a manager, he could not. He would not be able to earn a commission or engage in churning or switching. The NASD complaint was filed on September 17, 2001, and the Respondent recalled being called to testify at the arbitration very briefly, for about ten minutes, and then being excused by the panel. The arbitration was the first time that he ever met the customer. He further testified that he was never mentioned in the award. He never engaged in any switching, suitability or churning issues. He did not have a contract with the customers, nor was he in a relationship where there was a fiduciary duty which was breached. The Respondent already appeared before an adjudicatory agency for the same subject matter as was described in this occurrence and participated in a hearing on the merits. The panel declined to enter any award against Claimant. The archived disclosure itself already reflects that there was a denial of the claim by the arbitration panel. While information about a broker is often essential for the benefit of future investors and is a critical source of information for regulatory agencies, here, I do not believe such a purpose is being served, insofar as there was no substantive information about this incident other than that there was a claim that was denied as to Claimant. To the extent that Claimant's testimony at this hearing was not rebutted and is not inconsistent with the documentary evidence, I find it credible. I find that he had no contact with the customers and did not have any responsibility towards that account. It appears that Claimant's only connection to the original charges was that he was at one time the manager of the broker of record. However, the record is unclear if the incidents alleged by the original

customers even took place during that period that Claimant had that responsibility. It should also be noted that the original panel declined to enter an award against the broker of record, Claimant's one time subordinate, who did in fact have a direct connection to the customers. Accordingly, expungement is recommended.

3. The Arbitrator recommends the expungement of all references to Occurrence Number 1971132 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 findings based on the following reasons:

   This incident involved a complaint by a customer of American Capital Partners, against the company and Claimant. Claimant testified that this complaint involved an allegation of misrepresentation by the customer. Claimant became familiar with the customer several years before the incident when he managed a 401K that the customer had with his employer. When he no longer worked for that employer, he wanted to change his 401K to an IRA. Claimant met with the customer and assessed his risk tolerance, objectives, age, assets and overall knowledge of the market. He spoke to the customer about several different types of investments. One was a Real Estate Investment Trust ("REIT"), which the company had had success with in the past. This type of investment paid a monthly dividend, which the customer appreciated. It was not publicly traded and was described as a mutual fund with real estate, that is an investment trust. This type of trust had been used before by Claimant's coworkers, with a good degree of success. The original trust was no longer open; however, the investment was through a company known as American Realty Capital ("ARC"), which paid a 6% annual dividend in monthly payments. It was not traded so there was no market risk. Not all potential customers were allowed in, because there was a higher risk due to lack of liquidity. One would need to have either $250,000.00 in income or a million in net cash. This type of investment could not be purchased exclusively. It requires 10% of the net worth for a single investment, and one could not have more than 20% in alternative investments. This requirement, set by Claimant, was more stringent than that shown in the company's Alternative Investment Order Transmittal Form which required a minimum of $70,000.00 in gross income and $70,000.00 net worth, or $250,000.00 net worth, with a maximum of 10% investable assets. The investment not only provided monthly dividends, but it is valuable as NYC properties tend to appreciate, and when it is sold, it benefits the investor. The first investment of this type that was sold by Claimant's coworkers lasted one year, and it appreciated by 16%. The investment is now public, meaning that the investor is free to sell whenever he wishes. At the time, this option was also available, but it was somewhat

more complicated. The customer had left the company he was working for and moved to North Carolina. He made an application to take out his money from the investment based upon a hardship. Claimant and his company helped the customer with his application, but ARC rejected it. They have the final say on the decision. Before making this investment, it needs to be approved on several different levels, which included Claimant's company's own compliance review, and a review from ARC. Claimant further testified that at the time of the settlement of this matter, the customer still owned the investment, and in the end, may have made money. As the amount at issue was only $15,000.00, the company was more interested in settling it, because it would be easier and less costly to pay the fees associated with litigation. While the customer owned the REIT, Claimant conferred with him twice a month. Since the company was not traded, the values did not go up or down, and the dividends came from the rents. The customer had lost his job, but before he lost his job, he was satisfied with receiving the dividends and showed no frustration or disapproval about the investment. The customer was sent a private placement memorandum, as well as an alternative investment disclosure form, which addressed the suitability of this customer for this investment. Until the customer lost his job, he made no claims of hardship. After that, he came under pressure and started making claims of hardship. However, that determination was not in Claimant's hands.

After ARC denied the claim, the customer filed the complaint about a month later. National Securities Capital investigated the claim, but by then, Claimant was no longer working there. Claimant in not named in the settlement, did not sign the settlement agreement, was not involved in the settlement, and did not contribute any money to the settlement. The customer had been given a prospectus advising him that the investment could involve a high degree of risk, and that one should only invest if one could afford the entire loss. The alternative investment disclosure was either sent to, or delivered to, the customer. As to this complaint, it appears that it arose from a claim of misrepresentation regarding a single investment, I find based upon the uncontroverted testimony and evidence adduced, that this claim was false. There were stringent rules that were followed to allow the customer to participate in this type of investment, and at the time the customer more than met the qualifications for suitability. The customer was initially satisfied with the investment and this changed only because of an unforeseen change in the customer's personal circumstances. The customer received numerous advisements from Claimant and National Securities Corporation that the investment was illiquid and should only be entered into if one was in a position to lose the entire investment. The lack of liquidity was beyond the control of both Claimant and National Securities Corporation, despite the fact that attempts were made to secure a hardship exemption from ARC. I also consider that the settlement was relatively small, and that the time of costs of protracted litigation could well be higher. I further considered that Claimant, who was no longer with the company, had no input in determining the settlement and was not expected to contribute to it. Based upon the foregoing, expungement of this claim is recommended.

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 National Securities Corporation and Oppenheimer & Co., Inc. 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 19, 2021	1 session		
Two (2) hearing sessions on expungement request @ $50.00/session			=$	100.00
Hearings:	August 17, 2021	1 session		
	September 14, 2021	1 session		
Total Hearing Session Fees			=$	150.00

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

Amy Jill Baranoff - 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

Amy Jill Baranoff **09/27/2021**

Amy Jill Baranoff
Sole Public Arbitrator

Signature Date

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September 27, 2021
Date of Service (For FINRA Dispute Resolution Services use only)