

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimant  
Baerbel O'Haire

Case Number: 21-00117

vs.

Respondent  
Merrill Lynch Pierce Fenner & Smith Incorporated

Hearing Site: Boca Raton, Florida

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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 Baerbel O'Haire: Harris Freedman, Esq., HLBS Law, Westminster, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Incorporated (“MLPFS”): Kathryn D. Perreault, Esq. and Joel Everest, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: January 18, 2021.

Baerbel O'Haire signed the Submission Agreement: January 18, 2021.

Amended Statement of Claim filed on or about: March 25, 2021.

Answer to the Amended Statement of Claim filed by Respondent on or about: April 27, 2021.

Merrill Lynch Pierce Fenner & Smith Incorporated signed the Submission Agreement: April 29, 2021.

**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 Answer to the Amended Statement of Claim, Respondent took no position on Claimant’s expungement requests and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, as amended, Claimant requested expungement of Occurrence Numbers 775904, 1145158, and 1892141, and for any and all other relief that the Arbitrator deemed just and equitable.

In the Answer to the Amended Statement of Claim, Respondent did not delineate a relief request.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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

On March 25, 2021, Claimant amended the Statement of Claim to remove a request for expungement of a customer complaint.

On August 9, 2021, Claimant advised that one of the customers (wife) in Occurrence Number 775904, as well as the customers in Occurrence Numbers 1145158 and 1892141 (all collectively referred to herein as the "Customers") were served with the Statement of Claim and notice of the date and time of the expungement hearing.

On August 9, 2021, Claimant filed with FINRA Dispute Resolution Services a copy of a Lexis Nexis document reflecting the death record for one of the Customers (husband) in Occurrence Number 775904.

On September 2, 2021, FINRA Dispute Resolution Services received a submission from one of the customers (wife) in Occurrence Number 775904, in which she provided her summary of the alleged actions that occurred with the purchase of the annuities at issue.

On October 4, 2021, Claimant filed with FINRA Dispute Resolution Services an Affidavit attesting that on September 27, 2021, a Notice of Expungement was served upon the Customers.

On October 11, 2021, Claimant filed with FINRA Dispute Resolution Services an Affidavit attesting that on October 5, 2021, a Notice of Expungement was served upon the registered agent for the Customers in Occurrence Number 775904.

The Arbitrator conducted a recorded, telephonic hearing on November 3, 2021, so the parties could present oral argument and evidence on Claimant's requests for expungement.

Respondent participated in the expungement hearing and as stated in its Answer, took no position as to Claimant's requests for expungement.

The Customers did not participate in the expungement hearing. The Arbitrator found that the Customers had notice of the expungement requests 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.

On August 27, 2021, Respondent confirmed to Claimant in writing that it did not have the settlement agreement for Occurrence Number 775904. Inasmuch as Claimant also did not have a copy of the settlement agreement for Occurrence Number 775904, there was no settlement document for the Arbitrator to review.

The Arbitrator noted that the complaint related to Occurrence Number 1145158 was not settled and, therefore, there was no settlement document to review.

The Arbitrator reviewed the settlement documentation related to Occurrence Number 1892141, considered the amount of payment made to any party to the settlements, 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.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's Amended Statement of Claim; Respondent's Answer to the Amended Statement of Claim; the settlement agreement for Occurrence Number 1892141; Claimant's BrokerCheck® report; Claimant's testimony; and case related correspondence.

### **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:

The Arbitrator recommends the expungement of all references to Occurrence Numbers 775904, 1145158, and 1892141 from registration records maintained by the CRD for Claimant Baerbel O'Haire (CRD Number 1457604) with the understanding that, pursuant to Notice to Members 04-16, Claimant Baerbel O'Haire 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:

#### As to Occurrence Number 775904

The Customers became clients of Claimant in the early 1990s. They were retired and in their 60s and 70s. The Customers were conservative investors, and their primary objective was preservation of principal with a low risk tolerance. Claimant recommended a fixed annuity that would pay the Customers a specific, guaranteed interest rate and since it was not tied to the stock market, it carried no risk. Claimant explained all the

details of the annuity to the Customers, including all costs, fees, risks, terms, features, and benefits. Based on Claimant's credible testimony, Claimant and the Customers discussed the tax deferred nature of the annuity and the Customers spoke to their tax professional regarding the annuity, as well. The Customers made all of the investment decisions in their accounts, including their company account ("Company Customer"). The Customers purchased the annuity. For five years the Customers were pleased with their investments. Subsequently, when the annuity matured, they were displeased that they had to pay taxes on accrued interest. The Company Customer filed a complaint with Respondent, which in April 2000, was reported to CRD and Claimant's BrokerCheck® report. The complaint alleged that the annuities purchased were unsuitable and the Company Customer made a claim for \$68,000.00. As a business decision, Respondent MLPFS settled the claim for a fraction of the amount. Claimant did not participate in the settlement negotiations, did not contribute to the settlement, and the settlement was not contingent on expungement from Claimant's records.

The Customers were notified of the expungement hearing and were given the choice to participate. One of the Customers (the wife) sent a letter complaining of the tax liability. The letter did not address Claimant nor make any complaint regarding any unsuitability in the Company Customer's account. The Customers chose not to participate in the expungement hearing.

Because Claimant made suitable recommendations and performed her duties in a thorough, ethical and professional manner, the allegations in the CRD and Claimant's BrokerCheck® Report are false. The false allegations on CRD and Claimant's BrokerCheck® Report harm Claimant's reputation by misinforming the public of her conduct towards the Company Customer's account. The disclosure makes the records inaccurate and convey the false impression that Claimant acted improperly. There is not a benefit to the investing public that outweighs the harm to Claimant's reputation through the continued disclosure of this incident.

For all the above reasons, Claimant is entitled to have this incident expunged from her CRD records and Claimant's BrokerCheck® report under FINRA Rule 2080 (b)(1)(C) "the claim, allegation or information is false."

As to Occurrence Number 1145158

The Customer became a client of Claimant sometime in the 1990s. Based on the Customer's investor profile, Claimant made investment recommendations to the Customer that included equities. Claimant explained all details of her recommendations, including costs, fees, risks, terms, advantages, and disadvantages to the Customer. The Customer purchased the securities. Claimant and the Customer spoke several times a week regarding the securities in the Customer's account. Claimant recommended the Customer reduce her risk exposure by purchasing preferred stock, but the Customer did not follow her recommendations and continued to make unsolicited stock purchases that furthered her risk exposure. About 75% of the purchases made in the Customer's account were unsolicited purchases.

In May 2003, the Customer's complaint was reported to CRD and Claimant's BrokerCheck® report. The Customer alleged that the investment recommendations in her account were unsuitable and specified no damages. Respondent MLPFS investigated

the allegations and determined that they were without merit. Respondent MLPFS found that the Customer sought to achieve a higher level of return and follow a more aggressive approach than that recommended by Claimant. Respondents denied the claim and the Customer didn't pursue the complaint any further.

The Customer's claim that the investment recommendations in her account were unsuitable is clearly erroneous because the recommendations made by Claimant were based on the Customer's investment profile and the Customer had directed most of the trades made in the account based on a more aggressive approach than Claimant recommended. Because the allegations made in CRD and Claimant's BrokerCheck® Report are false allegations that do not offer any public protection and have no regulatory value, and mislead the person reviewing CRD and Claimant's BrokerCheck® Report, they should be expunged. This request for expungement meets the criteria for expungement under FINRA Rule 2080 (b)(1)(C) "the claim, allegation or information is false."

As to Occurrence Number 1892141

The Customers became clients of Claimants in March 2010. The Customers were retired in their 60s and 70s. Initially, the Customers wanted a high cash flow and had a moderate risk tolerance. After the husband suffered a health scare, the Customers decided they wanted a substantially higher cash flow and indicated to Claimant that they wanted to invest more aggressively. Claimant pleaded with the Customers to reduce their risk exposure and the Customers rejected her recommendations. The Customers would not invest in any securities that did not yield at least 10% or more. Claimant recommended a Master Limited Partnership ("MLP") as part of the strategy to substantially increase their cash flow. The Customers were pleased with the high yielding investment and directed the Claimant to purchase several MLPs. Claimant discouraged these purchases, but the Customers continued purchasing MLPs.

While the market stayed strong, the Customers were very pleased. However, eventually the market went down, and this triggered the Customers to file an arbitration with FINRA Dispute Resolution Services (Arbitration Number 16-01753) claiming unsuitable recommendations and misrepresentation. These allegations are false and are contradicted by the evidence. The Customers were the ones to direct most of the purchases in dispute in their quest for an extremely high cash flow. Claimant made sure that the Customers understood the risks of concentrating their portfolio in MLPs, but the Customers ignored the risks of concentrating their portfolio in their pursuit of a higher cash flow. In their arbitration complaint, the Customers alleged damages of \$470,000.00. To avoid the costs of litigation, Respondent MLPFS settled the claim for a fraction of the amount claimed. Claimant did not participate in, or contribute to the settlement, and the settlement was not contingent upon expungement of the Claimant's records.

This request for expungement meets the standard for expungement under FINRA Rule 2080 (b)(1)(C) "the claim, allegation or information is false." Because Claimant made suitable recommendations, fully and accurately represented the MLPs, and performed her duties as a representative in a thorough and professional manner, the public disclosure of the false allegation not only makes the record inaccurate but does not offer any protection to the investing public and has no regulatory value. If not expunged, any

person reviewing CRD and Claimant's BrokerCheck® Report will be misled regarding Claimant's ethical conduct.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution Services assessed a filing fee\* for each claim:

Expungement Filing Fee = \$ 1,575.00

*\*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 MLPFS is assessed the following:

Member Surcharge = \$ 1,900.00

Member Process Fee = \$ 3,750.00

#### **Postponement Fees**

Postponements granted during these proceedings for which fees were assessed or waived:

September 15, 2021, postponement requested by Claimant = \$ WAIVED

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Total Postponement Fees = \$ WAIVED

The Arbitrator has waived the postponement fees.

#### **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 @ \$1,125.00/session = \$ 1,125.00

Pre-Hearing Conference: May 10, 2021 1 session

One (1) hearing session on expungement request @ \$1,125.00/session = \$ 1,125.00

Hearing: November 3, 2021 1 session

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Total Hearing Session Fees = \$ 2,250.00

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**

Elena G. Rodriguez

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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**

***Elena G. Rodriguez***

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Elena G. Rodriguez  
Sole Public Arbitrator

**11/11/2021**

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Signature Date

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November 11, 2021

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