

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
James Allen Atwood

Case Number: 21-00133

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Incorporated

Hearing Site: Boston, Massachusetts

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 James Allen Atwood: Dochter Kennedy, MBA J.D., and Harris Freedman, Esq., AdvisorLaw LLC, Westminster, Colorado.

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

CASE INFORMATION

Statement of Claim filed on or about: January 20, 2021.

James Allen Atwood signed the Submission Agreement: January 20, 2021.

Statement of Answer filed by Respondent on or about: February 1, 2021.

Merrill Lynch, Pierce, Fenner & Smith Incorporated signed the Submission Agreement: February 1, 2021.

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 took no position on Claimant’s expungement request and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Numbers 62200, 266187, and 1981410; delete accompanying Disclosure Reporting Pages; and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested that any request for damages be denied.

OTHER ISSUES CONSIDERED AND DECIDED

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

By correspondence dated February 1, 2021, the parties agreed, pursuant to Rule 13401(c) of the Code of Arbitration Procedure ("Code"), to proceed with a single arbitrator for this matter.

On August 23, 2021, Claimant advised that the customers in Occurrence Numbers 266187 and 1981410 were served with the Statement of Claim and notice of the date and time of the expungement hearing. On August 30, 2021, Claimant filed an Affidavit confirming that the customers were served with the Statement of Claim and notice of the date and time of the expungement hearing. Claimant also advised that he was unable to serve the Statement of Claim and the notice of the expungement hearing on the customers related to Occurrence Number 62200 as the customers are deceased.

The Arbitrator conducted a recorded, telephonic hearing on September 28, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing.

The customers did not participate in the expungement hearing. The Arbitrator found that the customers in Occurrence Numbers 266187 and 1981410 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 documents related to Occurrence Numbers 62200 and 266187. Due to the age of the underlying occurrences, the actual Settlement Agreements disposing of the claims were unavailable. The Arbitrator considered the amount of payment made to any party to the settlements. Based on Claimant's testimony, the Arbitrator noted that the settlements were not conditioned on any party to the settlement not opposing the expungement request and that Claimant did not contribute to the settlement amount for Occurrence Number 266187. Despite Claimant's contribution to the settlement amount in Occurrence Number 62200, the Arbitrator recommends expungement of this occurrence because Claimant's contribution was required by the firm pursuant to an indemnification clause in Claimant's employment contract.

The Arbitrator reviewed the settlement documentation related to Occurrence Number 1981410, 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 amounts.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's BrokerCheck® Report, the pleadings, Claimant's testimony, and the 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 Number 62200 from registration records maintained by the CRD for Claimant James Allen Atwood (CRD Number 1268625) with the understanding that, pursuant to Notice to Members 04-16, Claimant James Allen Atwood 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:

The customers, retired and in their 70s, had modest investment experience and modest funds to invest. They were seeking a better return than what they were receiving with a moderate risk tolerance. Some of the customers funds were invested on a solicited basis and some on an unsolicited basis. Approximately 80% of the funds invested through Claimant were placed in a high-quality bond fund and the remaining 20% were invested in covered call options against high quality stocks, a very conservative approach. The bond fund's price declined subsequently; the customers did not raise any complaints to Claimant. When the customers died, an heir lodged a complaint and "alleged unsuitability with respect to options trading and account having been margined". No evidence presented supports the claims; on the contrary, the claim would appear to be based on the decline in the value of the bond fund. The case was settled in 1988; Claimant contributed 18.4% of the settlement amount which was required by an indemnification clause in his employment contract, not due to any wrongdoing on his part. Based on all the evidence presented, the Arbitrator finds the claim to be false.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 266187 from registration records maintained by the CRD for Claimant James Allen Atwood (CRD Number 1268625) with the understanding that, pursuant to Notice to Members 04-16,

Claimant James Allen Atwood 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:

The evidence presented, and not contradicted, is that the customers were very experienced investors. Claimant ascertained that the customers’ investment objectives were long-term growth with a high-risk tolerance. Claimant made investment recommendations, including the purchase of B-share mutual funds, the back-end sales charge of these funds was discussed, the prospectus was provided, and B-shares were purchased by customers. The customers sold the B-shares, incurring back-end sales charges, on an unsolicited basis earlier than anticipated without consulting Claimant. The customers claim that Claimant “misrepresented the commissions regarding mutual funds” is not supported by any evidence. Based on all the evidence provided, the Arbitrator finds the claim to be false.

3. The Arbitrator recommends the expungement of all references to Occurrence Number 1981410 from registration records maintained by the CRD for Claimant James Allen Atwood (CRD Number 1268625) with the understanding that, pursuant to Notice to Members 04-16, Claimant James Allen Atwood 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:

The customers were very experienced investors with a very high net worth. In discussion, it was determined that the customers’ investment objectives were for total return with a high-risk tolerance within a Charitable Remainder Trust (“CRT”). A dividend growth portfolio was selected as the preferred approach. It was further ascertained that approximately 20% of the assets within the CRT would be Master Limited Partnerships (“MLP”) held by the customers. Due to questions raised with respect to Unrelated Business Taxable Income (“UBTI”), Claimant and the dividend growth’s portfolio manager

met with the customers' accountant; it was reported that the opportunities offered by the MLP outweighed the risk of any unrelated UBTI issues. The customers later expressed concern with the MLP investments claiming "unsuitability". Based on all the evidence provided, the Arbitrator finds the claim to be false.

4. 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 = \$ 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 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 = \$ 1,900.00

Member Process Fee = \$ 3,750.00

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 @ \$1,125.00/session = \$ 1,125.00
Pre-Hearing Conference: May 25, 2021 1 session

One (1) hearing session on expungement request @ \$1,125.00/session = \$ 1,125.00
Hearing: September 28, 2021 1 session

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

David Wertz Ellis

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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

David Wertz Ellis

David Wertz Ellis
Sole Public Arbitrator

10/21/2021

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.

October 22, 2021

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