Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Eric Daniel Silvestre

vs.

Respondent
J.P. Morgan Securities, LLC

Case Number: 21-00430

Hearing Site: Los Angeles, California

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 Eric Daniel Silvestre ("Claimant"): Harris Freedman, Esq., HLBS Law, Westminster, Colorado.

For Respondent J.P. Morgan Securities, LLC ("Respondent"): Katherine L. Handy, Esq., Keesal, Young & Logan, Long Beach, California.

CASE INFORMATION

Statement of Claim filed on or about: February 17, 2021.
Claimant signed the Submission Agreement: February 17, 2021.

Statement of Answer filed by Respondent on or about: April 14, 2021
Respondent signed the Submission Agreement: April 13, 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.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of Occurrence Number 2047263 from Claimant's CRD records pursuant to FINRA Rule 2080, as:
    a. the claim, allegation, or information is factually impossible or clearly erroneous;
    b. Claimant was not involved in the alleged investment-related sales practice violation, theft, forgery, misappropriation, or conversion of funds; and/or
    c. the claim, allegation, or information is false; and
2. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent did not set forth a specific request for relief.

OTHER ISSUES CONSIDERED AND DECIDED

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

On March 22, 2021, the parties agreed to proceed with a single arbitrator for this matter.

On August 12, 2021, Claimant advised that the customer in Occurrence Number 2047263 ("Customer") was served with the Statement of Claim and notice of the date and time of the expungement hearing. On August 16, 2021, Claimant filed an Affidavit confirming that the Customer was 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 November 15, 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, took no position the request for expungement.

The Customer did not participate in the expungement hearing. The Arbitrator found that the Customer 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 occurrence in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Number 2047263, 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.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: the pleadings; Claimant's exhibits; and the settlement agreement.

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 2047263 from registration records maintained by the CRD for Claimant Eric Daniel Silvestre (CRD Number 3171573) with the understanding that, pursuant to Notice to Members 04-16, Claimant Eric Daniel Silvestre 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:

   > Claimant (CRD Number 3171573) seeks expungement of Occurrence Number 2047263, reported on September 25, 2019 by the Customer and described as follows:
   >
   > > "Client alleges unauthorized trading regarding Equity-OTC investment. Activity dates: 10/02/2015-10/02/2015".
   >
   > The allegations concern a single event: Claimant’s liquidation of a pre-existing portfolio of "blue chip" stocks (“Securities") two days after the Customer signed opening account documents - in particular, a "Discretionary Portfolio Mandate" ("DPM") and an "Advisory Account Agreement" ("AAA") that vested discretion in Respondent and certain third-party money managers to affect the liquidation under certain conditions.
   >
   > The Customer alleged in his Statement of Claim (SOS”) that the liquidation of the Securities was not authorized, and that he told Claimant not to sell the Securities, and that during several discussions, Claimant agreed not to do so, and even assured the Customer after the liquidation that the Securities had not in fact been sold. Claimant was also allegedly shocked to learn of the liquidation though trade confirmations. Respondent then failed to restore the Securities as it promised. As a consequence, of all this, the Customer moved his account from Respondent several months later.
   >
   > In stark contrast, Claimant testified that the only way the over-concentration in energy stocks that characterized the Securities could be eased and the asset allocations depicted in the pie charts in the DPM - just above the Customer approving signature - could be achieved, was by immediate liquidation of the Securities, and that Claimant discussed this essential liquidation with the Customer several times before the relationship was formalized on August 31, 2015. Furthermore, the Customer said he

understood and approved the liquidation strategy and the Customer never told Claimant *not* to liquidate the Securities.

The Customer waited almost four years after the Securities were sold to initiate a FINRA arbitration alleging $2 million in damages. Respondent and Claimant settled with the Customer for $300,000.00. This is not a nominal or "nuisance" settlement. Claimant testified that he provided information to Respondent about the dispute but did not have input into the settlement amount. However, Claimant acknowledged in the settlement agreement that he did in fact participate in negotiation and preparation of the settlement agreement. Claimant also testified that he did not contribute to the settlement. Respondent's non-opposition to expungement was not an express term of the settlement agreement.

The Arbitrator listened to Claimant's testimony and asked questions. The Arbitrator then listened again to the audio recording of the proceedings.

Reduced to its essence, Claimant's argument for expungement is that notwithstanding the clear conflict in the record about whether the liquidation of the Securities was contrary to the Customer's instructions and understandings, the claim nevertheless must be false, clearly erroneous, or impossible - or all of these - because the account was discretionary and Claimant and the third-party managers could liquidate no matter what the Customer may have said, or what the Customer and Claimant might have agreed to.

That argument is not a correct statement of the extent of an investment advisor's discretion over the client's investments, generally, or in this case.

While the Customer authorized the managers in the DPM to "construct [the] investment portfolio and to allocate across various asset classes and to shift investments among existing newly created asset classes", the discretion to "select investments for the account and determine when such investments shall be made" is subject to any restrictions stated in Section IV of the DPM". This section, along with additional similar language explaining the broad scope of discretion, places limits on discretion where the manager receives "special instructions for the portfolio" from the client. The phrase "special instructions" does not appear to be a defined term. It does not appear to require a writing. It seems clear that if given in this case, the Customer's instructions to not sell the Securities - however misguided or unworkable - would override the otherwise broad discretion the Customer granted Claimant, Respondent, and its agents through the DPM. However, as Respondent pointed out in its answer, the Customer acknowledged in Section II (D), "Investment Instructions and Restrictions in the DPM", that: "[He] does not wish to specify investment restrictions or other special instructions for this Portfolio." The DPM contains an integration clause barring oral and written modifications to the DPM that predate August 31, 2015. All the evidence and pleadings presented show that-- assuming they were in fact made-- any statements, assurances, or understandings that the Securities would not be liquidated, were made before August 31, 2015. Thus, the Customer's acknowledgement that there were no special instructions, and the integration clause could operate to bar the unauthorized trading claim. But that is not the end of the analysis. In the SOS, the Customer alleged that he was induced to enter into the relationship with Respondent and Claimant with the promises that the Customer would save capital gains taxes and that Claimant would obey the Customer's instructions not to

sell any of the blue chip stocks. If proven, this fraud could override the integration clause under the authority of River Island Cold Storage v. Fresno-Madera Production Credit Ass'n (2013) 55 Cal.4th 1169. There, the California Supreme Court held that "fraud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds." (Id., 55 Cal.4th at p. 1182.) Thus, California re-established the fraud exception to the parol evidence rule, which was held abated for nearly 80 years. But in River Island, the defendant lender still won on remand by summary judgement because the term of the contract was clear and the plaintiff could have simply read the contract. The same is true here of the "no special instructions" directive. So, the allegation or claim in Occurrence Number 2047263 that the sale of the Securities was unauthorized trading is not cognizable and therefore, false. Accordingly, Occurrence Number 2047263 is subject to expungement under FINRA Rule 2080(b)(1)(C).

2. 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(s) that employed the associated person(s) at the time of the event(s) 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

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

October 18, 2021, postponement requested by Claimant	=$	450.00
Total Postponement Fees	=$	450.00

The Arbitrator has assessed the total postponement fees to Claimant.

Last-Minute Cancellation Fees
Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

October 18, 2021, cancellation requested by Claimant	=$	600.00

Total Last-Minute Cancellation Fees	=$	600.00

The Arbitrator has assessed the total last-minute cancellation fees to Claimant.

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 @ $450.00/session	=$	450.00
Pre-Hearing Conference: June 8, 2021 1 session		
One (1) hearing session on expungement request @ $450.00/session	=$	450.00
Hearing: November 15, 2021 1 session		
Total Hearing Session Fees	=$	900.00

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 **12/14/2021**

Thomas E. Shuck
Sole Public Arbitrator

Signature Date

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December 14, 2021
Date of Service (For FINRA Dispute Resolution Services use only)