

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant

Patricia Mary Taylor Trust

Case Number: 21-02458

vs.

Respondents

Kestra Investment Services, LLC
Christopher Hudson Taylor

Hearing Site: San Diego, 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: Customer vs. Member and Associated Person

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimant Patricia Mary Taylor Trust (“Claimant”): G. Mark Brewer, Esq., Brewer Law Firm, APC, San Diego, California.

For Respondent Kestra Investment Services, LLC (“Kestra”): Amanda Beck, Esq. and Richard A. D’Amura, Esq., D’Amura & Zaidman, PLLC, Austin, Texas.

For Respondent Christopher Hudson Taylor (“Taylor”): Craig Zafis, Esq., R. Craig Zafis, Attorney at Law, Escondido, California.

Hereinafter, Kestra and Taylor are collectively referred to as “Respondents”.

CASE INFORMATION

Statement of Claim filed on or about: September 28, 2021.
Claimant signed the Submission Agreement: September 25, 2021.

Statement of Answer filed by Kestra on or about: December 1, 2021.
Kestra signed the Submission Agreement: December 1, 2021.
Taylor did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: breach of contract; negligence; breach of fiduciary duty; violation of Section 25401 of California Corporations Code; and financial elder abuse – violation of California Welfare and Institutions Code sections 15600 et seq. The causes of action relate to an alternative investment known as “ICON”.

Unless specifically admitted in the Statement of Answer, Kestra denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Compensatory damages in an amount not less than \$490,000.00;
2. Interest;
3. Punitive damages;
4. Reimbursement for all prosecution related costs;
5. FINRA forum fees and costs;
6. Attorneys’ fees as allowed by law; and
7. Such other relief as the Panel deems just and proper.

In the Statement of Answer, Kestra requested:

1. Dismissal of all Claimant’s claims;
2. Costs and disbursements relating to this proceeding; and
3. Such other, different or further relief as the Panel deems just, proper, and equitable.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On October 26, 2021, Taylor registered for the DR Portal, providing Taylor with access to all documents filed in the case, including the Statement of Claim, Overdue Notice, and Notification of Panel. Therefore, Taylor is bound by the Panel's ruling and determination.

On December 1, 2021, Kestra filed a Motion to Dismiss pursuant to Rule 12206 of the Code of Arbitration Procedure (“Code”). On December 29, 2021, Claimant filed a response opposing the Motion to Dismiss. On January 3, 2022, Kestra filed a reply in support of the Motion to Dismiss. On January 13, 2022 the Panel heard oral arguments on the Motion to Dismiss. The Panel hereby grants the Motion to Dismiss for the reasons stated in the Findings section below.

Kestra’s Motion to Dismiss pursuant to Rule 12206 of the Code is granted by the Panel without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing her claims in court pursuant to Rule 12206(b) of the Code.

The Award in this matter may be executed in counterpart copies.

FINDINGS

FINRA rule 12206(a) the so-called "Six Year Rule" is familiar: "No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim." The Rule is a statute of repose. That means a cause of action is absolutely barred as of a specified time after a precipitating event or occurrence, even if the cause of action has not accrued because it has not been discovered. Rule 12206(c) makes this clear: "The rule does not extend applicable statutes of limitations..." Thus, erroneous statements to the contrary in some case law notwithstanding, statutes of limitation concepts like tolling and discovery are antithetical to a statute of repose. The FINRA's guidance that "arbitrators may find that there is a continuing occurrence or event giving rise to the dispute" in place of the precipitating event--usually purchase of the investment-- is designed to assist the Panel to achieve certainty, not automatically expand the time to bring a claim. This is so because while the time period in Rule 12206 is generous, and exceeds time periods in most statutes of limitation, the Rule is inherently restrictive, not expansive.

Here, Claimant trustee alleges that her brother, Taylor, working for Kestra, sold Claimant--their mother Patricia Taylor's trust--an investment in ICON, for which Patricia Taylor was "...neither an eligible nor accredited investor when Taylor sold the investment to Claimant" (SOC, paragraph 7). The sale was on August 7, 2006. Clearly, if the initial purchase date is the "occurrence" triggering the six year "clock", the claim was barred in this forum after about August 6, 2012, nearly ten years ago.

Claimant made three arguments for a later "occurrence" date:

First, that various more recent "discoveries" by Claimant listed in Claimant's opposition at pages 1-3 should be treated as "occurrences". But in oral argument, Claimant candidly conceded that an "occurrence" must be an activity by the alleged wrongdoer, not the alleged victim. So, these discoveries do not qualify as "occurrences". It is probably in part for this very reason that "discoveries" are statute of limitations concepts, not statute of repose concepts.

Second, that fact-finding and document searching work during this FINRA case might reveal a later occurrence date. As an example, she suggested a hypothetical compliance review at Kestra within the last six years that might have revealed Claimant's ineligibility, and that such a discovery or confirmation should have triggered notice to Claimant. First, at bottom, this is yet another argument for a discovery exception. Second, even if such a compliance review had taken place, it would merely confirm that the investment was illegal as of the date of purchase.

Third, Claimant argued that from the moment Kestra sold the ICON investment to Claimant, Respondents had an ongoing, second-by-second, minute- by-minute duty--continuing to this day--to "come clean" and admit to the trust that Claimant was not in fact an eligible or accredited investor. Each point of silence in the time continuum was an "occurrence". This argument attempts to invoke the FINRA's guidance that an occurrence may be continuing. But we have here not a continuing occurrence, but rather a continuing non-occurrence.

First, if the non-occurrence was disclosure that Claimant was an ineligible unaccredited investor, that disclosure was due on or before the purchase date, not later. Claimant's very allegation of that fact establishes the point of purchase as the occurrence date. Second, even if the Panel ignored Claimant's inherent allegation that the claim-precipitating occurrence was the point of

sale, asking the Panel to pick a date when continuing inaction should end from a nearly infinite set of alternative points in time would obviously be capricious, uncertain, and unfair. In any event, the date chosen for the point when disclosure should have been made is not an "occurrence" but rather a revelation of the wrongful occurrence that took place on the original sale date.

Accordingly, taking as true Claimant's allegation that Claimant was an ineligible, unaccredited investor when she purchased the ICON investment on August 6, 2006, that date was the occurrence date from which six-year eligibility must be measured. The last day Claimant could initiate a FINRA arbitration on that claim was approximately August 5, 2012. She filed her claim on September 28, 2021. The claim is, therefore, barred in this forum under Rule 12206(a) and hereby DISMISSED without prejudice to refile in the state or district court under Rule 12206(c).

AWARD

After considering the pleadings, the testimony and evidence presented at the January 13, 2022 recorded pre-hearing conference, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are dismissed in their entirety against Respondents without prejudice, pursuant to Rule 12206.

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	= \$ 1,425.00
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**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 Kestra is assessed the following:

Member Surcharge	= \$ 2,025.00
Member Process Fee	= \$ 3,875.00

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator(s), including a pre-hearing conference with the Arbitrator(s), which lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with the Panel @ \$1,125.00/session	= \$ 1,125.00
Pre-Hearing Conference: January 13, 2022 1 session	
Total Hearing Session Fees	= \$ 1,125.00

The Panel has assessed \$562.50 of the hearing session fees to Claimant.

The Panel has assessed \$562.50 of the hearing session fees jointly and severally to Respondents.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Thomas E Shuck	-	Public Arbitrator, Presiding Chairperson
Randy R. Maher	-	Public Arbitrator
Mitchell Lee Lathrop	-	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.

Concurring Arbitrators' Signatures

Thomas E Shuck

Thomas E Shuck
Public Arbitrator, Presiding Chairperson

02/01/2022

Signature Date

Randy R. Maher

Randy R. Maher
Public Arbitrator

02/02/2022

Signature Date

Mitchell Lee Lathrop

Mitchell Lee Lathrop
Public Arbitrator

02/01/2022

Signature Date

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February 02, 2022

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