

**Cain v Financial Indus. Regulatory Auth., Inc.
(FINRA)**

2018 NY Slip Op 33130(U)

December 4, 2018

Supreme Court, New York County

Docket Number: 654664/2018

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

and said application having regularly come on to be heard, and after due deliberation having been had thereon,

NOW, upon the application of Bressler, Amery & Ross, P.C., attorneys for Petitioner, it is hereby

~~ORDERED~~ **ADJUDGED** that the Petition is hereby granted solely to that portion of the arbitration panel's Award in the FINRA Arbitration recommending expungement, and is confirmed consistent with the below:

After considering the pleadings, the testimony and evidence presented at the expungement hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- I. The Arbitrator recommends the expungement of all references to Occurrence Number 1646833 from the registration records maintained by the Central Registration Depository ("CRD"), for Claimant Brian Thomas Cain (CRD # 2758166), with the understanding that, pursuant to Notice to Members 04-16, Claimant Brian Thomas Cain 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, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

- The claim, allegation or information is factually impossible or clearly erroneous; and
- The claim, allegation, or information is false.

- II. The Arbitrator has made the above Rule 2080 finding based on the following reasons:

The original Statement of Claim by the customers did not name the Claimant a party, and accordingly there was no actionable remedy sought by them against him. There was however, innuendo. The Claimant in his Statement of Claim alleges that he acted properly at all times and committed no wrongdoing.

The customers alleged that Mr. Cain ordered the liquidation of securities in their UBS account 'although there were no outstanding margin calls and [the customers] were not in default on any loan or obligations.

Claimant submitted (UBS Bates Stamp 002112 – Daily Margin House Call Report MGED651P dated October 12, 2012) which is made part of Arbitrator's Exhibit 2. In accordance with this Margin Report on October 12, 2012 and Mr. Cain's sworn testimony, the customer accounts with UBS over which Mr. Cain as Complex Director had ultimate oversight, were no less than \$199,742.00 in deficit (negative equity), let alone below the 35% margin maintenance requirement for the uncovered option writing that was the basis for these collateral, option and loan accounts.

Mr. Cain as Complex Director for UBS had both marketing and compliance responsibilities. He and his subordinates wearing their marketing hats contacted the customers in advance of liquidating the accounts with UBS to try to have them meet their contractual obligations with UBS, both as to negative equity and to margin requirements. They were not required to contact the customer under the terms of the UBS Client Relationship Agreement and Loan Disclosure. Any modification of the Client Relationship Agreement had to be in writing, which Mr. Cain and his subordinates did not amend by having conversations with the customers. The options available to UBS under the Client Relationship Agreement are summarized in the Statement of Claim at pages 7 and 8. UBS also had security interests in all of the customers' assets held or carried by any UBS entity. The customers were both experienced lawyers and one of them claimed to be experienced in options and selected the investments. Their profiles, including for a family trust for which one of them was a trustee and beneficiary, sought aggressive and speculative trading. Purportedly, only 20% of their assets were with UBS, but they did not transfer any of their own assets to remedy their negative equity position.

Mr. Cain testified that if he did not liquidate the customers' accounts to enforce rights UBS had, UBS' Margin Department would have done so to comply with regulatory rules. Given the volatility of these investments UBS believed it necessary to liquidate the customers' open positions to determine the actual amount of the deficit at the time and then to liquidate their assets held with UBS to meet regulatory and UBS requirements.

In this Arbitrator's view, Mr. Cain acted appropriately. Despite the marketing downside to his decision, he took the appropriate compliance action.

III. Any and all claims for relief not specifically addressed herein are denied.

ADJUDGED

~~ORDERED~~ that the Award is confirmed and that all references to Occurrence Number 1646833 be expunged from the FINRA CRD records of Brian Thomas Cain (CRD# 2758166).

12-4-2018

Enter,



, J.S.C.

HON. MELISSA A. CRANE
J.S.C.