

Micera v Financial Indus. Regulatory Auth., Inc.

2020 NY Slip Op 30334(U)

January 13, 2020

Supreme Court, New York County

Docket Number: 657432/2019

Judge: Eileen A. Rakower

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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 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 hearing, and the post-hearing submissions (if any), 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 1938685 from registration records maintained by the CRD for Claimant John Peter Micera (CRD# 1255342), with the understanding that, pursuant to Notice to Members 04-16, Claimant John Peter Micera 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 findings of fact:

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

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

Testimony given by Claimant established that the customer was a sophisticated investor who regularly gave direction to the broker as to investments that he wished to make. The customer directed Claimant to invest in securities on his behalf which would provide more income, which resulted in a reallocation of assets in his portfolio which was still within his risk tolerance and revised investment objective. The customer did his own research on investment in international equities in New Zealand and Australia and directed their purchase despite Claimant's statement that he was not familiar with these securities, but the customer insisted on their purchase. The customer disregarded the Claimant's advice to sell certain

MLPs in the energy industry which had been performing well; but which had now experienced a significant decline in value in light of a drastic drop in the price of oil. The customer insisted on holding on to these securities, telling the broker he would “weather the storm.” The Claimant’s swap of an uninsured Puerto Rico Sales Tax bond (which was in the customer’s portfolio when it was transferred into the Respondent’s account at account opening) to an insured one was done with the customer’s consent and to his benefit. Regular portfolio reviews were conducted with the customer two to three times per year.

The management of the customer’s account was consistent with his account objectives as specified at account opening where he stated he sought growth and was amenable to moderate risk. Based on Claimant’s testimony which the Arbitrator found to be credible, the Arbitrator concluded that the allegations of misconduct asserted against the Claimant are clearly erroneous and false.

The Arbitrator also found that Respondent settled the claim with the customer for an amount that was significantly less than the amount of the asserted claim and that the amount of the settlement was consistent with what the costs of litigation might be if the claims were fully litigated. Additionally, the Arbitrator noted that Claimant did not participate in the settlement negotiations, was not asked to make a contribution, nor did he make any contribution to the settlement.

- II. The Arbitrator recommends the expungement of all references to Occurrence Number 1971350 from registration records maintained by the CRD for Claimant John Peter Micera (CRD# 1255342), with the understanding that, pursuant to Notice to Members 04-16, Claimant John Peter Micera 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 findings of fact:

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

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

The testimony offered by Claimant stated that the Claimant was in constant contact with the customer by telephone with respect to each transaction where the customer gave her approval, and the Claimant then confirmed by letter, to which the customer never raised any question or voiced any complaint or objection.

The customer was interested in increasing the income yield from her securities and the transactions which the Claimant carried out on her behalf were consistent with this objective. The customer and her late husband were customers of the Claimant for approximately 35 years and were satisfied with their portfolio as managed by the broker over those years. As the customer's health failed, investments were made in survivor option bonds which provided the security to the customer that on her husband's death, she would receive the full face proceeds of the bond even if the bond was trading at a lower face value at the time of his death.

The customer continued to invest in such bonds as her son-in-law's health began to fail. (The account was, by now a joint account with her daughter.) The ownership of such bonds resulted in additional revenue to the account of \$70,000.00 and \$100,000.00 upon the passing of the customer's husband and the passing of her daughter's husband.

Certain survivor option bonds carried a cap on how much of the bond's series could be protected and as the Claimant was advised by the Respondent's bond trading desk that the cap was being approached, the Claimant would swap those bonds for others with no cap on the survivor's option to cash in the bond at the [face] value regardless of how the bond was trading in the market.

The customer became interested in shares of Apple and Amazon which she directed the Claimant to purchase. Having accumulated 600 shares of Apple, the customer became concerned with the value of the stock and concurred with the Claimant's recommendation that she sell 300 shares and take down some of the profit in her investment. Certain energy securities were recommended by the Claimant and while oil prices were high, these stocks performed well and maintained their value. As oil prices began to drop, Claimant re-examined these securities and recommended other more stable investments. Some of these energy bonds were swapped for a better performing Puerto Rico Sales Tax Bond which the Claimant felt would stand a better chance of recovery than the energy bonds. The Claimant, in conjunction with the customer's tax planning, recommended certain year end transactions that would provide tax losses to offset some of the capital gains that the customer had received during the year.

The Arbitrator found the Claimant's testimony to be credible and felt that his management of the portfolio was reasonable and appropriate for the customer's needs, objectives and risk tolerance. The Arbitrator therefore finds that the allegations of misconduct are therefore clearly erroneous and false.

The Arbitrator also found that Respondent settled the claim with the customer for an amount that was significantly less than the amount of the asserted claim and that the amount of the settlement was consistent with what the costs of litigation might be if the claims were fully litigated. Additionally, the Arbitrator noted that Claimant did not participate in the settlement negotiations, was not asked to make a contribution, nor did he make any contribution to the settlement.

ORDERED that the Award is confirmed and that all references to Occurrence Numbers 1938685 and 1971350 be expunged from the FINRA CRD records of John P. Micera (CRD# 1255342).

Enter,



, J.S.C.

HON. EILEEN A. RAKOWER