Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant  
FSC Securities Corporation  

vs.

Respondent  
David Hergert  

Case Number: 20-00211  
Hearing Site: Houston, Texas

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: Member vs. Associated Person

REPRESENTATION OF PARTIES


For Respondent David Hergert ("Respondent"): Charles H. Peckham, Esq. and Mary A. Martin, Esq., Peckham Martin, PLLC, Houston, Texas.

CASE INFORMATION

Statement of Claim filed on or about: January 21, 2020.  
Claimant signed the Submission Agreement: January 21, 2020.

Statement of Answer filed by Respondent on or about: March 5, 2020.  
Respondent did not submit a properly executed Submission Agreement.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: unjust enrichment and breach of fiduciary duty. The causes of action relate to Claimant’s allegation that Respondent billed his clients in advance for quarterly asset management fees for the entirety of the second quarter of 2013 and collected and retained the fees, despite his employment with Claimant ceasing just after the commencement of that quarter. Claimant further alleges that it returned the fees to the customers and that it believes Respondent billed and collected the fees again when he went to a new firm but has not reimbursed Claimant for its expenditure.

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

In the Statement of Claim, Claimant requested compensatory damages consisting of all duplicate asset management fees collected and wrongly retained by Respondent for the second quarter of 2013 up to an amount of $33,380.00, plus interest through the date of payment; all costs, expenses, and fees incurred through the filing of this action to be specified at a hearing, but not less than $2,100.00; and such other and further relief as the Arbitrator deems just and proper.

In the Statement of Answer, Respondent requested that Claimant’s claims be dismissed, or, alternatively, that summary judgment be granted on the grounds that Claimant’s claims are time barred and/or that Claimant has no standing to bring said claims, or, alternatively, that there be a finding that the claims made are without merit and should be denied; an award of reasonable and necessary attorneys’ fees and costs incurred; and that he be granted all relief in law or equity to which he shows himself justly entitled.

OTHER ISSUES CONSIDERED AND DECIDED

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

Respondent did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure (“Code”) and having answered the claim, appeared and participated at the pre-hearing conferences, is bound by the determination of the Arbitrator on all issues submitted.

On March 5, 2020, Respondent filed a Motion to Dismiss Under Rules 13206 and 13504 [of the Code], Alternatively, Motion for Summary Judgment Under Rule 13503 [of the Code] (“Motion to Dismiss”). On March 31, 2020, Claimant filed a Response in Opposition to the Motion to Dismiss. On May 11, 2020, Claimant filed a Further Statement in Opposition to the Motion to Dismiss. On May 21, 2020, Respondent filed a Reply to Opposition to the Motion to Dismiss. On May 28, 2020, the Arbitrator heard oral arguments on the Motion to Dismiss and herein grants the Motion to Dismiss on the grounds that:

Claimant’s claim is time-barred under Rule 13206(a) of the Code, which requires disputes to be submitted to arbitration within six years of the occurrence or event giving rise to the claim. Claimant has admitted that it is time-barred from pursuing a direct claim against Respondent.

The Arbitrator found persuasive, and accepted as fact, the first three paragraphs of Claimant’s “Background and Circumstances of Claim” in the Statement of Claim. Respondent quit his job with Claimant immediately upon being paid in advance for services to his clients for the second quarter of 2013. His payment was deducted from his clients’ accounts. As Respondent was aware the funds were withdrawn in advance from his clients’ accounts, he would be implicitly aware he was being paid for work he had not yet accomplished and would never
perform. The Arbitrator is of the opinion that this is unethical and that any broker would be aware of such. It is the Arbitrator’s opinion that this violated FINRA Rule 2150(a) as an improper use of client funds.

Claimant brings forward a troubling claim that the clients who followed Respondent, after receiving timely reimbursements from Claimant, may have been billed again once they were situated at Respondent’s new firm. However, Claimant is only able to theorize that such a client exists and would require an order for discovery of another brokerage house’s client records. Even should such clients be identified, any related claims would be barred by the six year limitation on filing a claim in arbitration. Accordingly, in this context, the Arbitrator does not find Claimant’s use of the ‘discovery rule’ to be persuasive.

To allow the arbitration to proceed into a potentially expensive and lengthy discovery process and a multi-day hearing with potentially non-local witnesses and experts, defeats the purpose of arbitration which is to provide a faster and less expensive venue than litigation. To proceed would be an exercise in futility when no claim could be presented which was not barred by time limitations. Claimant’s argument regarding Rule 13504(a)(1) of the Code was well taken, however a Motion to Dismiss regarding time limitations is quite specifically an exception to the doctrine disfavoring motions to dismiss prior to the conclusion of a party’s case in chief.

As time limits have passed for Claimant’s claims, the Motion to Dismiss is granted.

Respondent’s Motion to Dismiss pursuant to Rule 13206 of the Code is granted by the Arbitrator without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing its claims in court pursuant to Rule 13206(b) of the Code.

AWARD

After considering the pleadings, Respondent’s Motion to Dismiss and responses thereto, and the arguments presented at the pre-hearing conference, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant’s claims are dismissed in their entirety pursuant to Rule 13206 of the Code.

2. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys’ fees, 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 = $1,450.00

*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:

<table>
<thead>
<tr>
<th>Fee Type</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member Surcharge</td>
<td>$750.00</td>
</tr>
<tr>
<td>Member Process Fee</td>
<td>$1,750.00</td>
</tr>
</tbody>
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**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:

<table>
<thead>
<tr>
<th>Event</th>
<th>Fee</th>
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<tbody>
<tr>
<td>May 7, 2020</td>
<td>$450.00</td>
</tr>
<tr>
<td>May 28, 2020</td>
<td>$450.00</td>
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Two (2) pre-hearing sessions @ $450.00/session = $900.00

Pre-hearing Conferences: May 7, 2020 1 session
Pre-hearing Conferences: May 28, 2020 1 session

Total Hearing Session Fees = $900.00

The Arbitrator has assessed $450.00 of the hearing session fees to Claimant.

The Arbitrator has assessed $450.00 of the hearing session fees to Respondent.

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

Jude A Smith  
Sole Non-Public Arbitrator  
06/06/2020  
Signature Date

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