

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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At IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of New York, at the Supreme Court, 60 Centre Street, New York, New York, on the 4th day of December, 2018.

PRESENT:

HON: MELISSA A. CRANE
JUSTICE.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
BRIAN THOMAS CAIN,

Petitioner,

v.

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC. (FINRA),

Nominal Respondent.
----- X

Index No. 654664/2018

DECISION AND ORDER

Petitioner Brian Thomas Cain ("Mr. Cain" or "Petitioner"), by his attorneys, Bressler, Amery & Ross, P.C., has duly applied for an Order pursuant to CPLR § 7510 to confirm the arbitration panel's Award in an arbitration before the Financial Industry Regulatory Authority, Inc. ("FINRA"), captioned *Brian Thomas Cain v. UBS Financial Services Inc.*, FINRA Dispute Resolution Arbitration No. 17-01952 (the "FINRA Arbitration").

Upon reading and filing the following papers submitted to the Court, including the Petition to Confirm an Arbitration Award Pursuant to CPLR § 7510, the Affirmation of David Buffa, Esq., with exhibits A and B annexed thereto, which include a copy of the FINRA arbitration panel's Award (the "Award") recommending expungement of this matter from Mr. Cain's Central Registration Depository ("CRD") and FINRA's letter dated March 15, 2018, waiving the obligation under FINRA Rule 2080 to name FINRA as a party in this proceeding

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.

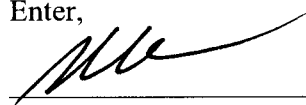
III. Any and all claims for relief not specifically addressed herein are denied.

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.