

**Award**  
**FINRA Office of Dispute Resolution**

---

In the Matter of the Arbitration Between:

Claimants  
Brian Sepe  
Dawn Sepe

Case Number: 18-01953

vs.

Respondent  
Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Boca Raton, Florida

---

Nature of the Dispute: Customers vs. Member

This case was decided by a majority-public panel.

**REPRESENTATION OF PARTIES**

For Claimants Brian Sepe and Dawn Sepe: Michael S. Taaffe, Esq., Shumaker, Loop & Kendrick, LLP, Sarasota, Florida.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): Leonel Peraza, Jr., Esq., Bressler, Amery & Ross, P.C., Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: May 21, 2018.  
Brian Sepe signed the Submission Agreement: May 21, 2018.

Statement of Answer filed by Respondent on or about: August 14, 2018.  
Merrill Lynch, Pierce, Fenner & Smith, Inc. signed the Submission Agreement: May 24, 2018.

Amended Statement of Claim filed on or about: April 29, 2019.  
Dawn Sepe signed the Submission Agreement: May 15, 2019.

Statement of Answer to Amended Statement of Claim filed by Respondent on or about: May 20, 2019.

**CASE SUMMARY**

In their Statement of Claim, as amended, Claimants asserted the following causes of action: offshore scheme that violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act; breach of duty; attempt to avoid FINRA jurisdiction in violation of industry rules; failure to disclose wrongful actions in violation of industry rules; breach of contract; and conspiring with other entities and individuals to avoid liability. The causes of action relate to Claimant Brian Sepe's variable compensation

award through his former employer, Respondent Merrill Lynch, which included his Incentive Stock Options and shares of the company stock MER (later BAC).

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

### **RELIEF REQUESTED**

In the Statement of Claim, as amended, Claimants requested: compensatory damages in an amount subject to proof; punitive damages; disgorgement of Respondent's "ill-gotten" gains; treble damages; costs and expenses; attorneys' fees; prejudgment interest; and such other relief as the Panel deemed just and proper.

In the Statement of Answer to the Statement of Claim, as amended, Respondent requested: Claimants' claims be dismissed in their entirety; forum fees and costs be assessed against Claimants; and such other, further, or different relief as deemed appropriate by the Panel.

### **OTHER ISSUES CONSIDERED AND DECIDED**

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

On or about September 4, 2018, Respondent filed a Motion to Dismiss Statement of Claim under FINRA Rule 12206 of the Code of Arbitration Procedure (the "Code") in which it asserted that Claimant Brian Sepe's claims are ineligible for arbitration because: (1) Rule 12206 bars any claims where the relevant occurrences or events happened more than six years before the claim was initiated; (2) Rule 12206 is not subject to any form of tolling; (3) even if equitable tolling were permitted by Rule 12206, Claimant Brian Sepe was on notice of his potential claims more than six years ago, so he cannot satisfy the strict requirements of the doctrine; and (4) the Motion is properly made at this stage of the proceeding. In his Response, Claimant Brian Sepe stated that: (1) the Motion is barred by Rule 12206(c) because the claims were directed to arbitration by a federal court; (2) even if Rule 12206(c) did not bar the present Motion to Dismiss, Claimant's claims fall within the six year period; and (3) the Panel must not grant the Motion to Dismiss prior to the conclusion of discovery. In its Reply, Respondent stated: (1) the limited carve-out in Rule 12206(c) does not apply; (2) all of the substantive claims relate to occurrences or events outside the six-year eligibility period; (3) Rule 12206 is not subject to tolling; (4) even if tolling were permitted by the Rule, Claimant is not entitled to the benefit of any tolling doctrine; and (5) Claimant's discovery argument is a "red-herring" that would cause delay and expenses for all parties, and FINRA rules do not ensure that parties complete – or even begin – discovery before eligibility motions are briefed and decided. In his Sur-Reply, Claimant Brian Sepe reiterated that: (1) his claims were directed to arbitration by a court, so Rule 12206 does not apply; (2) numerous claims and damages occurred within the six-year period and are eligible for arbitration; and (3) discovery is necessary and the FINRA Arbitrator's Guide allows it. In addition, Claimant stated that tolling is appropriate because Respondent actively concealed its fraud and discouraged Claimant from

mitigating his losses. In its Response to Claimant's Sur-Reply, Respondent argued, among other things, that Claimant's Sur-Reply should be disregarded as it is not permitted by FINRA rules, and Claimant was not a party to any court case nor did any court direct his claims to arbitration. In his Response, Claimant stated, among other things, that FINRA rules do not prohibit Sur-Replies.

On or about September 5, 2018, Respondent filed a Motion to Dismiss Statement of Claim under FINRA Rule 12504 on the basis that Claimant Brian Sepe's claims were previously released. In his Response, Claimant Brian Sepe asserted, among other things, that the Release was procured through Respondent's alleged fraud and is unenforceable, and further requested that the Panel enforce sanctions against Respondent for filing the frivolous Motion to Dismiss. In its Reply, Respondent stated that: (1) there are no allegations of fraud relating to the procurement of the Release, let alone any evidence of such fraud; (2) the Release is valid and binding and clearly releases all claims, known or unknown; (3) the Release covers all allegations and claims relating to Respondent's conduct prior to the execution of the Release; (4) Claimant Brian Sepe's allegations of purported fraud by Respondent do not impact the validity of the Release; (5) Claimant Brian Sepe's acceptance of separation payments and failure to promptly repudiate the Release precludes the argument that the Release is invalid; (6) Claimant Brian Sepe's argument that the "instant claims were not 'resolved in a previous dispute'" is completely without merit; and (7) Claimant Brian Sepe's Request for Sanctions is absurd and should be rejected.

On or about April 16, 2019, Claimant Brian Sepe filed a Motion to Amend the Statement of Claim for the sole purpose of adding his wife, Dawn Sepe, as an additional Claimant in this matter, to which Respondent did not object.

On April 25, 2019, the Panel conducted a recorded in-person pre-hearing conference to hear oral argument on Respondent's Motion to Dismiss Statement of Claim as ineligible for arbitration under FINRA Rule 12206. The Panel deferred argument on Respondent's Motion to Dismiss under FINRA Rule 12504 until a decision was rendered under Rule 12206, as prescribed by the Code. The Panel also heard oral arguments on Claimant Brian Sepe's Motion to Amend the Statement of Claim.

Pursuant to the Order dated April 29, 2019, the Panel: requested (1) live testimony from Claimant Brian Sepe, only, as to when he had actual, constructive, or reasonable notice of the facts which underlie the fraud he was relying upon to avoid dismissal under the eligibility rule, (2) reserved ruling on Respondent's Motion to Dismiss under Rule 12206; and (3) granted Claimant Brian Sepe's Motion to Amend.

On September 11, 2019, the Panel conducted a recorded in-person pre-hearing conference to hear the live testimony it requested from Claimant Brian Sepe in connection with Respondent's Motion to Dismiss Statement of Claim as Ineligible for Arbitration under FINRA Rule 12206.

On or about September 18, 2019, the Panel directed the parties to submit briefs on their respective positions regarding whether the Motion to Dismiss also applied to Co-Claimant Dawn Sepe, as she was added to this claim after Respondent's Motion to Dismiss was filed.

On or about September 27, 2019, in compliance with the Panel's directive, Respondent filed a Supplemental Submission Addressing Applicability of Eligibility Argument on Claimant Dawn Sepe's Claim in which it asserted: (1) Claimant Dawn Sepe asserts the same claims to recover the same alleged losses on the same shares held in the same brokerage accounts as her husband, Brian Sepe; (2) for the same reasons argued with respect to Claimant Brian Sepe, the events and occurrences giving rise to both Claimants' claims occurred well before the eligibility cutoff date; and (3) the facts and law negating Claimant Brian Sepe's allegation of equitable tolling apply with equal force to Claimant Dawn Sepe.

On or about September 27, 2019, in compliance with the Panel's directive, Claimants filed their Response to the Panel's September 18, 2019 directive and asserted that Respondent's pending Motion to Dismiss pursuant to FINRA Rule 12206 does not apply to Claimant Dawn Sepe because: (1) Respondent previously informed the Panel that it did not intend for the pending FINRA Rule 12206 Motion to apply to Claimant Dawn Sepe; and (2) the currently pending Motion was filed on September 4, 2018, nearly nine months prior to when Respondent filed its Answer to the Amended Statement of Claim.

On or about October 1, 2019, Respondent filed a Motion to Dismiss the Amended Statement of Claim Pursuant to FINRA Rule 12206 in which it re-asserted its briefing and argument on the previously-filed Motion to Dismiss the original Statement of Claim in this matter. Specifically, Respondent moved to dismiss the claims of both Brian Sepe and Dawn Sepe. In their Response, Claimants asserted that Claimant Dawn Sepe's claims differ from that of Claimant Brian Sepe's claims in that she cannot be imputed with "inquiry notice" or constructive knowledge of Respondent's alleged fraud. In its Reply, Respondent stated that: (1) the events and occurrences giving rise to Claimant Dawn Sepe's claim are identical to those giving rise to her husband, Brian Sepe's claim and occurred years before the eligibility cutoff date; and (2) Claimant Dawn Sepe's tolling argument fails for the same reasons as her husband's, Brian Sepe's, arguments.

On December 20, 2019, the Panel heard oral arguments on the issue of Dawn Sepe's standing in Respondent's Motion to Dismiss and determined that Co-Claimant Dawn Sepe would be treated as a party to the Motion. The Panel also heard oral argument on Respondent's Motion to Dismiss Amended Statement of Claim as Ineligible for Arbitration under Rule 12206. In its Order, dated January 2, 2020, the Panel granted Respondent's Motion and provided the following explanation:

Claimant Brian Sepe was a decorated, long-term employee of Respondent who rose through the ranks of management and was, at some point, in charge of, and had responsibility for, one-sixth of the United States for Respondent. Claimant Brian Sepe previously received proceeds from an Employee Retirement Income Security Act of 1974 (ERISA) lawsuit filed against Respondent. On May 21, 2018, Claimant Brian Sepe filed this arbitration proceeding against Respondent, seeking damages as a customer and former employee. Claimant Brian Sepe's damages arise from the collapse in the market of the securitized residential mortgage-backed securities and collateralized debt obligations, which occurred prior to the merger of Respondent and Bank of America on or about January 2009. Despite being in an upper management position, Claimant Brian Sepe alleges that he did not have any

knowledge of fraud on the part of Respondent until sometime after a settlement was reached with the Department of Justice and other regulators in August 2014.

Respondent moved for dismissal of Claimant Brian Sepe's claims on the grounds that the claims are ineligible for arbitration under Rule 12206 of the FINRA Code of Arbitration Procedure for Customer Disputes. Rule 12206(a) provides: "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 panel will resolve any questions regarding the eligibility of a claim under this rule."

As Claimant Brian Sepe was in upper management, after the initial argument on Respondent's motion to dismiss on April 25, 2019, the Panel requested that Claimant Brian Sepe appear before the Panel for the limited purpose of determining when he had actual, constructive, or reasonable notice of the facts which underlie the fraud he was relying upon to avoid dismissal under the eligibility rule. Claimant Brian Sepe provided limited testimony on this issue before the Panel on September 11, 2019.

Claimant Brian Sepe has set forth multiple arguments in opposition to Respondent's Motion to Dismiss. Claimant Brian Sepe argues that the FINRA eligibility rule does not apply, as Rule 12206(c) of the Code of Arbitration Procedure for Customer Disputes provides in part: "The rule does not extend applicable statutes of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person." Claimant Brian Sepe acknowledges that his claim was not directed to arbitration by any court but relies instead on decisions issued by courts in other matters that have referred similar claims to arbitration. As Claimant Brian Sepe's claim was not referred to arbitration by any court, the Panel finds Rule 12206(c) inapplicable.

Claimant Brian Sepe alleges the existence of an ongoing pattern of loss based on the allegation that certain stock options he possessed expired worthless during the six-year eligibility period. As there is no allegation that the options had any value at any time during the eligibility period, the Panel discounts any claim that the expiration of the option period constituted a new loss.

Claimant Brian Sepe alleges that the eligibility rule is subject to equitable tolling based upon Respondent having engaged in secretive fraudulent activities that were unknown to Claimant Brian Sepe and that could not have been discovered by Claimant Brian Sepe until after the August 2014 Department of Justice report. The parties are compelled to arbitrate this dispute as a matter of contract. Arbitration before FINRA Office of Dispute Resolution is subject to the applicable Code of Arbitration Procedure. Rule 12206 of the FINRA Code of Arbitration Procedure for Customer Disputes imposes a six-year time limit for claims to be eligible for arbitration. Neither Rule 12206 nor any other rule in the FINRA Code of Arbitration Procedure for Customer Disputes enables a panel to toll the six-year time period set forth in Rule 12206. This Panel therefore determines that the six-year eligibility period is not subject to tolling.

Finally, the Panel determines that if the six-year time period under Rule 12206 can be tolled, equitable tolling is not proper as to Claimant Brian Sepe. Claimant Brian Sepe was in an upper management position at Respondent. Claimant Brian Sepe participated in a prior ERISA claim against Respondent. Claimant Brian Sepe was highly experienced in the industry and chose to not concern himself with prior claims against Respondent, news, books, and articles regarding allegations of fraud against Respondent that would have put him on notice of the alleged fraud more than six years prior to the filing of this arbitration.

On April 16, 2019, Claimant Brian Sepe sought leave to amend his Statement of Claim to add his wife, Dawn Sepe, to the proceeding, as the accounts were joint accounts. This amendment did not otherwise change the Statement of Claim.

The Panel was concerned that the initial Motion to Dismiss did not address Claimant Dawn Sepe or the Amended Statement of Claim, as the initial Motion to Dismiss was filed prior to the amendment. The Panel requested additional information and argument from the parties. The parties agreed that the evidence and arguments made at the prior in-person hearings would be applicable to Claimant Dawn Sepe. Respondent filed its Motion to Dismiss the Amended Statement of Claim and the Claimants responded thereto. To ensure compliance with Rule 12206, the Panel requested a telephonic prehearing conference which was conducted on December 20, 2019. After consideration of the parties' filings and arguments at the December 20, 2019 prehearing conference, the Panel finds that the arguments applicable to Claimant Brian Sepe are also applicable to Claimant Dawn Sepe and that new arguments made on behalf of Claimant Dawn Sepe are not sufficient to make her claims eligible for arbitration under Rule 12206.

For the above-stated reasons, Respondent's Motion to Dismiss and Amended Motion to Dismiss pursuant to Rule 12206 are granted. Accordingly, the Panel did not make a determination as to Respondent's Motion to Dismiss pursuant to FINRA Rule 12504.

Respondent's Motion to Dismiss pursuant to Rule 12206 of the Code is granted by the Panel without prejudice to any right the Claimants have to file in court; the Claimants are not prohibited from pursuing their claims in a court pursuant to Rule 12206(b) of the Code.

The Arbitrators have provided an explanation of their decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

### **AWARD**

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

Claimants Brian Sepe's and Dawn Sepe's claims are dismissed pursuant to Rule 12206 of the Code.

## **FEES**

Pursuant to the Code, the following fees are assessed:

### **Filing Fees**

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee	=\$ 1,575.00
--------------------------	--------------

*\*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 Merrill Lynch is assessed the following:

Member Surcharge	=\$ 1,900.00
Member Process Fee	=\$ 3,750.00

### **Discovery-Related Motion Fee**

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with three (3) arbitrators @ \$600.00/decision	=\$ 600.00
--	------------

Claimants submitted one (1) discovery-related motion

---

Total Discovery-Related Motion Fees	=\$ 600.00
-------------------------------------	------------

The Panel has assessed the total \$600.00 discovery-related motion fee jointly and severally to Claimants.

### **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) that lasts four (4) hours or less. Fees associated with these proceedings are:

Six (6) pre-hearing sessions with the Panel @ \$1,125.00/session	=\$ 6,750.00
Pre-hearing conferences:	
September 24, 2018	1 session
November 16, 2018	1 session
January 22, 2019	1 session
April 25, 2019	1 session
September 11, 2019	1 session
December 20, 2019	1 session

---

Total Hearing Session Fees	=\$ 6,750.00
----------------------------	--------------

The Panel has assessed \$2,812.50 of the hearing session fees to Claimant Brian Sepe.

The Panel has assessed \$2,250.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$1,687.50 of the hearing session fees to Respondent.

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



**ARBITRATION PANEL**

Steven Gerard Goerke	-	Public Arbitrator, Presiding Chairperson
Gary Mathew Singer	-	Public Arbitrator
Michael A. Levin	-	Non-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**

**Steven Gerard Goerke**

Steven Gerard Goerke  
Public Arbitrator, Presiding Chairperson

01/08/2020

Signature Date

**Gary Mathew Singer**

Gary Mathew Singer  
Public Arbitrator

01/09/2020

Signature Date

**Michael A. Levin**

Michael A. Levin  
Non-Public Arbitrator

01/08/2020

Signature Date

January 10, 2020

Date of Service (For FINRA Office of Dispute Resolution office use only)