

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant

Larry E. Reeder, as Trustee of the Mattie M. Kelly 908 Trust FBO Imogene Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Bernarr Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Carnera Kelly U/A DTD 03/27/1992, and Mattie M. Kelly 908 Trust FBO Carol Kelly U/A DTD 03/27/1992

Case Number: 18-03103

vs.

Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Hearing Site: Boca Raton, Florida

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: Customer vs. Member

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimant Larry E. Reeder, as Trustee of the Mattie M. Kelly 908 Trust FBO Imogene Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Bernarr Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Carnera Kelly U/A DTD 03/27/1992, and Mattie M. Kelly 908 Trust FBO Carol Kelly U/A DTD 03/27/1992: Bradford M. Gucciardo, Esq., Gucciardo Law Group, P.A., Lakewood Ranch, Florida.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. (“MLPFS”): Keith Olin, Esq., Bressler, Amery & Ross, P.C., Fort Lauderdale, Florida.

*FINRA recorded the appearance of Claimant’s counsel at the time of filing of the Statement of Claim. Counsel’s representation of Claimant may have ended with the parties’ settlement. Please see the Other Issues Considered and Decided section of this Award for information on whether Claimant’s counsel appeared at the expungement hearing.

CASE INFORMATION

Statement of Claim filed on or about: August 30, 2018.

Larry E. Reeder, as Trustee of the Mattie M. Kelly 908 Trust FBO Imogene Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Bernarr Kelly U/A DTD 03/27/1992, Mattie M. Kelly 908 Trust FBO Carnera Kelly U/A DTD 03/27/1992, and Mattie M. Kelly 908 Trust FBO Carol Kelly U/A DTD 03/27/1992, signed the Submission Agreement: September 4, 2018.

Statement of Answer filed by Respondent on or about: November 29, 2018.
MLPFS signed the Submission Agreement: September 11, 2018.

CASE SUMMARY

Claimant asserted the following causes of action: common law fraud; breach of fiduciary duty; negligence (gross negligence); and breach of contract. The causes of action relate to Claimant's investments in various securities, including, but not limited to: Twitter Inc; EV Energy Partners LP; Windstream Holdings Inc.; Valeant Pharmaceuticals; Emerge Energy Services; Linn Energy LLC; Enlink Midstream; Sunpower Corp.; Seadrill Partners LLC; Barrick Gold Corporation; Seadrill Ltd.; Vivus Inc Del Pv; BP Plc Spon Adr.; American Capital World; Crestwood Equity; Nokia Corp Spon Adr; Columbia Select Large; United Sts Stl Corp New; Transocean LTD, Bank of America Corp.; Vaneck Vectors Gold; Enernoc Inc.; Arcelormittal SA; Luxembourg Pennantpark Floating Rate; Alibaba Group Holding Lt.; Box Inc Cl A; Putnam Global Natural Continental Resources; Cushing MLP Total Return FD; Zoetis Inc.; Calamos Dynamic; General Electric; Hewlett Packard Co Del; Blackrock Res & Commodity; Pengrowth Energy; Ishares Silver Tr.; Genworth Finl Inc Com; Cleveland Biolabs Inc.; Freeport McMoran Inc.; Eros Intl Plc Shs.; Ford Motor Co.; Ares Dynamic Credit; Energy Transfer Ptnrs. LP; and Cliffs Natural Resources.

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 not less than \$1,500,000.00; punitive damages in an amount to be determined; pre-award and post-award interest, at the legal rate, for Claimant's loss of use of capital; all costs and fees incurred in this action including all forum fees, expert witness-related fees, and additional costs/fees incurred by counsel; and such further relief as the Panel deemed just and appropriate.

In the Statement of Answer, Respondent requested: denial of the Statement of Claim with prejudice; that FINRA costs associated with this arbitration proceeding be assessed against Claimant; and a recommendation of expungement of all references to this arbitration from Unnamed Parties Paul Lindsey Harp and Luther Matthew Byrd's respective Central Registration Depository ("CRD") records. In addition, MLPFS did not agree to submit the issue of attorneys' fees to the Panel for resolution, either as to entitlement or amount, and specifically reserved those issues to be heard by a court of competent jurisdiction at the conclusion of the arbitration.

OTHER ISSUES CONSIDERED AND DECIDED

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

On October 13, 2020, Respondent filed a Motion to Dismiss as a Sanction pursuant to Rule 12212 of the Code of Arbitration Procedure (“Code”). In its Motion, Respondent asserted, among other things, that Claimant had not fully complied with the Panel’s August 28, 2020, Discovery Order (“Order”) and a prior order on Respondent’s Motion to Compel Compliance, and that Claimant’s numerous discovery violations to date supported a Motion to Dismiss. On October 23, 2020, Claimant filed a response opposing the Motion to Dismiss and asserted, among other things, that Respondent waived its rights for documents responsive to the Order, that Claimant had complied with the Order, and that he had no additional documents responsive to the Order in his possession, custody or control. On October 28, 2020, Respondent filed a Reply in which, among other things, it denied ever waiving its rights for documents responsive to the Order, and stated that Claimant’s representation that he does not have documents in his possession, custody, and control was a disguise and dismissal was warranted. On November 30, 2020, the Panel heard oral arguments on the Motion to Dismiss. On December 9, 2020, the Panel issued an Order in which it granted the Motion to Dismiss on the following grounds:

“In the Panel’s Order of August 28, 2020, Claimant was specifically warned as follows:

1. During the hearing, Claimant’s counsel indicated that he could provide the requested documents to Respondent’s counsel within 30 days, i.e. September 27, 2020. It is noted that he thereby will have taken five months to produce the requested documents since the order was issued in April compelling him to do so. That was besides the several months since initial discovery. If Claimant does not deliver the requested documents by September 27, consequences may include sanctions, including possible dismissal of this case.

As Respondent’s filings in the instant Motion and Reply reveal, the Claimant has persistently failed to comply with the orders of the Arbitrators as well as the letter and spirit of discovery in a FINRA proceeding.

Because of Claimant’s serious, extended failure to properly respond to disclosure requests since the first disclosure deadline of October 11, 2019 and continuing to date despite two orders to produce documents, the Panel unanimously voted to grant Respondent’s Motion To Dismiss As a Sanction.”

On December 21, 2020, Respondent filed a Motion for Expungement on behalf of Unnamed Party Luther Matthew Byrd, to which no response was filed.

Respondent did not pursue the expungement of this arbitration/Occurrence Number 1996776 from Unnamed Party Paul Lindsey Harp’s CRD records (CRD Number 4695060), as requested in the Statement of Answer. Accordingly, the Panel made no determination with respect to Respondent’s request for expungement on behalf of Unnamed Party Paul Lindsey Harp.

The Panel conducted a recorded, telephonic hearing on February 10, 2021, so the parties could present oral argument and evidence on Respondent’s request for expungement on behalf of Unnamed Party Luther Matthew Byrd.

Claimant did not appear at the expungement hearing. Upon review of the file, the Panel determined that Claimant’s counsel and Claimant both received due notice of the hearing and that arbitration of the matter would proceed without said Claimant present, in accordance with the Code.

The Panel reviewed the BrokerCheck® Report for Unnamed Party Luther Matthew Byrd. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrence in the CRD.

In recommending expungement, the Panel relied upon the following documentary or other evidence: the Statement of Claim; Respondent's Answer; the motions filed by Respondent's counsel in an effort to obtain needed discovery; all other documents of record on the FINRA Portal related to this case; and the sworn testimony of Unnamed Party Luther Matthew Byrd under oath at the expungement hearing.

The Award in this matter may be executed in counterpart copies.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants' claims are dismissed with prejudice as a sanction pursuant to Rule 12212 of the Code.
2. The Panel recommends the expungement of all references to the above-captioned arbitration/Occurrence Number 1996795 from registration records maintained by the CRD for Unnamed Party Luther Matthew Byrd (CRD Number 873649) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Luther Matthew Byrd 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 12805 of the Code, the Panel has made the following Rule 2080 affirmative finding of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

The Panel has made the above Rule 2080 finding based on the following reasons:

In this claim, the named Respondent is MLPFS. In the Statement of Claim, two brokers are mentioned. One of them is Unnamed Party Luther Matthew Byrd. He is seeking the expungement. In the claim, any reference to the broker refers to both brokers with no particularity as to what each broker did. No evidence was taken in this case, as the case was dismissed after continuous and unjustified failure by Claimant to provide information and documents as required under FINRA rules, and following specific notice to Claimant's counsel that continuation of this conduct could result in dismissal of the case as a sanction. When the contumacious conduct continued following two Panel orders requiring discovery,

the case was dismissed as a discovery sanction. In considering Respondent's Motion for Expungement on behalf of Unnamed Party Luther Matthew Byrd, a recorded hearing was held at which Mr. Byrd testified under oath that he was totally uninvolved in any matter related to Claimant or the accounts in question. Since there was no one at the hearing for Claimant, the Panel closed the hearing for deliberations. Having been involved throughout this case, including the many hearings held, all documents on file at the FINRA Portal relating to this case, the sworn testimony of Mr. Byrd and the arguments presented by Respondent's counsel, the Panel unanimously decided to grant the Motion for Expungement on the basis of FINRA Rule 2080(b)(1)(B). It is requested that the entry relating to this proceeding on Unnamed Party Luther Matthew Byrd's records be expunged.

3. Any and all claims for relief not specifically addressed herein, 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 = \$ 2,000.00

*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:

Member Surcharge = \$ 3,025.00

Member Process Fee = \$ 6,175.00

Discovery-Related Motion Fees

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

Two (2) decisions on discovery-related motions on the papers with one (1) Arbitrator @ \$200.00/decision = \$ 400.00

Respondent submitted two (2) discovery-related motions

Total Discovery-Related Motion Fees = \$ 400.00

The Panel has assessed the total discovery-related motion fees to Claimant.

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), which lasts four (4) hours or less. Fees associated with these proceedings are:

ARBITRATION PANEL

Michael H. McConihe	-	Public Arbitrator, Presiding Chairperson
Peter A. Roche	-	Public Arbitrator
Mimi Vivien Turin	-	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

Michael H. McConihe

Michael H. McConihe
Public Arbitrator, Presiding Chairperson

02/19/2021

Signature Date

Peter A. Roche

Peter A. Roche
Public Arbitrator

02/19/2021

Signature Date

Mimi Vivien Turin

Mimi Vivien Turin
Public Arbitrator

02/19/2021

Signature Date

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February 19, 2021

Date of Service (For FINRA Dispute Resolution Services use only)