

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Robert Matthew Krieger

Case Number: 20-03047

vs.

Respondent
Merrill Lynch Pierce Fenner & Smith Inc.

Hearing Site: San Francisco, California

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: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant Robert Matthew Krieger: Benjamin Winograd, Of Counsel, HLBS Law, Westminster, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc.: Laura Pizzitola, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: September 8, 2020.
Claimant signed the Submission Agreement: September 8, 2020.

Statement of Answer filed by Respondent on or about: November 4, 2020.
Respondent signed the Submission Agreement: November 4, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted a claim seeking expungement of customer dispute information from registration records maintained by the Central Registration Depository (“CRD”).

In the Statement of Answer, Respondent took no position on Claimant’s expungement request made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of Occurrence Numbers 1215172, 1375811, and 1406018 from Claimant's CRD records pursuant to FINRA Rule 2080, as:
 - a. the claim, allegation, or information is factually impossible or clearly erroneous; and/or
 - b. Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and/or
 - c. the claim, allegation, or information is false;
2. Compensatory damages in the amount of \$1.00 from Respondent; and
3. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent did not set forth a specific request for relief.

At the hearing, Claimant withdrew the request for \$1.00 in damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

On November 3, 2021, Claimant filed an affidavit stating that the customer in Occurrence Number 1215172 ("Mr. P") could not be located. In the affidavit, Claimant stated that despite diligent efforts, he was unable to obtain information needed to serve Mr. P with the Statement of Claim and notice of the date and time of the expungement hearing. Claimant also advised that Mr. P's information, including the last known address, was not in his possession and Respondent was unable to provide any information to assist with the research. Claimant further advised that he has exhausted all avenues from which to obtain information needed to serve Mr. P. The Arbitrator found sufficient efforts had been made to serve Mr. P.

On February 7, 2022, Claimant advised that the customers in Occurrence Numbers 1375811 ("Mr. E") and 1406018 ("Ms. M") were served with the Statement of Claim and notice of the date and time of the expungement hearing. On February 14, 2022, Claimant filed an Affidavit confirming that Mr. E and Ms. M were served with the Statement of Claim and notice of the date and time of the expungement hearing.

Hereinafter, Mr. P, Mr. E, and Ms. M will collectively be referred to as "Customers".

The Arbitrator conducted a recorded, telephonic hearing on March 9, 2022, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and, as stated in the Statement of Answer, did not oppose the request for expungement.

The Customers did not participate in the expungement hearing. The Arbitrator found that the Customers had notice of the expungement request and hearing.

The Arbitrator reviewed Claimant's BrokerCheck® Report. The Arbitrator noted that a prior arbitration panel or court did not previously rule on expungement of the same occurrences in the CRD.

The Arbitrator was unable to review the settlement documentation related to Occurrence Number 1215172. The Arbitrator noted that, upon diligent search, the settlement documents could not be produced due to the age of the complaint and Respondent's record retention policy had lapsed. Based upon Claimant's testimony and BrokerCheck® Report, the Arbitrator considered the amount of payment made to any party to the settlement and noted that Claimant did not contribute to the settlement amount. The Arbitrator also noted that the date of the settlement preceded the effective date of the rule against conditioned settlements.

The Arbitrator noted that the disputes related to Occurrence Numbers 1375811 and 1406018 were not settled and, therefore, there were no settlement documents to review.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Statement of Claim; Claimant's testimony at the expungement hearing; and Claimant's BrokerCheck® Report.

AWARD

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

1. The Arbitrator recommends the expungement of all references to Occurrence Numbers 1215172, 1375811, and 1406018 from registration records maintained by the CRD for Claimant Robert Matthew Krieger (CRD Number 2441634) with the understanding that, pursuant to Notice to Members 04-16, Claimant Robert Matthew Krieger 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 of Arbitration Procedure ("Code"), the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous.

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

The claim, allegation, or information is false.

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

Based on the evidence adduced at the recorded expungement hearing in this matter held on March 9, 2022, the Arbitrator found that Claimant was very knowledgeable, competent, clear and most importantly, credible in regard to his testimony in support of his request to expunge each of these three customer complaints listed on his CRD and BrokerCheck Reports. Additionally, Respondent filed an answer in this matter which,

“took no position as to the request for expungement made by Claimant... Merrill Lynch properly reported these complaints to the CRD pursuant to FINRA reporting rules, which require member firms to report sales practices complaints by filing Form U-4 or Form U-5 updates, *irrespective of whether the claims have merit.*” (Emphasis added) Moreover, Claimant has had a career in financial services for about 30 years, and these three complaints are the only customer complaints on his records for that entire time, which is also helpful. Furthermore, Claimant has not made any previous expungement request. The Arbitrator also notes the testimony concerning each of these complaints were filed about investments made and/or held during two significant nation-wide, sectors-wide, and investment-wide downturns in the market, per se.

Occurrence Number 1215172

Mr. P’s portfolio recommended by Claimant was suitable, diversified, conservative and provided regular income. Subsequent unanticipated, spontaneous cash withdrawals from that agreed-upon portfolio, requested and made by Mr. P, while the regular income was being paid from the investment portfolio, depleted the value of his portfolio and rate of return without regard to investment risk – all contrary to Claimant’s advice. During a mediation, this matter was settled for 25% of the customer’s request. The testimony was that Claimant did not contribute to the settlement and that it was made, without any admissions, for business reasons by Respondent herein, to avoid protracted arbitration and/or litigation. Claimant, counsel, and Respondent made good faith attempts to locate the settlement documents. The settlement occurred in 2007, outside Respondent’s document retention policy and at a time before such documents were digitized by Respondent. The Arbitrator, therefore, finds and holds that Claimant has met his burden of persuasion and proof and recommends that Occurrence Number 1215172 be expunged from Claimant’s CRD and BrokerCheck Report pursuant to Rule 2080(b)(1)(A) and 2080(b)(1)(C).

Occurrence Number 1375811

Mr. E’s portfolio was suitable, diversified and within the customer’s risk tolerances and longevity expectations. Positive returns were realized in a down market. Income was generated and the principal was not risked. Some profitable equities were sold at a loss, at the client’s request, to reduce tax exposure. Respondent investigated, then denied the complaint at the time it was filed, and introduced into evidence its letter to Mr. E explaining, at that time, the downturn in the investment and the rationale for denial of the claim. Although Mr. E’s lawyer wrote a letter demanding a settlement before initiating a legal action, Mr. E did not pursue arbitration or litigation. Mr. E was also invited to submit written documentation, participate, appear, testify, cross examine in this hearing, with or without counsel, but did not communicate or appear. The Arbitrator, therefore, finds and holds that Claimant has met his burden of persuasion and proof and recommends that Occurrence Number 1375811 be expunged from Claimant’s CRD and BrokerCheck reports pursuant to Rule 2080(b)(1)(A).

Occurrence Number 1406018

Ms. M was only casually acquainted with Claimant. Testimony and contemporaneous documents introduced support the proposition that Claimant’s professional financial

advisor relationship with Ms. M ended after introducing her, as a client, to his colleague who then handled and advised her portfolio and investments thereafter. Claimant was not her financial advisor, or her financial planner. Claimant did not sign any new account documents, nor any other related paperwork, nor make investment advice or recommendations, nor discuss any questions regarding fees, nor review her investment transactions as her financial advisor. Respondent investigated, then denied the complaint at the time it was filed. Ms. M was also invited to submit written documentation, participate, appear, testify, cross examine in this hearing, with or without counsel, but did not communicate or appear. The Arbitrator therefore finds and holds that Claimant has met his burden of persuasion and proof and recommends that Occurrence Number 1406018 be expunged from Claimant's CRD and BrokerCheck reports pursuant to Rule 2080(b)(1)(A) and 2080(b)(1)(B).

In addition to the weight of the evidence, the Arbitrator also finds and holds that continued CRD/BrokerCheck disclosures of said occurrences will not offer public investor protection, nor regulatory value, nor valuable information for informed-investor decision making due to Claimant's credibility and character within his business relationships and his many unrelated, positive community activities.

2. 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	= \$	50.00
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**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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$	150.00
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Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

August 27, 2021, postponement requested by Claimant	= \$	Waived
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December 14, 2021, postponement requested by Claimant	= \$	50.00
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Total Postponement Fees	= \$	50.00
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The Arbitrator has assessed the total postponement fees to Claimant.

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:

One (1) pre-hearing session with a single Arbitrator @ \$50.00/session	= \$	50.00
Pre-Hearing Conference: January 8, 2021	1 session	

One (1) hearing session on expungement request @ \$50.00/session	= \$	50.00
Hearing: March 9, 2022	1 session	

Total Hearing Session Fees	= \$	100.00
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The Arbitrator has assessed the total hearing session fees to Claimant.

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

ARBITRATOR

John J. Fitzpatrick, Jr.

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Sole 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.

Arbitrator's Signature

John J. Fitzpatrick, Jr.

John J. Fitzpatrick, Jr.
Sole Public Arbitrator

03/17/2022

Signature Date

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March 18, 2022

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