

**AWARD**

FINRA Office of DISPUTE RESOLUTION

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CASE #: [REDACTED]

[REDACTED] (Claimant) vs. Merrill Lynch Pierce Fenner & Smith Inc. (Respondent)

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**REPRESENTATION OF PARTIES:**

For Claimant [REDACTED]: Doctor Kennedy, MBA, J.D. and Armin Sarabi, J.D., AdvisorLaw, LLC, Broomfield, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc.: Randi P. Spallina, Esq., Bressler, Amery & Ross, P.C., Fort Lauderdale, Florida.

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**NATURE OF DISPUTE:** Associated Person vs. Member

Statement of Claim filed on: April 6, 2017.

Statement of Answer filed on: June 5, 2017.

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**CASE SUMMARY:** Claimant requested expungement of customer complaint occurrence number [REDACTED] ("Underlying Complaint") from his Central Registration Depository ("CRD") record.

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**RELIEF REQUESTED:**

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Complaint from his CRD record pursuant to FINRA Rule 2080(b)(1)(B), finding that Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.
2. Expungement of the Underlying Complaint from his CRD record pursuant to FINRA Rule 2080(b)(1)(C), finding the claim, allegation or information is false.
3. An award of compensatory damages in the amount of \$1.00 from Respondent; and
4. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent advised that while it takes no position as to Claimant's request for expungement and does not intend to participate in the final hearing, it objects to Claimant's request for compensatory damages and asserts various affirmative and other defenses.

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**AWARD:** The undersigned Arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The Arbitrator recommends the expungement of all references to the Underlying Complaint, namely occurrence number [REDACTED], from [REDACTED] (CRD# [REDACTED]) registration records maintained by the CRD, with the understanding that pursuant to Notice to Members 04-16, Claimant [REDACTED] 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 false.

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

Claimant provided documentation that clearly indicated that Mr. M, the customer in the Underlying Complaint, did not misunderstand the provisions of the annuity in dispute. Mr. M decided after the fact that he did not want the living benefit rider, which was an irrevocable provision, and the insurance company refused to cancel the provision. Now Mr. M believes that he did not check the box electing the living benefit (11 years after the fact), but that it was checked off by Claimant. Claimant’s compensation “with the provision” was less than it would have been without it and there was no evidence of any such wrongdoing. In fact, Claimant’s Exhibit 2, Mr. M’s Letter to the California Department of Insurance Claims Services Bureau dated October 8, 2009 and Exhibit 3, Email Correspondence from Mr. M to Claimant dated October 26, 2009, indicate that Mr. M did in fact make the election and later had a change of heart. Respondent’s report on the CRD is clearly defamatory in nature.

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

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OTHER ISSUES: The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

At the time of appointment to this case, the Arbitrator was classified as a public arbitrator. On October 12, 2017, the parties were advised that the Arbitrator’s classification had been changed to non-public.

On August 11, 2017, Claimant provided notice that Mr. M had been served with the Statement of Claim and notice of the expungement hearing.

On August 15, 2017, Claimant provided an affidavit of service that Mr. M had been served with the Statement of Claim.

On September 29, 2017, Mr. M filed a response in opposition of Claimant’s request for expungement.

On November 1, 2017, Claimant submitted the most recent copy of Claimant’s BrokerCheck® Report.

On November 16, 2017, Mr. M filed a further response in opposition to Claimant’s request for expungement and notice of intent to participate in the expungement hearing.

The Arbitrator conducted a recorded telephonic hearing on November 21, 2017 so the parties could present oral argument and evidence on Claimant's request for expungement. Mr. M appeared at the expungement hearing and opposed the expungement request.

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

Mr. M filed a complaint against the insurance company issuing the annuity with the California Department of Insurance Claims Services Bureau. The insurance company reported that complaint to Respondent and Respondent was compelled to report the occurrence on Claimant's CRD records. The Arbitrator determined that Mr. M never filed a complaint with FINRA or Respondent, and there was no settlement agreement for the Arbitrator to review.

The Arbitrator noted that Claimant did not previously request expungement of the Underlying Complaint.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's BrokerCheck® Report, Claimant's oral testimony, Mr. M's oral testimony, Mr. M's Letter to the California Department of Insurance Claims Services Bureau dated October 8, 2009 and Email Correspondence from Mr. M to Claimant dated October 26, 2009.

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OTHER FEES: Respondent has paid to FINRA Office of Dispute Resolution the \$150.00 Member Surcharge previously invoiced.

FINRA Dispute Resolution 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.

#### Hearing Session Fees and Assessment

The Arbitrator 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:

One (1) Pre-hearing session with a single arbitrator @ \$50.00/session	= \$50.00
Pre-hearing conference: August 3, 2017 1 session	
One (1) Hearing session on expungement request @ \$50.00/session	= \$50.00
Hearing Date: November 21, 2017 1 session	
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Total Hearing Session Fees	= \$100.00

The Arbitrator has assessed \$100.00 of the hearing session fees to Claimant.

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

**ARBITRATOR**

A. Joel Klein

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Sole 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.

Arbitrator's Signature

  
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A. Joel Klein  
Sole Non-Public Arbitrator

12/5/2017  
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Signature Date

December 5, 2017  
Date of Service (For FINRA-ODR office use only)