In the Matter of the Arbitration Between:

Claimants
Craig Kinard
Guido Graff

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith
Incorporated

Nature of the Dispute: Associated Persons vs. Member

REPRESENTATION OF PARTIES

For Claimants Craig Kinard and Guido Graff: Jason S. Pinney, Esq., Morgan Lewis & Bockius LLP, Boston, Massachusetts.


CASE INFORMATION

Statement of Claim filed on or about: November 20, 2018.
Craig Kinard signed the Submission Agreement: November 20, 2018.
Guido Graff signed the Submission Agreement: November 20, 2018.

Statement of Answer filed by Respondent on or about: January 17, 2019.

CASE SUMMARY

Claimants asserted the following causes of action: expungement.

In the Statement of Answer, Respondent denied any allegations of wrongdoing and supported Claimants’ request for expungement.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested: expungement of Occurrence Numbers 1623027 and 1624031 from their registration records maintained by the Central Registration Depository (“CRD”); and any additional relief that the Arbitrator deems
appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that she has read the pleadings and other materials filed by the parties.

The Arbitrator conducted a recorded in-person hearing on August 27, 2019 so the parties could present oral argument and evidence on Craig Kinard and Guido Graff’s request for expungement.

Claimants provided FINRA Office of Dispute Resolution with proof that the customer related to Occurrence Numbers 1623027 and 1624031 was notified of the expungement request, the date and time of the expungement hearing, and of his right to participate and testify at the expungement hearing. The customer was served a copy of the Statement of Claim with the notice. The customer did not participate in the expungement hearing and did not contest the request for expungement.

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated did not participate in the expungement hearing and did not contest the request for expungement.

The Arbitrator reviewed the BrokerCheck® Reports for Craig Kinard and Guido Graff. The Arbitrator also reviewed the settlement document, considered the amount of payments made to the customer, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on the customer not opposing the request for expungement. The Arbitrator also noted that neither Craig Kinard nor Guido Graff contributed to the settlement amount.

The Arbitrator noted that Craig Kinard and Guido Graff have not previously filed a claim requesting expungement of the same disclosure in the CRD.

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: pleadings, party submissions, hearing exhibits, and Claimants’ BrokerCheck® Reports and testimony.

AWARD

After considering the pleadings, and the testimony and evidence presented at the hearing, 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 Number 1623027 from registration records maintained by the CRD for Claimant Craig Kinard (CRD# 2477579), with the understanding that, pursuant to Notice to Members 04-16, Claimant Craig Kinard 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 false.

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

The account opening documents evidence the customer's primary investment objective as aggressive income, defined as being for investors seeking higher returns either as growth or income with greater risk to principal. The suitability form evidences the customer's trading objective as hedging, indicates that he had engaged in previous commodities transaction activity and shows liquid assets of $15 million and net worth of $30 million. The customer had many years of experience investing in complex products including options as evidenced by his account statements. Additionally, the customer is President and owner of his own investment company. The customer is also the CEO, President, and founder of an energy development company, where his bio states that he is an accomplished oil and gas executive.

The customer completed a suitability protocol prior to purchasing the product at issue including meeting the requirements of an eligible contract participant under the Commodity Exchange Act; signing a commodities and derivatives transactions suitability form which included detailed information concerning the customer's net worth, investment experience, risk tolerance, and investment objectives; signing a letter of representations and acknowledgments affirming that he had reviewed and understood the material terms and conditions of the transaction documents, and that he had such knowledge and experience in financial and business affairs as to be capable of evaluating the merits and risks of entering into the transaction; participating in a detailed suitability call in which he was asked numerous times whether he understood the transaction and whether he had any questions; and signed a long form trade confirmation with explicit details of the transaction.

Prior to the customer's purchase of the product at issue, Mr. Kinard sent him a deck which included an overview of the strategy, such as the structure of the transaction, an explanation of the indexes used, historical performance of the indexes, and the trigger option.

Both Mr. Kinard and Mr. Graff participated in two due diligence/suitability calls with the customer where they explained the terms of the transaction, the maturity, leverage, the return and risk, the construction of the index, and liquidity and interim price risk.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1624031 from registration records maintained by the CRD for Claimant Guido Graff (CRD# 4675325), with the understanding that, pursuant to Notice to Members 04-16, Claimant Guido Graff 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 false.

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

The risks associated with the product at issue were disclosed in the offering materials. This included short-term supply and demand shocks to underlying commodities, as well as geopolitical events, weather shocks, and other natural disasters with market impact, all which could affect the index performance.

In addition, Mr. Graff and Mr. Kinard participated in two due diligence/suitability calls with the customer where they explained the terms of the transaction, the maturity, leverage, the return and risk, the construction of the index, and liquidity and interim price risk.

In May of 2012, an email was sent to the customer highlighting the main points of the poor performance of the product at issue, including low harvests of soy and corn due to frost and lack of rain which negatively impacted prices. Mr. Graff testified to being on a telephone call with the customer explaining the disruption in the commodities market and what was driving the performance of the transaction at issue, namely the increase in corn and soybean prices as the drought worsened.

**FEES**

Pursuant to the Code of Arbitration Procedure, 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 that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is assessed the following:

| Member Surcharge | =$ 1,900.00 |
| Member Process Fee | =$ 3,750.00 |
Postponement Fees
Postponements granted during these proceedings for which fees were assessed or waived:

June 27, 2019, postponement by Claimants  WAIVED

Total Postponements Fees  WAIVED

Last Minute Cancellation Fees
Fees apply when a hearing on the merits is postponed or settled within ten calendar days before the start of a scheduled hearing session:

June 27, 2019, postponement requested by Claimants  WAIVED

Total Last Minute Cancellation Fees  WAIVED

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

One (1) pre-hearing session with a single arbitrator @ $450.00/session  =$ 450.00
Pre-hearing conference: February 25, 2019  1 session

Two (2) hearing sessions @ $450.00/session  =$ 900.00
Hearing Date: August 27, 2019  2 sessions

Total Hearing Session Fees  =$ 1,350.00

The Arbitrator has assessed the $1,350.00 hearing session fees to Claimants.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.
I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature

Keely D. Parr
Sole Public Arbitrator

October 04, 2019
Date of Service (For FINRA Office of Dispute Resolution office use only)