

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimant  
Kent Kirby

Case Number: 21-01152

vs.

Respondent  
UBS Financial Services, Inc.

Hearing Site: Nashville, Tennessee

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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 Kent Kirby: David I. Hantman, Esq., Bressler, Amery & Ross, P.C., New York, New York.

For Respondent UBS Financial Services, Inc.: Omar Perez, Esq., UBS Business Solutions US, LLC, Nashville, Tennessee.

**CASE INFORMATION**

Statement of Claim filed on or about: May 3, 2021.  
Kent Kirby signed the Submission Agreement: May 4, 2021.

Statement of Answer filed by Respondent on or about: May 6, 2021.  
UBS Financial Services, Inc. signed the Submission Agreement: May 6, 2021.

**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 did not oppose Claimant’s expungement request.

**RELIEF REQUESTED**

In the Statement of Claim, Claimant requested expungement of Occurrence Numbers 1014024 (“Customer A”), 1390398 (“Customer B”), 1493691 (“Customer C”), 1528918 (“Customer D”), and 1566478 (“Customers E”), hereinafter referred to collectively as the “Customers.”

In the Statement of Answer, Respondent requested that all costs and fees associated with the claim be assessed solely against Claimant.

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

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

On August 13, 2021, Claimant filed an Affirmation confirming that the Customers were served with the Statement of Claim and notice of the date and time of the expungement hearing.

On August 23, 2021, Customer B submitted notice of his intent to appear at the expungement hearing on September 13, 2021. However, Customer B ultimately did not appear at the hearing.

On August 25, 2021, Customer E1, one of the two individuals comprising Customers E, submitted notice of his intent to appear at the expungement hearing on September 13, 2021.

On September 12, 2021, Customer E1 submitted a statement detailing his opposition to expungement, as well as an exhibit.

The Arbitrator conducted a recorded, telephonic hearing on September 13, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

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

Customer E1 participated in the expungement hearing and opposed the expungement request. The Arbitrator found that Customer E2 also had notice of the expungement request and hearing.

Customers A, B, C, and D did not participate in the expungement hearing. The Arbitrator found that Customers A, B, C, and D 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 also reviewed the settlement documentation related to Occurrence Numbers 1493691, 1528918, and 1566478, considered the amount of payment made to any party to the settlements, and considered other relevant terms and conditions of the settlements. The Arbitrator noted that the settlements were not conditioned on any party to the settlements not opposing the expungement request and that Claimant did not contribute to the settlement amounts.

The Arbitrator did not review the settlement documentation related to Occurrence Numbers 1014024 and 1390398, because Respondent was unable to produce the settlement documentation for these matters. The Arbitrator noted that, based on the testimony provided, the settlements were not conditioned on any party to the settlements not opposing the expungement request and that Claimant did not contribute to the settlement amounts.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: testimony of Claimant at the hearing; testimony of Customer E1 at the hearing; Claimant's BrokerCheck® Report; the settlement documentation for Occurrence Numbers 1493691, 1528918, and 1566478; and the fact that Respondent did not oppose expungement.

### **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 1014024, 1390398, 1493691, 1528918, and 1566478 from registration records maintained by the CRD for Claimant Kent Kirby (CRD Number 2322053) with the understanding that, pursuant to Notice to Members 04-16, Claimant Kent Kirby 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 claim, allegation, or information is false.

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

Occurrence Number 1014024 (Case Number 01-04612):

Expungement of Occurrence Number 1014024 is being recommended because the facts fit the requirements of both FINRA Rules 2080(b)(1)(A) and (C).

Rule 2080(b)(1)(A): The claim, allegation, or information is factually impossible or clearly erroneous.

Customer A was a retiree who had a good relationship with Claimant. Customer A was invested in a very balanced, well diversified portfolio. In the 1990's, on an unsolicited basis, Customer A purchased the Van Kampen Internet Trust Fund ("Van Kampen Fund"), attempting to capitalize on the rapid growth of the internet and technology markets. Although his accounts did well, Customer A filed a complaint alleging that his accounts should have done better. He claimed unsuitability because he lost opportunities to invest even more in these markets. Customer A stated that, at some point, he gave an order to sell the Van Kampen Fund investments. Neither Claimant, nor anyone else on his team or at Merrill Lynch, has any knowledge, recollection, or record of such a request. Customer A filed a complaint demanding monetary damages. Merrill Lynch ultimately made a nuisance settlement of nominal sum. Claimant was not involved and did not contribute to the

settlement. Claimant had no involvement in either the purchase of the Van Kampen Fund or in the alleged request to sell it.

Rule 2080(b)(1)(C): The claim, allegation, or information is false.

The same facts and reasoning apply with respect to this rule as well. The Arbitrator finds that Customer A's claim is false with respect to Claimant.

Occurrence Numbers 1390398, 1493691 (Case Number 09-07071), 1528918 (Case Number 10-03892), and 1566478 (Case Number 11-01947):

Expungement of Occurrence Numbers 1390398, 1493691, 1528918, and 1566478 is being recommended because the facts fit the requirements of both FINRA Rules 2080(b)(1)(A) and (C).

Rule 2080(b)(1)(A): The claim, allegation, or information is factually impossible or clearly erroneous.

The allegation of breach of fiduciary duties is false and factually impossible because Respondent's conduct was, at all times, in accordance with the standards of all FINRA Rules. These four cases all relate to the purchase of Collateralized Debt Obligations ("CDO"). The product in question in all four cases were various series of Alesco Preferred Funding, Ltd. CDO's ("Alesco CDO's"). These were private placement funds that invested in preferred securities. Customers B, C, D, and E were told upfront that the CDO's were an illiquid investment. In the beginning, these investments did quite well. However, when the market collapsed in mid-2007 and 2008, a global credit crisis occurred, affecting the investments.

Prior to recommending the Alesco CDO's, Claimant engaged in very intensive due diligence regarding the product. Claimant had calls with the Merrill Lynch CDO desk; he had calls with Cohen Brothers (the second largest manager of CDO's and specifically, the manager of the Alesco Funds); he had calls with Merrill Lynch's senior financial advisors; and he attended meetings and seminars regarding the CDO product in both Wyoming and New York.

Customers B, C, D, and E were prescreened by Claimant and found to be qualified to invest in the CDO's. They each had to invest a specific, high minimum amount, and each had to have investable assets of a substantial amount. Once each customer was approved, Claimant provided each of them with written materials describing the CDO's. First, they were provided Preliminary Offering Memoranda describing the investments. Then, they were provided Marketing Decks. Claimant had personal discussions about the CDO's with each customer. Finally, each customer executed investor applications which acknowledged their familiarity with the products and attested they had received and read the Preliminary Offering Memorandum and the Final Offering Memorandum. These memoranda included investor qualification requirements and suitability provisions. Finally, each customer signed a Subscription Agreement which contained language that confirmed that the customer was not relying on the CDO issuers, their managers or advisors, the brokerage firm, or any of their representatives, but rather had consulted their own legal, tax, financial, and accounting advisors, and had made their own individual judgments as to whether or not to invest in the

CDO's. Further, each customer reviewed, completed, and signed all necessary authorization forms related to their investment.

Rule 2080(b)(1)(C): The claim, allegation, or information is false.

The same facts and reasoning apply with respect to this rule as well. The Arbitrator finds that Customers B, C, D, and E's claims are false with respect to Claimant.

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:

Expungement Filing Fee	= \$ 1,600.00
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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	= \$ 2,000.00
Member Process Fee	= \$ 3,850.00

#### **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) hearing session on expungement request @ \$1,150.00/session	= \$ 1,150.00
Hearing: September 13, 2021 1 session	

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Total Hearing Session Fees	= \$ 1,150.00
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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**

Harvey R. Linder

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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**

***Harvey R. Linder***

Harvey R. Linder  
Sole Public Arbitrator

**09/16/2021**

Signature Date

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September 17, 2021

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