

FACSIMILE TRANSMISSION

To:

From: James Bellamy

Phone:

Phone: (303) 952-4025 * 1246

Fax Phone: (202) 772-9324

Fax Phone: 13039524025

Note:

3-19228_2021-11-01_Pearce_Unopposed Motion to Adduce Additional Evidence with Attached Exhibit 1

Date: 11/01/2021

Pages: 10

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

KENT VINCENT PEARCE

For Review of Action Taken by

FINRA

File No. 3-19228

MR. PEARCE'S UNOPPOSED MOTION TO ADDUCE ADDITIONAL EVIDENCE

I. INTRODUCTION

Applicant, Kent Vincent Pearce, ("Pearce"), moves the Commission for leave to adduce additional evidence pursuant to SEC Rule of Practice 452. Through his Application for Review, Mr. Pearce seeks for the Commission to review FINRA's decision to deny Mr. Pearce access to its arbitration forum to seek expungement of a customer dispute disclosure. Mr. Pearce now requests to introduce as additional evidence in this case an Affidavit (the "Affidavit" attached as **Exhibit 1**) to aid in addressing the Commission's questions raised in its Order Requesting Additional Briefing dated September 13, 2021 ("Additional Briefing Order"). The Commission should permit the introduction of Exhibit 1 to the record of this case because it is material and there were reasonable grounds for failing to adduce this evidence previously. Mr. Pearce's counsel has conferred with FINRA's counsel, and this motion is unopposed.

II. FACTUAL BACKGROUND

Mr. Pearce has been working in the securities industry since June of 1995 and has been registered with Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) in Towson, Maryland since then. CR¹ at 1. In May of 2000, Mr. Pearce began giving investment advice to Mr. Edward P. Dubicki and Mrs. Margaret M. Dubicki (together, the “Customers”). CR at 2. In or around January of 2001, the Customers transferred their accounts away from Mr. Pearce and Merrill Lynch. CR at 6. Almost two years later, on or about December 10, 2002, the Customers filed a complaint with the NASD, alleging unsuitable investment recommendations and other causes of action. CR at 7. This complaint was reported to Mr. Pearce’s Central Registration Depository (“CRD”) and BrokerCheck records.

From February 17, 2004 to February 19, 2004, a recorded hearing (“Hearing”) was held. CR at 76. Mr. Pearce testified at the Hearing, but he does not recall his request for expungement ever being addressed at the Hearing. *See*, Exhibit 1 at 8-9. On February 25, 2004, the arbitration panel issued a decision, finding: Merrill Lynch and Mr. Pearce jointly and severally liable in the amount of \$50,000 for compensatory damages, and denying all other requested relief. CR at 76. Merrill Lynch did not hold Mr. Pearce financially responsible for any portion of the award, nor was not required to, nor did he, contribute to the award. *See*, Exhibit 1 at 11. There have never been any additional hearings to address Mr. Pearce’s request for expungement. *See*, Exhibit 1 at 12.

On June 26, 2019, Mr. Pearce submitted a Statement of Claim to FINRA requesting a hearing for the expungement of his CRD record as it relates to the customer dispute disclosure occurrence number 1111750 (“the Occurrence”). CR at 1. On June 27, 2019, Mr. Pearce received

¹ “CR at ___” refers to the Certified Record filed by FINRA on or about July 10, 2019, and the specific page number cited.

notice that the Director of FINRA Office of Dispute Resolution (“the Director”) denied him access to the FINRA forum for arbitration, claiming that the Director determined that Mr. Pearce’s request for expungement of the Occurrence “is not eligible for arbitration,” citing Industry Code Rule 13203(a). CR at 83.

In response, Mr. Pearce submitted his Application for Review with the Commission. After the Commission found jurisdiction over this appeal and briefing by the parties were submitted, the Commission issued its Additional Briefing Order requesting specific questions be addressed by the parties. To aid in addressing the Commission’s Additional Briefing Order, Mr. Pearce hereby seeks to adduce additional evidence as outlined in this Motion.

III. ARGUMENT

Pursuant to SEC Rule of Practice 452, the Commission may grant this Motion if Mr. Pearce shows that the evidence is material and there were reasonable grounds for failure to adduce such evidence previously. 17 CFR § 201.452. The Affidavit is material and there are reasonable grounds for not adducing the evidence previously. Thus, it should be admitted into evidence.

The Affidavit is material because it addresses questions raised by the Commission in its Additional Briefing Order and tends to prove Mr. Pearce’s assertion that he was prohibited access to FINRA’s Arbitration Forum regarding the issue of expungement. Specifically, the Affidavit explains that Mr. Pearce did not have an adequate opportunity to be heard with respect to his request for expungement in the underlying arbitration proceeding, a central issue to his Application for Review. *See*, Exhibit 1.

There were reasonable grounds not to adduce the Affidavit previously because the Commission only recently issued its Additional Briefing Order requesting additional information from the parties. Additionally, the question as to whether Mr. Pearce previously sought

expungement has not been a central issue in this appeal, as the crux of Mr. Pearce's Application for Review sought Commission review of FINRA's prohibition or limitation of his access to the use of its arbitration forum. *See*, Opening Joint Brief at 7 ("[t]here can be no dispute that none of the Applicants ever filed a request for expungement, nor are any of the Applicants subject to an award or decision denying expungement from an arbitration, state, or federal judgment" as well as the fact that "[a]n examination of each and every one of the awards at issue in this Consolidated Arbitration Application shows that none of the arbitrators considered or determined the issue of whether the disclosure has regulatory value pursuant to the FINRA standards for expungement. . ."). Finally, FINRA does not oppose the admission of the Affidavit as evidence.

In conclusion, the Affidavit is material and there were reasonable grounds for not previously introducing the evidence. Mr. Pearce filed this Motion to Adduce promptly. Therefore, the Commission should grant Mr. Pearce's Motion.

Dated: November 1, 2021

Respectfully submitted,



Michael Bessette
Senior Attorney
T: (720) 432-6546
E: michael.bessette@hlbslaw.com
HLBS Law, LLC
9737 Wadsworth Pkwy, G-100
Westminster, CO 80021



Owen Harnett,
Managing Attorney
T: (720) 515-9069
E: owen.harnett@hlbslaw.com
HLBS Law
9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021

CERTIFICATE OF SERVICE

I, James Bellamy, certify that on November 1, 2021, I caused a copy of the foregoing Unopposed Motion to Adduce Additional Evidence with Attached Exhibit 1 Affidavit in the matter of the Application for Review of Kent Vincent Pearce Administrative Proceeding File No. 3-19228 to be filed through the SEC's eFAP system and served by electronic mail on:

The Office of the Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, D.C. 20549-1090

Celia Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
ersilia.Passaro@finra.org

Megan Rauch
Associate General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
megan.rauch@finra.org

Alan Lawhead
Vice President and Director – Appellate Group
Office of General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
alan.lawhead@finra.org

General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
Email: nac.casefilings@finra.org

[X] (STATE) I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

/s/James Bellamy

James Bellamy

9737 Wadsworth Pkwy Suite G-100

Westminster, CO 80021

EXHIBIT 1

AFFIDAVIT OF KENT PEARCE

I, Kent Vincent Pearce, do hereby swear that the information contained herein is complete and accurate to the best of my knowledge. I do depose and say:

1. My name is Kent Vincent Pearce and I reside at [REDACTED] Hunt Valley, MD
2. I am a registered representative and investment adviser representative registered with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") in Towson, MD.
3. On or about December 10, 2002, the Dubicki Living Trust, Margaret Dubicki, and Edward P. Dubicki ("Underlying Claimants") submitted a Statement of Claim filed in the case captioned NASD # 02-07575, *Dubicki Living Trust, Margaret Dubicki, and Edward P. Dubicki v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Kent V. Pearce* ("Underlying Action").
4. Throughout the Underlying Action, I was represented by Merrill Lynch's counsel and not represented by an independent counsel of my choosing.
5. I denied the merits of the allegations made by the Underlying Claimants in the Underlying Action then and still do to this day.
6. Merrill Lynch submitted on my behalf in its Statement of Answer a request for expungement of references to the Underlying Action from my Central Registration Depository ("CRD") record.
7. On or about February 17, 2004 to February 19, 2004, an arbitration hearing was conducted ("Hearing") to address the Underlying Claimants' causing of action.
8. I was present and testified at the Hearing.
9. At the Hearing, I do not recall my request for expungement of the Underlying Action ever being addressed by anyone nor do I recall the standard for expungement being addressed.
10. On or about February 25, 2004, the arbitration panel in the Underling Action issued an award ("Award") finding me and Merrill Lynch jointly and severally liable for \$50,000 in compensatory damages. The Underlying Claimants were requesting over \$260,000 in compensatory damages.
11. I was not required by Merrill Lynch to contribute to the Award amount.
12. No additional hearing to address my request for expungement was ever held.

I, Kent Vincent Pearce, hereby declare the above affidavit was written and signed absent duress, and in good faith.

Kent Pearce
Kent Vincent Pearce

10-27-21
Date

STATE OF MARYLAND, COUNTY OF BALTIMORE

On this 27th day of October, 2021, before me, Kent Pearce, personally appeared (or satisfactorily proven) to be the person whose name is subscribed in the within Affidavit, and, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit and that the matters stated herein are true to the best of his/her information, knowledge, and belief.

In witness whereof I hereunto set my hand and official seal.

KEBRON HABTEHOWER
Notary Public

NOTARY - PUBLIC
Title

My commission expires 07.25.2022

Kebron

