

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

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In the Matter of the Arbitration Between:

Claimants

Philip D. Sims, individually and on behalf of his IRA

Case Number: 19-00603

vs.

Respondent

McNally Financial Services Corporation

Hearing Site: Houston, Texas

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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: Customers vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

**REPRESENTATION OF PARTIES**

For Claimants Philip D. Sims, Individually and on behalf of his IRA (“Claimants”): Robert H. Rex, Esq., Dickenson Murphy Rex and Sloan, P.A., Austin, Texas.\*

For Respondent McNally Financial Services Corporation (“Respondent”): Gary S. Kessler, Esq. and Bryon Romine, Esq., Kessler & Collins, Dallas, Texas.

\*FINRA recorded the appearance of Claimant’s counsel at the time of filing of the Statement of Claim. Counsel’s representation of Claimant may have ended with the parties’ settlement. Please see the Other Issues Considered and Decided section of this Award for information on whether Claimant’s counsel appeared at the expungement hearing.

**CASE INFORMATION**

Statement of Claim filed on or about: February 27, 2019.

Claimants signed the Submission Agreement: February 6, 2019.

Statement of Answer filed on or about: May 2, 2019.

Respondent signed the Submission Agreement: May 3, 2019.

### **CASE SUMMARY**

In the Statement of Claim, Claimants asserted the following causes of action: common law fraud, common law negligent misrepresentation; breach of fiduciary duty, negligent failure to supervise, and negligence. The causes of action relate to Claimant's allegations that Respondent permitted its registered representative to recommend various unsuitable and risky investments, including annuities, an investment in Behringer Harvard Priority Income Fund, and an investment in a Credit Suisse product which was later exchanged for share of Coherent (COHR).

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants requested forum and filing fees; actual damages between \$100,000.00 and \$500,000.00 or such other amount as proven at hearing; interest and all of Claimants' costs, expenses and disbursements, including expert witness fees; and such other relief as the Panel deems just and proper.

In the Statement of Answer, Respondent requested that the Panel dismiss Claimants' claims in full, that Respondent be awarded costs, attorneys' fees, and expert fees; that the Panel recommend expungement of all references to this matter from Central Registration Depository ("CRD") registration records for Unnamed Party Mark Alan Kemp ("Kemp"), and that Respondent have any and all further relief for which it may show itself justly entitled.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On December 10, 2021, Claimant filed notice that the case had settled and that he would be filing a dismissal with prejudice. The same day, Respondent filed correspondence requesting that a hearing be held for Respondent's request for expungement on behalf of Kemp. On December 28, 2021, Claimant dismissed the case with prejudice. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On December 17, 2020, Claimant filed correspondence that he did not oppose Respondent's request for expungement on behalf of Kemp.

The Panel conducted a recorded hearing by videoconference on December 17, 2021 and December 28, 2021, so the parties could present oral argument and evidence on Respondent's request for expungement on behalf of Kemp.

Neither Claimant nor Claimant's counsel participated in the expungement hearing.

The Panel reviewed Kemp's BrokerCheck® Report. The Panel noted that a prior arbitration panel or court has not previously ruled on expungement of the same occurrence in the CRD.

The Panel also reviewed the settlement documentation, considered the amount of payment made to any party to the settlement, and considered other relevant terms and conditions of the settlement. The Panel noted that the settlement was not conditioned on any party to the settlement not opposing the request for expungement and that Kemp did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Kemp's BrokerCheck® Report, notice to customer letter from Claimant's counsel, New Account Agreement, Combined Summary document, settlement agreement, and email from Claimant's counsel.

The Award in this matter may be executed in counterpart copies.

### **AWARD**

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

1. The Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2022180) from registration records maintained by the CRD for Unnamed Party Mark Alan Kemp (CRD Number 2057200) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Mark Alan Kemp 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 12805 of the Code of Arbitration Procedure ("Code"), the Panel has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is factually impossible or clearly erroneous; and

The claim, allegation, or information is false.

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

From the uncontradicted testimony of Kemp, the Panel was of the collective opinion that the trades with Claimant were suitable, that Claimant had approved each such trade, that Claimant had withdrawn his arbitration claim with prejudice with no payments made by Respondent or Kemp, and that Claimant had in fact made a profit on his investments with Kemp.

2. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, 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	=\$ 1,425.00
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*\*The filing fee is made up of a non-refundable and a refundable portion.*

Pursuant to Rule 12902(d) of the Code, FINRA shall retain the total amount of the filing fee deposited by Claimant/Respondent since this office was notified by the parties that they settled or withdrew this matter within 10 calendar days of the first scheduled hearing session.

### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	=\$ 1,900.00
Member Process Fee	=\$ 3,750.00

### Last-Minute Cancellation Fees

Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

December 14-17, 2021, settled by the parties	=\$ 1,800.00
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Total Last-Minute Cancellation Fees	=\$ 1,800.00
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The Panel has assessed \$900.00 of the last-minute cancellation fees jointly and severally to Claimants.

The Panel has assessed \$900.00 of the last-minute cancellation fees to Respondent.

### Hearing Session Fees and Assessments

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

Three (3) pre-hearing sessions with the Panel @ \$1,125.00/session	=\$ 3,375.00
Pre-Hearing Conferences: July 8, 2019	1 session
April 14, 2020	1 session
February 9, 2021	1 session

Two (2) hearing sessions on expungement request @ \$1,125.00/session	=\$ 2,250.00
Hearings: December 17, 2021	1 session
December 28, 2021	1 session

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Total Hearing Session Fees	= \$	5,625.00
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The Panel has assessed \$1,687.50 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$3,937.50 of the hearing session fees to Respondent.

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

**ARBITRATION PANEL**

Thomas A. Martin	-	Public Arbitrator, Presiding Chairperson
Jack Chapline Vaughan	-	Public Arbitrator
Camille Morris Tankersley	-	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.

**Concurring Arbitrators' Signatures**

***Thomas A. Martin***

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Thomas A. Martin  
Public Arbitrator, Presiding Chairperson

**12/29/2021**

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Signature Date

***Jack Chapline Vaughan***

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Jack Chapline Vaughan  
Public Arbitrator

**12/29/2021**

\_\_\_\_\_  
Signature Date

***Camille Morris Tankersley***

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Camille Morris Tankersley  
Public Arbitrator

**12/29/2021**

\_\_\_\_\_  
Signature Date

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December 30, 2021

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