

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Allen Papir

Case Number: 19-02616

vs.

Respondent
Hennion & Walsh, Inc.

Hearing Site: Boca Raton, Florida

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: Customer vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant Allen Papir: Randall C. Place, Esq., Randall Place, P.A., Bonita Springs, Florida.

For Respondent Hennion & Walsh, Inc.: Jennifer Woods Burke, Esq., Hennion & Walsh, Inc., Parsippany, New Jersey.

*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: August 29, 2019.

Allen Papir signed the Submission Agreement: July 30, 2019.

Statement of Answer filed by Respondent on or about: November 19, 2019.

Hennion & Walsh, Inc. signed the Submission Agreement: November 19, 2019.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: breach of fiduciary duty, negligence, negligent supervision, fraud, and breach of contract. The causes of action relate to the sale of Puerto Rico bonds (“PR bonds”).

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, Claimant requested: damages in excess of \$100,000.00, punitive damages, interest, costs, and such other and further relief the Panel deems just and proper.

In the Statement of Answer, Respondent requested: that the Panel deny Claimant’s Statement of Claim in its entirety with prejudice; an Award ordering expungement of this matter (Occurrence Number 2047587) from the CRD Records of Unnamed Party Sean J. McElduff (CRD Number 5565355); and such other relief that the Panel deems fair and equitable.

Respondent filed a request for expungement, on behalf of Unnamed Party Sean J. McElduff (“McElduff”), of all references to this matter from Central Registration Depository (“CRD”) registration records. Please see the Other Issues Considered and Decided section of this Award for more information.

OTHER ISSUES CONSIDERED AND DECIDED

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

On May 27, 2021, Claimant filed a notice of settlement. Therefore, the Panel made no determination with respect to any of the relief requests contained in the Statement of Claim.

On June 10, 2021, Respondent filed an Unopposed Motion for Expungement on behalf of Unnamed Party McElduff, to which no response was filed.

On August 24, 2021, Claimant filed notice that he will not be participating in the expungement hearing.

On October 26, 2021, Respondent filed an email from Claimant, dated June 2, 2021, stating that Claimant does not oppose expungement, so long as it is contended that expungement is appropriate pursuant to FINRA Rules 2080(b)(1)(A) and (B), but not pursuant to FINRA Rule 2080(b)(1)(C).

The Panel conducted a recorded hearing by videoconference on November 4, 2021, so the parties could present oral argument and evidence on Respondent’s request for expungement on behalf of Unnamed Party McElduff.

Claimant and counsel did not participate in the expungement hearing. The Panel found that Claimant had notice of the expungement request and hearing.

On November 12, 2021, the Panel issued a post-hearing Order directing Respondent to advise if a panel or court has previously ruled on (granted or denied) expungement of this same disclosure in CRD for Unnamed Party McElduff. On November 15, 2021, Respondent filed a response, answering “No” to the Panel’s inquiry.

The Panel reviewed Unnamed Party McElduff’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 Unnamed Party McElduff did not contribute to the settlement amount.

In recommending expungement, the Panel relied upon the following documentary or other evidence: sworn testimony of Unnamed Party McElduff; Respondent’s expungement chart with exhibits; Respondent’s new account documents; Respondent’s trade confirmation documents; Respondent’s All-Activities – History documents; overall profit/loss summary; suitability profile; Claimant’s Statement of Claim; Respondent’s Statement of Answer; executed settlement agreement between Claimant and Respondent; Claimant’s confirmation of non-opposition to expungement request; and the BrokerCheck® Report for Unnamed Party McElduff.

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 2047587) from registration records maintained by the CRD for Unnamed Party Sean J. McElduff (CRD Number 5565355) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Sean J. McElduff 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.

The claim, allegation, or information is false.

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

Clear and convincing evidence was presented to the Panel at the expungement hearing establishing that Unnamed Party McElduff, was not involved in the alleged sales practice violation that was the subject of Claimant's Statement of Claim ("SoC"). Unnamed Party McElduff was never a named respondent in this case and Claimant did not seek any relief from him.

Additionally, through evidence and sworn testimony received at the expungement hearing, the Panel found that Claimant made several false allegations against Unnamed Party McElduff in Claimant's SoC. First, Claimant alleged in his SoC, paragraph 7, that he received a cold call from Unnamed Party McElduff. However, at the hearing it was shown that Claimant initially opened an account at Respondent in 2008 with another financial advisor.

Second, Claimant alleged in his SoC, paragraph 8, that he informed Unnamed Party McElduff that he wanted (desired) to receive income without risking his principal. Notwithstanding, it was shown at the hearing that Claimant was willing to accept risk, had thirty (30) years of investment experience, and had stated he had a moderate risk tolerance and accepted medium risk at two other financial institutions regarding similar types of investments.

Third, Claimant alleged in his SoC, paragraph 9, that Unnamed Party McElduff informed him that he was aware of his aversion to risk and that he would only make recommendations that were safe. However, it was similarly shown at the hearing that the Claimant was willing to accept risk.

Fourth, Claimant alleged in the SoC, paragraph 10, that PR bonds were high risk and unsuitable for his conservative risk tolerance. However, at the hearing it was shown that the purchases of PR bonds were investment grade at the times of purchase.

Fifth, Claimant alleged in the SoC, paragraph 11, that Unnamed Party McElduff made investment recommendations to Claimant that would concentrate his portfolio over 45% in PR bonds, which were tied to a single geographical area that has been in a recession since 2006 and were grossly unsuitable. However, at the hearing it was demonstrated by notes that Claimant held a diverse array of bonds at both Respondent and Claimant's other broker dealer, from a variety of locations.

Sixth, Claimant alleged in the SoC, paragraph 28, that though only meeting face-to-face once, from 2013 through at least 2016, Claimant had numerous conversations with Unnamed Party McElduff concerning the PR bonds; that seeing the value dropping in the PR bonds, Claimant questioned whether these investments should be sold; that Unnamed Party McElduff continuously assured Claimant that there was nothing to worry about and that the bonds were insured; that when the values continued to drop, again Claimant sought Unnamed Party McElduff's financial advice about whether to sell, and Unnamed Party McElduff responded by recommending continuing to hold because there were "deals on the table" and the bonds would bounce back. However, at the hearing, it was demonstrated through the Broker Activity Notes that Claimant was duly informed of the risks, and Unnamed Party McElduff recommended selling some of the bonds. The notes show that when Unnamed Party McElduff told Claimant that the PR bonds were trading in the 90's and that he should sell them, Claimant chose not to sell. Additionally, the notes demonstrate that at this juncture, on a total return basis, the bonds should have returned a profit.

Seventh, Claimant alleged in the SoC, paragraph 30, that Respondent's actions and inactions have caused Claimant considerable monetary damages. At the hearing, it was shown that Claimant's account was profitable on a total return basis. However, the PR bonds and/or portfolio being profitable was not dispositive in the Panel's decision to recommend expungement, and the Panel simply notes it. A recommendation of expungement is warranted because Claimant recommended selling the subject bonds, and the purchases had been otherwise suitable.

The Panel also reviewed the settlement agreement between Claimant and Respondent and considered its terms and conditions along with the amount paid to Claimant to fully resolve the matter without admitting or incurring any liability. Accordingly, based upon the evidence and findings, the Panel concluded that a recommendation of expungement of this matter from Unnamed Party McElduff's CRD record is warranted, because the allegations set forth by Claimant against him were clearly erroneous and false.

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

FEES

Pursuant to the Code of Arbitration Procedure ("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

**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 event giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge = \$ 1,700.00

Member Process Fee = \$ 3,250.00

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:

One (1) pre-hearing session with the Panel @ \$1,125.00/session = \$ 1,125.00
Pre-Hearing Conference: January 16, 2020 1 session

One (1) expungement hearing session @ \$1,125.00/session = \$ 1,125.00
Hearing: November 4, 2021 1 session

Total Hearing Session Fees = \$ 2,250.00

The Panel has assessed \$562.50 of the hearing session fees to Claimant.

The Panel has assessed \$1,687.50 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

R. Lee Britton, Jr.	-	Public Arbitrator, Presiding Chairperson
Will Murphy	-	Public Arbitrator
Donna Greenspan Solomon	-	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

R Lee Britton, Jr.

R. Lee Britton, Jr.
Public Arbitrator, Presiding Chairperson

11/22/2021

Signature Date

Will Murphy

Will Murphy
Public Arbitrator

11/23/2021

Signature Date

Donna Greenspan Solomon

Donna Greenspan Solomon
Public Arbitrator

11/23/2021

Signature Date

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November 23, 2021

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