

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
James Byron Underhill

Case Number: 20-02006

vs.

Respondent
Voya Financial Advisors, Inc.

Hearing Site: Phoenix, Arizona

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

This case was administered under the Special Proceeding option for simplified cases.

REPRESENTATION OF PARTIES

For Claimant James Byron Underhill (“Claimant”): Tosh D. Grebenik, Esq., Judex Law, LLC, Broomfield, Colorado.

For Respondent Voya Financial Advisors, Inc. (“Respondent”): Matthew Tracy, Esq., Winget, Spadafora & Schwartzberg, LLP, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: June 25, 2020.

Claimant signed the Submission Agreement: June 24, 2020.

Statement of Answer filed by Respondent on or about: August 14, 2020.

Respondent signed the Submission Agreement: October 13, 2020.

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 request for expungement.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of Occurrence Numbers 1897231 and 2013933 from Claimant's CRD records, pursuant to a finding that the claims, allegations, or information are factually impossible and clearly erroneous in accordance with FINRA Rule 2080(b)(1)(A) and that the claims, allegations, or information are false in accordance with FINRA Rule 2080(b)(1)(C); and
2. Compensatory damages in the amount of \$1.00 from Respondent.

In the Statement of Answer, Respondent requested:

1. A statement from the Arbitrator on the issue of whether to order recommending that the customer complaints be expunged from Claimant's CRD records in the form required by FINRA Rule 2080;
2. Denial of Claimant's request for compensatory damages of \$1.00;
3. Imposition of all costs and FINRA forum fees on the Claimant; and
4. Such other and further relief as the Arbitrator deems just and appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

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

On February 7, 2021, Claimant advised that the customers in Occurrence Numbers 1897231 and 2013933 ("Customers") was served with the Statement of Claim and notice of the date and time of the expungement hearing.

The Arbitrator conducted a recorded, telephonic hearing on March 9, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondent participated in the expungement hearing and, as stated in its Statement of Answer, did not oppose the request for expungement.

The customer in Occurrence Number 2013933 participated in the expungement hearing and opposed the request for expungement.

The Arbitrator has provided an explanation of his decision in this award. The explanation is for the information of the parties only and is not precedential in nature. The parties filed a joint request for explained decision at the initial prehearing conference that took place on October 13, 2020. By Order dated October 13, 2020, the Arbitrator granted the parties' joint request for explained decision.

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. Claimant's claim for \$1.00 in compensatory damages is denied.

2. Claimant's (CRD Number 2848252) request for expungement of Occurrence Numbers 1897231 and 2013933 from his registration records maintained by the CRD is denied.

Explained Decision

The Arbitrator has made the decision based on the following reasons:

Occurrence Number 1897231

Claimant's request for expungement of the claims made by the customers in Occurrence Number 1897231 ("Mr. and Mrs. K") is denied. Claimant has failed to carry his burden of proof as required by FINRA Rule 2080. The Arbitrator specifically finds that the allegations by Mr. and Mrs. K against Claimant were colorable and were not clearly erroneous or factually impossible as Claimant asserts. The Arbitrator is placing great weight on the substantial amount of the payment made by Respondent to settle Mr. and Mrs. K's claims. As Claimant was the investment advisor for Mr. and Mrs. K during the time period alleged in their claims and Claimant was named as a respondent in the FINRA claim filed by Mr. and Mrs. K, it follows that Claimant was the underlying direct cause of Mr. and Mrs. K's alleged damages and that his conduct was the basis for the payment made by Respondent.

Occurrence Number 2013933

Claimant's request for expungement of the claims made by the customers in Occurrence Number 2013933 ("Mr. and Mrs. S") is denied. Claimant has failed to carry his burden of proof as required by FINRA Rule 2080. The Arbitrator specifically finds that the allegations of Mr. and Mrs. S against Claimant were colorable and were not clearly erroneous nor factually impossible. Mr. S's testimony at the expungement hearing was credible. By Mr. S's direct testimony and in response to questioning from Claimant's counsel, it is apparent that Claimant did not exercise due diligence in fully researching the Northstar Healthcare Income REIT ("REIT"). It was apparent from Mr. S's testimony as well from Claimant's own testimony that the REIT was comprised of almost random, far flung properties in some half dozen states. By implication, Claimant, through counsel, defended his diligence by claiming that the random scattered nature of the properties comprising the REIT made it impossible to be fully informed about all the properties. The Arbitrator concurs. As such, Claimant was basically recommending and selling a "black hole" that paid him 7% commission up front. If it was impossible to diligently research all of the underlying properties comprising the REIT, then Claimant should not have recommended that investment to Mr. and Mrs. S.

3. 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	= \$	50.00
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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(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	= \$	150.00
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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) pre-hearing session with a single Arbitrator @ \$50.00/session	= \$	50.00
Pre-Hearing Conference: November 13, 2020	1 session	

One (1) hearing session on expungement request @ \$50.00/session	= \$	50.00
Hearing: March 9, 2021	1 session	

Total Hearing Session Fees	= \$	100.00
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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

Howard R. Gaines

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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

Howard R. Gaines

Howard R. Gaines
Sole Public Arbitrator

03/26/2021

Signature Date

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March 26, 2021

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