

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

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In the Matter of the Arbitration Between:

Claimant

Kevin John McPhee

Case Number: 20-02453

vs.

Respondents

Joseph Gunnar & Co., LLC  
American Capital Partners, LLC  
A. R. Baron & Co., Inc.  
First United Equities Corporation

Hearing Site: New York, New York

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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. Members

**REPRESENTATION OF PARTIES**

For Claimant Kevin John McPhee (“Claimant”): Michael H. Ference, Esq. and Thomas P. McEvoy, Esq., Sichenzia Ross Ference, LLP, New York, New York.

For Respondent Joseph Gunnar & Co., LLC (“Joseph Gunnar”): Peter Bon Viso, Esq., Joseph Gunnar & Co., LLC, New York, New York.

For Respondent American Capital Partners, LLC (“American Capital”): John Gardini, CCO, American Capital Partners, LLC, Hauppauge, New York.

Respondent A. R. Baron & Co., Inc. (“A. R. Baron”) did not enter an appearance.

Respondent First United Equities Corporation (“First United”) did not enter an appearance.

**CASE INFORMATION**

Statement of Claim filed on or about: July 30, 2020.

Kevin John McPhee signed the Submission Agreement: July 30, 2020.

Statement of Answer filed by Respondent Joseph Gunnar on or about: September 21, 2020.

Respondent Joseph Gunnar signed the Submission Agreement: September 21, 2020.

Statement of Answer filed by Respondent American Capital on or about: October 1, 2020.  
Respondent American Capital signed the Submission Agreement: October 2, 2020.

Respondent A. R. Baron did not file a Statement of Answer or sign the Submission Agreement.

Respondent First United did not file a Statement of Answer or sign the Submission Agreement.

### **CASE SUMMARY**

In the Statement of Claim, Claimant asserted a claim seeking expungement of customer dispute information and an employment termination disclosure from registration records maintained by the Central Registration Depository ("CRD").

In the Statement of Answer, Respondent Joseph Gunnar noted no opinion with respect to Claimant's expungement request.

In the Statement of Answer, Respondent American Capital did not contest Claimant's expungement request.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested: an award for damages in the amount of \$1.00, and an order for the expungement of all references to the customer complaints corresponding to Occurrence Numbers 193149, 1164506, 1628903, 180660, 1054426, 1089398, and the employment termination disclosure corresponding to Occurrence Number 1018035.

In the Statement of Answer, Respondent Joseph Gunnar denied any allegations against Respondent Joseph Gunnar not specifically addressed in its Answer; denied it is liable to Claimant for any damages; requested that Claimant's request for any and all damages against Respondent Joseph Gunnar be denied; and requested that any and all of its costs and/or fees in this matter be assessed against Claimant.

In the Statement of Answer, Respondent American Capital denied any and all liability or wrongdoing and denies any request for monetary damages or compensation.

At the hearing, Claimant withdrew the request for \$1.00 in damages.

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

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

Respondent A. R. Baron did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and is bound by the determination of the Arbitrator on all issues submitted.

Respondent First United did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code and is bound by the determination of the Arbitrator on all issues submitted.

On September 11, 2020, Claimant submitted a Notice of Withdrawal Without Prejudice with respect to Occurrence Numbers 193149, 1164506, and 1628903. Therefore, the Arbitrator made no determination with respect to these Occurrence Numbers.

On November 11, 2020, Respondent Joseph Gunnar filed a Motion to Consolidate this case with Case Number 20-03218. On November 12, 2020, Claimant filed a response opposing Respondent Joseph Gunnar's Motion to Consolidate. On December 21, 2020, the Arbitrator heard oral arguments on the Motion to Consolidate. During the pre-hearing conference, Respondent Joseph Gunnar withdrew its Motion to Consolidate in its entirety, and the Arbitrator issued an Order memorializing this on December 22, 2020.

On September 23, 2021, Claimant advised that the customers in Occurrence Numbers 180660 ("Customer A"), 1054426 ("Customer B"), 1089398 ("Customer C"), hereinafter referred to collectively as the "Customers," were served with the Statement of Claim and notice of the date and time of the expungement hearing. Occurrence Number 1018035 is an employment termination disclosure, and thus there was no customer to serve.

On September 29, 2021, Respondent Joseph Gunnar submitted notice that it would not appear at the October 4, 2021 expungement hearing.

On September 29, 2021, Respondent American Capital submitted notice that it would not appear at the October 4, 2021 expungement hearing.

The Arbitrator conducted an in-person hearing on October 4, 2021, so the parties could present oral argument and evidence on Claimant's request for expungement.

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

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

On October 21, 2021, FINRA informed the Parties that due to a technical error, the expungement hearing had not been recorded. FINRA inquired if the Parties either agreed to waive the recording requirement, or alternatively, if the Parties preferred to hold another expungement hearing. On October 21, 2021, Claimant filed notice of his agreement to waive the recording requirement. On October 22, 2021, Respondents Joseph Gunnar and American Capital each filed notice of their agreement to waive the recording requirement. Respondents A. R. Baron and First United did not respond to the inquiry and have otherwise not participated in this case.

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 did not review settlement documentation related to Occurrence Number 180660. However, the Arbitrator did review Claimant's CRD record, which contained the settlement amount. The Arbitrator considered the amount of payment made to any party to the settlement. The Arbitrator noted that the monetary loss at issue had occurred after Claimant had left Respondent A. R. Baron, and that Claimant did not contribute to the settlement amount.

The Arbitrator noted that the disputes related to Occurrence Numbers 1054426 and 1089398 were not settled and, therefore, there were no settlement documents to review.

The Arbitrator noted that Occurrence Number 1018035 is an employment termination disclosure, and thus there is no settlement documentation to review.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Exhibits 1 through 17 and the testimony of Claimant.

### **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 180660, 1054426, 1089398, and 1018035 from registration records maintained by the CRD for Claimant Kevin John McPhee (CRD Number 2316848) with the understanding that, pursuant to Notice to Members 04-16, Claimant Kevin John McPhee 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 finding of fact:

The claim, allegation, or information is false.

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

Occurrence Number 180660:

Customer A alleged that Claimant purchased shares of a specific stock without Customer A's approval. This resulted in a monetary loss. Customer A filed a complaint on September 10, 1995. However, this was after Claimant left Respondent A. R. Baron in June of 1995. A. R. Baron never advised Claimant of Customer A's complaint, nor did Respondent A. R. Baron investigate Claimant. The disclosure related to this occurrence on Claimant's CRD, filed as Exhibit 7, shows that Claimant did not contribute towards the settlement. There was no evidence that the Claimant was served with any arbitration related to the Customer's complaint. The Arbitrator determined the claims and allegations to be false because Respondent A. R. Baron never advised Claimant of Customer A's complaint and never investigated Claimant. Moreover, Claimant never contributed any monies towards the settlement amount, which would indicate he was not involved with the case.

Occurrence Number 1054426:

Customer B alleged that on December 12, 2001, Claimant engaged in unauthorized trading, resulting in monetary losses. The disclosure related to this occurrence on Claimant's CRD was filed as Exhibit 8. The posting page of the trade was filed as Exhibit 14. On January 8, 2002, Respondent Joseph Gunnar's Chief Compliance Officer ("CCO") sent a letter to Customer B's attorney, filed as Exhibit 13, stating that the complaint was investigated, and no wrongdoing was found with respect to Claimant. The letter from the CCO indicated that the trade was properly authorized. There was no evidence that Respondent Joseph Gunnar took any action with respect to this complaint. There was no evidence that Customer B pursued this claim any further. There was no evidence that Claimant was served with any arbitration related to the Customer's complaint. The Arbitrator determined the claims and allegations to be false because Customer B never pursued the matter after the CCO responded to Customer B that there was no wrongdoing in the trade.

Occurrence Number 1089398:

Customer C alleged that Claimant engaged in unauthorized trades and did not follow instructions, resulting in monetary losses. The losses claimed were more than the amount that was originally in Customer C's account. The disclosure related to this occurrence on Claimant's CRD was filed as Exhibit 9. On July 31, 2002, the CCO of Respondent Joseph Gunnar sent a letter to Customer C's attorney, filed as Exhibit 16, stating that they investigated the complaint and found no wrongdoing by Claimant. Respondent Joseph Gunnar took no disciplinary action against the Claimant. There was no evidence that Customer C pursued the claim any further. Claimant did not pay any monies towards any settlement, as evidenced by the disclosure occurrence on Claimant's CRD, filed as Exhibit 9. There was no evidence that the Claimant was served any arbitration related to the Customer's complaint. The Arbitrator determined the claims and allegations to be false because Customer C never pursued the matter after the CCO responded to Customer C that there was no wrongdoing in the trade.

Occurrence Number 1018035:

The disclosure related to this occurrence in CRD was filed as Exhibit 10. This is an employment termination disclosure from Respondent First United. Item number 4 of this exhibit, titled "Allegation(s)," was vague, and there was no specific evidence of any "violations of industry rules and regulations and standards of conduct." Despite this allegation, there was no evidence of any investigations by Respondent First United or findings of wrongdoing with respect to Claimant. Claimant did not contribute monies towards any settlement. There was no evidence that Claimant was served with any arbitration related to this employment termination. The Arbitrator determined the claims and allegations to be false because they were vague and Respondent First United never investigated Claimant for the allegations asserted.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1018035 maintained by the CRD for Claimant Kevin John McPhee (CRD Number 2316848). Any "Yes" answers should be changed to "No," as applicable.

The above recommendation is made with the understanding that the registration records are not automatically amended. Claimant Kevin John McPhee must obtain confirmation of this Award from a court of competent jurisdiction, before the CRD will execute the expungement directive, and must forward a copy of the Court Order to FINRA's Credentialing, Registration, Education and Disclosure Department for the amendments to be incorporated into the Registration Records.

3. 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:

Initial Claim Filing Fee = \$ 50.00

*\*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 firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents are each assessed the following:

Member Surcharge = \$ 150.00

**Postponement Fees**

Postponements granted during these proceedings for which fees were assessed or waived:

May 26, 2021, postponement requested by Claimant = \$ WAIVED

August 2, 2021, postponement requested by Claimant = \$ WAIVED

December 20, 2021, postponement requested by Claimant = \$ 50.00

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Total Postponement Fees = \$ 50.00

The Arbitrator has assessed the total postponement fees to Claimant.

**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:

Three (3) pre-hearing sessions with a single Arbitrator @ \$50.00/session = \$ 150.00

Pre-Hearing Conferences: December 21, 2020 1 session

January 11, 2021 1 session

May 26, 2021 1 session



**ARBITRATOR**

Selma Moy

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

**Arbitrator's Signature**

***Selma Moy***

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Selma Moy  
Sole Public Arbitrator

**11/02/2021**

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

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November 03, 2021

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