

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant

Gerald Francis Monahan, III

Case Number: 20-02638

vs.

Respondent

Mutual of Omaha Investor Services, Inc.

Hearing Site: Omaha, Nebraska

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

REPRESENTATION OF PARTIES

For Claimant Gerald Francis Monahan, III (“Claimant”): Frances Menzer, Esq. and Dochter Kennedy, Esq., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Mutual of Omaha Investor Services, Inc. (“Respondent”): Trenten P. Bausch, Esq. and Adam W. Barney, Esq., Cline Williams Wright Johnson & Oldfather, L.L.P., Omaha, Nebraska.

CASE INFORMATION

Statement of Claim filed on or about: August 18, 2020.

Amended Statement of Claim filed on or about: September 15, 2020.

Claimant signed the Submission Agreement: August 17, 2020.

Statement of Answer to Amended Statement of Claim filed on or about: October 6, 2020.

Respondent signed the Submission Agreement: October 6, 2020.

CASE SUMMARY

In the Statement of Claim, as amended, 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 to the Amended Statement of Claim, Respondent took no position on Claimant’s expungement request, denied all wrongdoing, and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, as amended, Claimant requested expungement of Occurrence Number 1166672, compensatory damages in the amount of \$1.00, and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer to the Amended Statement of Claim, Respondent requested that Claimant's Amended Statement of Claim be denied, to the extent that it seeks monetary damages against Respondent; an award be entered in favor of Respondent; forum fees and costs be taxed to Claimant; reasonable attorneys' fees be assessed in favor of Respondent; and such further relief as the circumstances may justify.

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

OTHER ISSUES CONSIDERED AND DECIDED

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

On February 1, 2021, Claimant advised that the customer in Occurrence Number 1166672 ("Customer") was served with the Statement of Claim and notice of the date and time of the expungement hearing ("Notice"). On February 9, 2021, Claimant filed an Affidavit confirming that the Customer was served with the Notice. Claimant also filed a copy of the FedEx tracking information available online for the Notice.

The Arbitrator conducted a recorded, telephonic hearing on April 26, 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 the Statement of Answer to the Amended Statement of Claim, took no position on the request for expungement.

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

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 occurrence in the CRD.

The Arbitrator also reviewed the settlement documentation related to Occurrence Number 1166672, considered the amount of payment made to any party to the settlements, and considered other relevant terms and conditions of the settlement. The Arbitrator noted that the settlement was not conditioned on any party to the settlement not opposing the expungement request and that Claimant contributed to the settlement amount.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's testimony and Claimant's Exhibits.

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 Number 1166672 from registration records maintained by the CRD for Claimant Gerald Francis Monahan, III (CRD Number 2722135) with the understanding that, pursuant to Notice to Members, 04-16, Claimant Gerald Francis Monahan, III 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 findings of fact:

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

The claim, allegation, or information is false.

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

Claimant testified that the Customer’s purchase of a variable annuity (“VA”)—which was used to fund a Charitable Remainder Trust—was recommended by Claimant, the Customer’s attorney, and her certified public accountant (collectively “Advisory Team”). Claimant also sought input from an experienced financial advisor with Respondent (“Mr. W”), whom Claimant considered a mentor. The evidence established that Claimant, on more than one occasion, both in person and through documents signed by the Customer, fully explained the risks and benefits of the purchase. The purchase was consistent with the Customer’s goal of obtaining more income from her investments, while avoiding capital gains taxes. The Advisory Team, along with Mr. W, provided opinions that the purchase of the VA was reasonable and consistent with the Customer’s goal.

Claimant also testified that, in consultation with the Advisory Team and Mr. W, he recommended that the Customer buy a variable universal life (“VUL”) policy inside a life insurance trust, but the Customer did not want to do so. The purchase of the VUL was consistent with the Customer’s objective to provide a specific sum of money to her three children.

Claimant’s testimony, buttressed by the opinions of the other members of the Advisory Team, also established that any losses sustained by the Customer were the result of market forces, and not the result of Claimant’s recommendations.

2. 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 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

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 @ \$50.00/session = \$ 50.00
Pre-Hearing Conference: January 4, 2021 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing: April 26, 2021 1 session

Total Hearing Session Fees = \$ 100.00

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

John R. Loss

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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

John R. Loss

John R. Loss
Sole Public Arbitrator

05/10/2021

Signature Date

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May 10, 2021

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