

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Kevin John McPhee

Case Number: 20-03218

vs.

Respondents
American Capital Partners, LLC
Joseph Gunnar & Co. LLC
A. R. Baron & Co., Inc.

Hearing Site: New York, New York

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: Thomas McEvoy, Esq. and Michael Ference, Esq., Sichenzia Ross Ference LLP, New York, New York.

For Respondent American Capital Partners, LLC: John Gardini, American Capital Partners, LLC, Hauppauge, New York.

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

Respondent A. R. Baron & Co., Inc. did not enter an appearance in this matter.

CASE INFORMATION

Statement of Claim filed on or about: September 11, 2020.
Kevin John McPhee signed the Submission Agreement: September 11, 2020.

Statement of Answer filed by Respondent American Capital Partners, LLC on or about:
November 6, 2020.
American Capital Partners, LLC signed the Submission Agreement: November 9, 2020.

Statement of Answer filed by Respondent Joseph Gunnar & Co. LLC on or about: November 11, 2020.
Joseph Gunnar & Co. LLC signed the Submission Agreement: November 11, 2020.

A. R. Baron & Co., Inc. did not submit 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 from registration records maintained by the Central Registration Depository (“CRD”).

In the Statement of Answer, Respondent American Capital Partners, LLC did not oppose Claimant’s expungement request and denied the allegations made in the Statement of Claim.

In the Statement of Answer, Respondent Joseph Gunnar & Co. LLC took no position on Claimant’s expungement request and denied the allegations made in the Statement of Claim.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: expungement of Occurrence Numbers 1164506 and 1628903; compensatory damages in the amount of \$1.00 from Respondents; and any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent American Capital Partners, LLC requested that the request for compensatory damages be denied.

In the Statement of Answer, Respondent Joseph Gunnar & Co. LLC requested that Claimant’s request for damages be denied; and all costs and fees assessed against Claimant.

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.

On July 3, 1996, Respondent A. R. Baron & Co., Inc. filed for bankruptcy under the United States Bankruptcy Code. In accordance with these filings, all claims against Respondent A. R. Baron & Co., Inc. are indefinitely stayed. Therefore, the Panel made no determination with respect to the claims against Respondent A. R. Baron & Co., Inc.

On July 29, 2021, Claimant advised that the customers in Occurrence Number 1628903 were served with the Statement of Claim and notice of the date and time of the expungement hearing. Claimant also advised that he was unable to serve the Statement of Claim and the notice of the expungement hearing on the customers related to Occurrence Number 1164506 as the customers are deceased

The Arbitrator conducted a recorded, in-person hearing on August 4, 2021, so the parties could present oral argument and evidence on Claimant’s request for expungement.

Respondents American Capital Partners, LLC and Joseph Gunnar & Co. LLC did not participate in the expungement hearing and, as stated in their Statements of Answer, did not oppose the request for expungement.

The customers in Occurrence Number 1628903 also did not participate in the expungement hearing. The Arbitrator found that the customers 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 occurrences in the CRD.

The Arbitrator reviewed the settlement documentation related to Occurrence Numbers 1164506 and 1628903, considered the amount of payment made to any party to the settlements, and considered other relevant terms and conditions of the settlements. The Arbitrator noted that the settlements were not conditioned on any party to the settlement not opposing the expungement request and although Claimant contributed to the settlement amounts, the decision was made without his input or consent and he was legally bound to pay due to indemnification clauses. The Arbitrator determined that expungement is therefore still appropriate.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Claimant's BrokerCheck® Report; the pleadings; Claimant's testimony; and the 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 1164506 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 findings of fact:

The claim, allegation, or information is false.

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

The occurrence arose out of a claim made while Claimant was employed with Joseph Gunnar & Co. LLC. The allegations were errors/chargers, failure to supervise, breach of fiduciary duties, misrepresentation, non-disclosure, unauthorized trading, churning, omission of facts and suitability. A claim for damages was sought in the amount of \$338,710.00 and settled for \$150,000.00. The evidence established that the incidents in question took place in the days following the September 11, 2001 attacks where the

customers, against the advice of the Claimant, elected to sell all of their investments due to their concerns regarding the market conditions at the time. Insofar as the losses suffered were in large part due to both market conditions and the failure to heed the advice of the Claimant, the charges made against the Claimant are found to be false.

2. The Arbitrator recommends the expungement of all references to Occurrence Number 1628903 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 findings of fact:

The claim, allegation, or information is false.

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

The occurrence arose from a claim of unsuitability while Claimant was employed at American Capital Partners, LLC. The evidence at the hearing established both that the customers were sophisticated investors who initially requested high risk investments and who subsequently changed their goals to more speculative. The company displayed due diligence by regular monitoring through their compliance units to determine if the customers were aware of the risks, could tolerate the risks, and continued to agree to the stated objectives. As such, the claim is false.

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
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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 firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents American Capital Partners, LLC and Joseph Gunnar & Co. LLC are each 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:

Two (2) pre-hearing sessions with a single Arbitrator @ \$50.00/session = \$ 100.00
Pre-Hearing Conferences: January 29, 2021 1 session
June 8, 2021 1 session

One (1) hearing session on expungement request @ \$50.00/session = \$ 50.00
Hearing: August 4, 2021 1 session

Total Hearing Session Fees = \$ 150.00

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

Amy Jill Baranoff

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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

Amy Jill Baranoff

Amy Jill Baranoff
Sole Public Arbitrator

09/02/2021

Signature Date

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.

September 03, 2021

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