Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Douglas J. Donnelly

vs.

Respondent
Wells Fargo Clearing Services, LLC

Case Number: 20-04013

Hearing Site: Seattle, Washington

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 Douglas J. Donnelly ("Claimant"): Michael Bessette, Esq., HLBS Law, Westminster, Colorado.

For Respondent Wells Fargo Clearing Services, LLC ("Respondent"): Michael Naccarato, Esq., Wells Fargo Legal Department, St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed on or about: December 9, 2020.
Claimant signed the Submission Agreement: December 10, 2020.

Statement of Answer filed on or about: February 1, 2021.
Respondent signed the Submission Agreement: December 17, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted a claim alleging that the Form U5 filed by Respondent, as part of registration records maintained by the Central Registration Depository ("CRD"), is defamatory in nature, misleading, inaccurate, and/or erroneous.

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:

1. Expungement of the Disclosure – the Form U5 entry corresponding with Occurrence Number 1602520, and those relevant portions of the Form U4 – from Claimant's CRD records on the basis that the statement is defamatory in nature, misleading, inaccurate, and/or erroneous, to include:
    a. amendment of the Reason for Termination entry in Section 3 of Claimant's Form U5 to read "Voluntary;"
    b. expungement of the Reason for Termination explanation on Claimant's CRD;
    c. amendment of the answers to question 7F(1) of Claimant's Form U5, from a "Yes" response to "No;" and
    d. deletion of the Termination Disclosure Reporting Pages accompanying Occurrence Number 1602520;
2. Compensatory damages in the amount of $1.00 from Respondent; and
3. Any other relief as the Arbitrator deems just and equitable.

In the Statement of Answer, Respondent requested:

1. The Statement of Claim be dismissed in its entirety and with prejudice;
2. Costs and expenses of the arbitration; and
3. Such other further relief that the Arbitrator deems as just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

On April 8, 2021, Respondent filed a Motion to Dismiss pursuant to Rule 13206 of the Code of Arbitration Procedure ("Code"). On May 10, 2021, Claimant filed a response opposing the Motion to Dismiss. On May 17, 2021, Respondent filed a reply in support of the Motion to Dismiss. On May 26, 2021, the Arbitrator heard oral arguments on the Motion to Dismiss. On May 28, 2021, the Arbitrator requested supplemental briefs. On June 10, 2021, the Arbitrator granted the Motion to Dismiss for the reasons stated in the Findings section below.

Respondent's Motion to Dismiss pursuant to Rule 13206 of the Code is granted by the Arbitrator without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing his claims in court pursuant to Rule 13206(b) of the Code.

FINDINGS

Respondent's Motion to Dismiss is GRANTED pursuant to FINRA Code of Arbitration Procedure Rule 13206(a), which provides that "no claim shall be eligible for submission to arbitration under the code where six years have elapsed from the occurrence or event giving rise to the claim."

In dismissing Claimant's claim, the Arbitrator takes note of three guiding principles that apply to this matter:

1. "[P]arties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and granted only under limited circumstances." See, FINRA's Dispute Resolution Services Arbitrator's Guide at 49. Although discouraged, prehearing dismissals are not prohibited. FINRA Rule 13206 sets forth the procedure for the parties and panel to follow in resolving a motion to dismiss based on the eligibility rule.
2. Determination of the applicability of the eligibility rule is reserved to the arbitration panel in the first instance and not to the court. In other words, arbitrators have competence to determine issues of eligibility. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
3. Expungement of a CRD record under any circumstance is an extraordinary remedy and should be used only when the expunged information has no meaningful regulatory or investor protection value.

In this matter, Claimant, a former Wells Fargo Advisors Financial Advisor, seeks expungement of disclosures regarding the termination of his employment on his forms U4 and U5. Claimant was employed by Wells Fargo as a registered financial advisor between July 2003 and March 1, 2012. Claimant alleges that on March 1, 2012, he was notified by his branch managers that his employment was terminated, effective immediately, for allegedly introducing clients of Wells Fargo to an outside Regulation D offering with written approval by Wells Fargo. On or about December 9, 2020, Claimant filed his Statement of Claim in the instant matter.

Both the termination of Claimant's employment and the U4/U5 publication that he seeks to expunge from his CRD records occurred in March of 2012. Claimant did not file his Statement of Claim until December 2020, more than six years had passed between the event or occurrence giving rise to the claim and the filing of the statement of claim. Claimant attempts to avoid the 6-year eligibility bar of Rule 13206 by arguing that it is tempered by equitable tolling principles that traditionally apply only to statutes of limitation and not to statutes of repose. In order to resolve this dispute, it is important to understand the primary difference between these two types of statutes.

A statute of limitations focuses on requiring timeliness of action from an injured party, and thus may potentially be extended where a delay in commencing a legal action is not the injured party's fault. The operation of a statute of limitations can be avoided or tolled by several equitable factors, such as attempts by a wrongdoer to conceal evidence of responsibility. A statute of repose focuses on immunizing the alleged injuring party from long-term liability, and thus is generally based on elapsed time from an event, even if the potential cause of action cannot reasonably be discovered until a later date or it has not even accrued because the damage has not yet occurred.

During oral argument on the Motion to Dismiss, Claimant stated that the 6-year eligibility rule of 13206 is neither a statute of limitation nor a traditional statute of repose but it arguably incorporates common law equitable principles to extend the 6-year period of eligibility. The U.S. Supreme Court addressed this issue in the case of Cal. Pub. Employees' Retirement Sys. v. ANZ Securities, Inc., 137 S. Ct. 2042 (2017), which was analyzed by Claimant and Respondent in supplemental briefs requested by the Arbitrator. In that case, the Court interpreted Section 13 of the Securities Act of 1933 and held that, "[T]he pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. The two periods work

together: the discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability."

Like Section 13 of the Securities Act, FINRA Rule 13206 expressly contemplates two distinct limitations on the time to bring a claim: a 6-year rule of repose in Section (a) and a reference to state-law statutes of limitations in Section (c). To paraphrase the conclusion of the Supreme Court, "The final analysis, then, is straightforward. The [6]-year time bar in Rule [13206(a)] is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of [arbitrators] to modify statutory time limits in the name of equity." Therefore, any reliance by Claimant on the equitable principles to extend the 6-year eligibility limitation is misplaced.

Claimant, however, makes additional arguments that require further consideration. He argues that Respondent's act of publication is causing him "continuing wrong", and thus his claims continue to accrue with each additional instance of reputational damage. This argument fails for four reasons. First, the continuing wrong doctrine does not depend on continuing damage, but on continuing wrongful acts. Second, Washington subscribes to the "single publication rule" that deems the original publication to be the triggering event for running of the applicable limitation period not each recurring publication. Third, FINRA does not require proof of actual reputational damages for expungement in industry disputes. Fourth, even if Washington State defamation law was coextensive with FINRA expungement rules, actual damages are not required to sustain a state court case for defamation per se.

Taking those one at a time, (1) Claimant argues that each time a potential customer views his BrokerCheck, he suffers injury and a new basis for his expungement claim accrues. Even if the continuing wrong doctrine applied to the FINRA eligibility rule, Claimant misconstrues the rule. The application of the doctrine must be predicated on continuing unlawful acts, (e.g., ongoing fraud or multiple publications), and not on the continuing effects of earlier unlawful conduct (e.g., recurring reputational damage from a single defamatory publication). Here, there was one arguable triggering "occurrence or event," i.e., the entry of U4/U5 termination disclosures into his CRD records that caused the 6-year eligibility period to commence running. The assertion that this occurrence or event resulted in multiple or continuing reputational damages does not alter or toll the 6-year statute of repose.

(2) Claimant alludes to the closely related argument that the eligibility period commences to run from each recurring publication of the defamatory statement, i.e., the period commences to run each time an existing or potential client reviews his Broker-Check. That argument fails because Washington subscribes to the "single publication rule" which holds that the statute of limitations for written defamation begins to run when a statement is first published. Herron v. KING Broad. Co., 746 P.2d 295 (Wash. 1987). The purpose of the single-publication rule is to safeguard publishers against endless liability because the statute of limitations on bringing libel suits — two years in Washington, RCW 4.16.100 — is no longer triggered each time a statement is "published" in print or online, but is measured by the initial publication, i.e., the first occurrence or event. Plaintiffs must either sue within that initial period or forfeit their rights.

(3) Claimant's argument that the eligibility period does not run until actual damage has occurred fails for a third reason. In an intra-agency expungement dispute, a Claimant does not have to prove actual reputational damages to obtain relief. All that need be proven is that the entry made on the advisor's record was "defamatory in nature." The standard for a finding of

defamation in a FINRA expungement action is more lenient than it would be in a state court action involving a defamation claim. See NASD Notice 99-54 ("Arbitrators, however, are not required to state explicitly in the award that they have found that all of the elements required to satisfy a claim in defamation under governing law have been met.") In other words, actual damage to reputation need not be proven to support expungement.

(4) Claimant's argument fails for a fourth and final reason. Even if he were required to prove all the elements necessary to sustain a state court defamation lawsuit in his FINRA expungement claim, Washington law does not require proof of actual damages if the false statements are "defamatory per se." Damages are presumed without the need of specific proof when false statements injure the Claimant in their business, trade or profession. Canfield v. Clark, 196 Wn. App. 191, 385 P.3d 156 (2016). Proof of damages are not a prerequisite to all defamation lawsuits in Washington State and thus are not necessary to commencement of the applicable period of limitation.

For all the reasons set forth herein, the Arbitrator concludes that Claimant's claim was not filed within the 6-year period of eligibility, and therefore the claim is DISMISSED.

AWARD

After considering the pleadings, the testimony and evidence presented at the May 26, 2021 recorded pre-hearing conference, and any post-hearing submissions, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are dismissed without prejudice, pursuant to FINRA Rule 13206 .

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 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	=$	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: April 9, 2021	1 session		
May 26, 2021	1 session		
Total Hearing Session Fees		=$	100.00

The Arbitrator has assessed $50.00 of the hearing session fees to Claimant.

The Arbitrator has assessed $50.00 of the hearing session fees to Respondent.

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

ARBITRATOR

Craig Charles Beles - 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

Craig Charles Beles **06/18/2021**

Craig Charles Beles
Sole Public Arbitrator

Signature Date

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June 21, 2021
Date of Service (For FINRA Dispute Resolution Services use only)