

Securities Regulation & Law

REPORT

*Arbitration**November 2008*

N.Y. Court Confirms Award Expunging Broker Record Despite AG's Objections

The New York Supreme Court Oct. 16 confirmed a stipulated arbitration award denying an investor's claims his account was mishandled by Casimir Capital L.P. and two of its brokers, and--over the state's Attorney General's objections--expunged the matter from the records of the Financial Industry Regulatory Authority (*In re Walker v. Connelly*, N.Y. Sup. Ct., 100681/08, 10/16/08).

In confirming the award, Judge Joan A. Madden concluded that the panel "had a sufficient evidentiary record to support its conclusion that the claim was 'factually impossible or clearly erroneous.'"

According to the court, the AG sought to intervene in the matter to protect the state's interests in preserving certain official records. In urging that the award be vacated, he argued that the arbitration panel failed to provide factual support for its expungement order, among other deficiencies. The court granted the AG's intervention motion, but rejected his substantive challenge. It said that under New York and federal law, "arbitrators are not required to give reasons or explain the basis for an award."

"The court rejected the attorney general's argument," the brokers' counsel **Richard A. Roth** of **Roth Law Firm PLLC** said in a release Nov. 11. **Roth** said he suspected that the court, in allowing intervention, was inclined to dismiss the petition to confirm the award. "Instead, the Court allowed them in the front door and booted them out the back, sending a strong message In the end, it was the right result," **Roth** said in the release.

Expungement Request.

The case began when Peter W. Connelly filed a statement of claim against Casimir Capital, Wayde C. Walker, and Nathaniel R. Clay, seeking damages for losses he allegedly suffered in stock trading. Connelly's claims included breach of contract, breach of fiduciary duty, negligence, churning, excessive trading, and failure to supervise.

The parties agreed to a confidential settlement, and requested the FINRA arbitration panel to issue a stipulated award, including a recommendation for expungement. The panel declined to accept the agreement without additional information in support of the requested expungement. In response, the parties submitted Walker and Clay's combined affidavit and "stipulated fact particulars" outlining the facts of the case.

After receiving the additional information, the panel issued the stipulated award based on its finding that the claim was impossible or erroneous.

Intervention.

When Casimir, Walker, and Clay sought to confirm the arbitration award with the court, the attorney general moved to intervene. The reason for attorney general's request for intervention, said the court, was to protect from expungement records of the state's Department of Law, which are kept electronically in the FINRA Central Registration Depository. Granting the attorney general's request, the court found that the state had a “strong interest in maintaining the accuracy and integrity of the CRD records for the protection of New York's investing public.”

The court then addressed the attorney general's objection to confirmation on the ground that the panel had exceeded its authority in issuing the award without sufficient factual support. In addition, the attorney general objected that the “expungement without explanation” violated public policy and that the recommendation of expungement was not a confirmable award.

Rejecting the attorney general's first objection, the court said that “irregardless of whether the Rule 2130 requires 'affirmative findings,' the record before the arbitration panel ... contains a sufficient factual basis to support both the panel's determination that 'the claim, allegation or information is factually impossible or clearly erroneous,' and the panel's recommendation of expungement as to the individual respondents Walker and Clay. For these reasons, it cannot be said that the arbitration panel exceeded its power in recommending expungement.”

The court rejected the attorney general's contention that the recommendation of expungement was not a confirmable award, as well. “[I]n this proceeding, the arbitration panel's decision is written so that the recommendation of expungement is part of the 'Award,' and as such, is properly before the court for consideration,” the court explained.

The court noted, however, that a proposal by the Securities and Exchange Commission could require arbitrators to hold a hearing before ruling on a request for expungement (73 Fed. Reg. 18,308 (2008); See also FINRA proposal contingent on SEC approval 39 SRLR 1985, 12/24/07). On Oct. 30, the SEC approved FINRA's proposed rule change (SEC Release No. 34-5886; File No. SR-FINRA-2008-010) [*See related report in this issue*].

The court also found that the attorney general failed to demonstrate how the confirmation of the award would violate public policy.

Petitioners Wayde C. Walker, and Nathaniel R. Clay were represented by **Richard A. Roth** of **Roth Law Firm PLLC**, New York.

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