

**Award**  
**FINRA Office of Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimants

Lorelei Mooney, as trustee and on behalf of the Herbert and Helen Schweiger Trust dated November 5, 2002; Robert Schmiedeke, individually and as trustee of the Robert E. Schmiedeke Separate Property Trust dated December 28, 2000

Case Number: 16-00746

vs.

Respondents

Jeffrey James Cannella; Michael Washington Jones; Royal Alliance Associates, Inc.; National Planning Corporation; Investors Capital Corp.; and Jim Andrew Lund

Hearing Site: Los Angeles, California

*Consolidated with:*

Claimants

Lorelei Mooney, as trustee and on behalf of the Herbert and Helen Schweiger Trust dated November 5, 2002; Robert Schmiedeke, individually

Case Number: 14-02936

vs.

Respondents

Tweed Financial Services, Inc.; Robert Tweed a.k.a. Robert "Rusty" Tweed; Michelle Rebecca Langer; United Securities Alliance, Inc.

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Nature of the Dispute: Customers vs. Members and Associated Persons  
Customers vs. Member, Associated Persons and Non-Member

This case was decided by an all-public panel.

**REPRESENTATION OF PARTIES**

For Claimants Lorelei Mooney, as trustee and on behalf of the Herbert and Helen Schweiger Trust dated November 5, 2002 ("Mooney"), Robert Schmiedeke ("Schmiedeke"), individually and as trustee of the Robert E. Schmiedeke Separate

Property Trust dated December 28, 2000 ("Schmiedeke Trust"): Kenneth J. Catanzarite, Esq., Catanzarite Law Corporation, Anaheim, California.

Hereinafter, Mooney, Schmiedeke and Schmiedeke Trust are collectively referred to as "Claimants."

Respondent Michael Washington Jones ("Jones") appeared pro se.

For Respondents Jeffrey James Cannella ("Cannella"), Investors Capital Corp. ("ICC") and Jim Andrew Lund ("Lund"): Derek C. Anderson, Esq., Winget Spadafora & Schwartzberg, LLP, Boulder, Colorado.

For Respondent National Planning Corporation ("NPC"): Elizabeth Lowery, Esq., Freeman, Mathis & Gary, LLP, Hermosa Beach, California.

For Respondent Royal Alliance Associates, Inc. ("RAA"): Theodore J. Sawicki, Esq., Alston & Bird, LLP, Atlanta, Georgia.

For Respondent Robert Russel Tweed ("Tweed"): H Thomas Fehn, Esq., Fields, Fehn & Sherwin, Los Angeles, California.

For Respondent Michelle Rebecca Langer ("Langer"): Jeffrey S. Kob, Esq., Evans & Kob, PC, Coronado, California.

For Respondent United Securities Alliance, Inc. ("USA"): Michael Washington Jones, Custodian, United Securities Alliance, Inc., Charlotte, North Carolina.

Respondent Tweed Financial Services, Inc. ("Tweed Financial") did not enter an appearance in this matter.

\*FINRA recorded the appearance of Claimants' counsel at the time of filing of the Statement of Claim. Counsel's representation of Claimants may have ended with the parties' settlement. Please see the Other Issues Considered and Decided section of this award for information on whether Claimants' counsel appeared at the expungement hearing.

### **CASE INFORMATION**

#### **Master Consolidated Case 16-00746**

Statement of Claim filed on or about: March 14, 2016.

Amended Statement of Claim filed on or about: June 27, 2016.

Second Amended Statement of Claim filed on or about: February 10, 2017.

Third Amended Statement of Claim filed on or about: July 20, 2017.

Fourth Amended Statement of Claim filed on or about: July 26, 2018.

Mooney and Schmiedeke signed the Submission Agreement: March 23, 2016.

Schmiedeke Trust did not sign the Submission Agreement.

Statement of Answer to the Statement of Claim filed by Jones on or about: January 12, 2017.

Statement of Answer to the Amended Statement of Claim filed by Jones on or about: July 20, 2016.

Statement of Answer to the Second Amended Statement of Claim filed by Jones on or about: March 1, 2017.

Jones signed the Submission Agreement: January 12, 2017.

Statement of Answer to the Statement of Claim filed by Cannella on or about: June 23, 2016.

Statement of Answer to the Amended Statement of Claim filed by Cannella on or about: July 18, 2016.

Statement of Answer to the Second Amended Statement of Claim filed by Cannella on or about: March 2, 2017.

Statement of Answer to the Third Amended Statement of Claim filed by Cannella on or about: August 9, 2017.

Cannella signed the Submission Agreement: June 30, 2016.

Statement of Answer to the Amended Statement of Claim filed by NPC on or about: July 18, 2016.

Statement of Answer to the Second Amended Statement of Claim filed by NPC on or about: March 2, 2017.

Statement of Answer to the Fourth Amended Statement of Claim filed by NPC on or about: August 15, 2018.

NPC signed the Submission Agreement: June 14, 2016.

Statement of Answer to the Statement of Claim filed by RAA on or about: October 27, 2016.

Statement of Answer to the Amended Statement of Claim filed by RAA on or about: October 31, 2016.

Statement of Answer to the Third Amended Statement of Claim filed by RAA on or about: August 17, 2017.

RAA signed a Conditional Submission Agreement<sup>1</sup> on or about: February 23, 2017.

Statement of Answer to the Fourth Amended Statement of Claim filed by Lund and ICC on or about: September 14, 2018.

ICC signed the Submission Agreement: September 12, 2018.

Lund signed the Submission Agreement: September 13, 2018.

### **Subordinate Case 14-02936**

Statement of Claim filed on or about: September 26, 2014.

Claimants signed the Submission Agreement: September 17, 2014.

Statement of Answer filed by Tweed on or about: April 2, 2015.

First Amended Statement of Answer filed by Tweed on or about: July 1, 2015.

Tweed signed the Submission Agreement: April 15, 2015.

Statement of Answer filed by Langer on or about: January 2, 2015.

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<sup>1</sup> RAA filed a "Conditional" Submission Agreement. By Order dated March 17, 2017, the Panel found that it was acceptable and should be deemed filed by FINRA.

Langer signed the Submission Agreement: December 18, 2014.

USA did not file a Statement of Answer or sign the Submission Agreement.

### **CASE SUMMARY**

#### **Master Consolidated Case 16-00746**

In the Statement of Claim, Mooney and Schmiedeke asserted the following causes of action: (1) violation of standards of reasonable basis suitability (NASD Rule 2310, FINRA Rule 2310(b)), just and equitable principles of trade (FINRA Rule 2010); (2) fraud, misleading statements, misleading omissions of material information (NASD Rule 2210(d)(1)), just and equitable principles of trade (FINRA Rule 2010); (3) breach of fiduciary duty; (4) negligent misrepresentation; (5) negligence; (6) breach of contract; (7) breach of the covenant of good faith and fair dealing; (8) elder abuse; (9) aiding and abetting financial elder abuse, Welfare and Institutions Code §15610.30(A)(2); and (10) failure to supervise (NASD Rules 3010, 3012, 2110 and industry standards of practice). The causes of action relate to Claimants' investment in tenant in common ("TIC") interests in NNN Triple Net (one was known as "City Centre"), Argus Realty and Triple Net Realty.

In the Amended Statement of Claim, Mooney and Schmiedeke included additional facts and allegations about the parties.

In the Second Amended Statement of Claim, Mooney and Schmiedeke consolidated the Statement of Claim from Arbitration Case No. 14-02936 into this case, including Tweed Financial, Tweed and USA as respondents.

In the Third Amended Statement of Claim, Mooney and Schmiedeke added the Schmiedeke Trust as a claimant, and a claim for failure to supervise.

In the Fourth Amended Statement of Claim, Claimants added Lund and ICC as respondents and removed the following causes of action: elder abuse; and aiding and abetting financial elder abuse, Welfare and Institutions Code §15610.30(A)(2). Claimants also removed Mooney as a claimant since the respondents she had claims against were dismissed without prejudice.

Unless specifically admitted in the Statements of Answer, Jones denied the allegations made in the Statement of Claim, Amended Statement of Claim and Second Amended Statement of Claim.

Unless specifically admitted in the Statements of Answer, Cannella denied the allegations made in the Statement of Claim, Amended Statement of Claim, Second Amended Statement of Claim and Third Amended Statement of Claim, and asserted various affirmative defenses.

Unless specifically admitted in the Statements of Answer, NPC denied the allegations made in the Amended Statement of Claim, Second Amended Statement of Claim and Fourth Amended Statement of Claim, and asserted various affirmative defenses.

Unless specifically admitted in the Statements of Answer, RAA denied the allegations made in the Statement of Claim, Amended Statement of Claim and Third Amended Statement of Claim, and asserted various affirmative defenses.

Unless specifically admitted in the Statement of Answer, Lund and ICC denied the allegations made in the Fourth Amended Statement of Claim and asserted various affirmative defenses.

**Subordinate Case 14-02936**

In the Statement of Claim, Mooney and Schmiedeke asserted the following causes of action: (1) violation of standards of reasonable basis suitability (NASD Rule 2310, FINRA Rule 2310(b)), just and equitable principles of trade (FINRA Rule 2010); (2) fraud, misleading statements, misleading omissions of material information (NASD Rule 2210(d)(1)), just and equitable principles of trade (FINRA Rule 2010); (3) breach of fiduciary duty; (4) negligent misrepresentation; (5) negligence; (6) breach of contract; (7) breach of the covenant of good faith and fair dealing; (8) elder abuse; (9) aiding and abetting financial elder abuse, Welfare and Institutions Code §15610.30(A)(2). The causes of action related to Mooney and Schmiedeke TIC interests in Argus Realty, Triple Net Realty and NNN Triple Net.

Unless specifically admitted in the Statement of Answer, Tweed denied the allegations made in the Statement of Claim. In the First Amended Statement of Answer, Tweed stated that Claimants' claims were barred by the applicable statutes of limitation and FINRA Rule 12206.

Unless specifically admitted in the Statement of Answer, Langer denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

**Master Consolidated Case 16-00746**

In the Statement of Claim, Amended Statement of Claim, and the Second, Third and Fourth Amended Statements of Claim, Mooney and Schmiedeke requested:

For Claims 1 – 9:

1. Compensatory damages in an unspecified amount for claims 1 – 7;
2. Consequential and incidental damages for claims 6 and 7;
3. Exemplary and punitive damages for claims 1, 2, 3, 8 and 9;

For All Claims

4. General and special damages in an unspecified amount;
5. Compensation for the reasonably necessary loss of time, attorneys' fees and other expenditures allegedly suffered or incurred under the "tort of another" doctrine as required to act in the protection of Claimants' interests in accordance with *Prentice v. North Am. Title Guaranty Corp., Alameda Division* (1963) 59 Cal.2d 618; *Electrical Electronic Control, Inc. v. Los Angeles Unified School Dist.* (2005) 126 Cal.App.4<sup>th</sup> 601;
6. Costs of the arbitration;
7. Statutory damages;
8. Prejudgment and post judgment interest, according to law; and

9. Such other and further relief as the Panel may deem just and proper.

In the Third Amended Statement of Claim, Claimants added relief requests for claim 10, including:

1. Compensatory damages in an unspecified amount;
2. General and special damages; and
3. Exemplary and/or punitive damages.

In the Fourth Amended Statement of Claim, Schmiedeke and Schmiedeke Trust removed all relief requests associated with claims 8 and 9.

In the Statement of Answer to the Statement of Claim, Jones requested:

1. Dismissal of all claims against him;
2. Any fees or costs of this arbitration not be assessed against him;
3. Attorney consultation fees; and
4. Any other costs be assessed against Claimant.

In the Statements of Answer to the Amended and Second Amended Statements of Claim, Jones requested:

1. The Amended Statement of Claim be dismissed with prejudice;
2. An award in his favor;
3. Forum fees;
4. Costs;
5. Attorneys' fees;
6. Travel expenses;
7. Expert witness fees; and
8. Such other and further relief that the Panel deems just and proper.

In the Statements of Answer to the Statement of Claim, Amended Statement of Claim, and Second and Third Amended Statements of Claim, Cannella requested:

1. Claimants' claims be dismissed with prejudice;
2. An award in his favor;
3. Forum fees;
4. Costs;
5. Attorneys' fees;
6. Travel expenses;
7. Expert witness fees; and
8. Such other and further relief that the Panel deems just and proper.

In the Statement of Answer to the Amended Statement of Claim, Second and Fourth Amended Statement of Claim, NPC requested:

1. Mooney and Schmiedeke's claims be dismissed with prejudice and they take nothing by way of their claims;
2. Reimbursement of the costs of the arbitration, attorneys' fees, filing fees and other such costs as are deemed reasonable;
3. Schmiedeke and his attorney pay sanctions to NPC in an amount not less than \$10,000.00 and at least equal to NPC's allegedly ever-increasing costs and attorneys' fees; and
4. Such other and further relief as the Panel deems just and proper.

In the Statement of Answer to the Second Amended Statement of Claim, NPC increased its request for sanctions against Schmiedeke and his attorney to an amount not less than \$20,000.00.

In the Statement of Answer to the Fourth Amended Statement of Claim, NPC amended its request for sanctions against Schmiedeke to an amount at least equal to NPC's costs of arbitration, attorneys' fees, filing fees and other such costs as are deemed reasonable and equitable and as provided by law, including by CCP Section 128.7.

In the Statements of Answer to the Statement of Claim, Amended Statement of Claim and Third Amended Statement of Claim, RAA requested:

1. Dismissal of all causes of action in their entirety, with prejudice.
2. Forum fees be assessed against Claimant; and
3. Such other and further relief as the Panel deems just and proper.

In the Statements of Answer to the Amended and Third Amended Statements of Claim, RAA also requested that it be awarded its costs, attorneys' fees, travel expenses and expert witness fees.

In the Statement of Answer to the Fourth Amended Statement of Claim, Lund and ICC requested:

1. Dismissal of the Fourth Amended Statement of Claim in its entirety with prejudice;
2. Reasonable costs and expenses;
3. Reasonable attorneys' fees;
4. Forum fees; and
5. Such further relief as the Panel may deem just and proper.

#### **Subordinate Case 14-02936**

In the Statement of Claim, Mooney and Schmiedeke requested:

##### For Claims 1 – 9:

1. Compensatory damages in an unspecified amount for claims 1 – 7;
2. Consequential and incidental damages for claims 6 and 7;
3. Exemplary and punitive damages for claims 1, 2, 3, 8 and 9;

##### For All Claims

4. General and special damages in an unspecified amount;
5. Compensation for the reasonably necessary loss of time, attorneys' fees and other expenditures allegedly suffered or incurred under the "tort of another" doctrine as required to act in the protection of Claimants' interests in accordance with *Prentice v. North Am. Title Guaranty Corp., Alameda Division* (1963) 59 Cal.2d 618; *Electrical Electronic Control, Inc. v. Los Angeles Unified School Dist.* (2005) 126 Cal.App.4<sup>th</sup> 601;
6. Costs of the arbitration;
7. Statutory damages;
8. Prejudgment and post judgment interest, according to law; and
9. Such other and further relief as the Panel may deem just and proper.

In the Statements of Answer, Tweed did not include any separate relief requests.

In the Statement of Answer, Langer requested:

1. Mooney and Schmiedeke's claims be denied;
2. All relief reasonably necessary to make her whole, including costs, attorneys' fees and expenses; and
3. Expungement of this matter from her Central Registration Depository ("CRD") records.

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

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

#### **Master Consolidated Case 16-00746**

USA did not file with FINRA Office of Dispute Resolution 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 Panel on all issues submitted.

Tweed Financial is not a member or associated person of FINRA and did not voluntarily submit to arbitration. Therefore, the Panel made no determination with respect to Claimants' claim against Tweed Financial.

On March 14, 2016, Claimants filed a Motion for Consolidation of FINRA arbitration case 14-02936 with case number 16-00746 ("Motion for Consolidation"). No responses were received. By Order dated April 18, 2016, the Panel denied Claimant's Motion for Consolidation.

On April 8, 2016, RAA advised that it filed a Complaint for Declaratory and Injunctive Relief in the United States District Court ("District Court") seeking a declaration that RAA is not bound to arbitrate Mooney and Schmiedeke's claim.

On June 21, 2016, Claimants filed a Motion for Reconsideration of the Motion for Consolidation ("Motion for Consolidation Reconsideration"). No responses were received. By Order dated July 11, 2016, the Panel granted Claimants' Motion for Consolidation Reconsideration.

On June 27, 2016, Mooney and Schmiedeke filed an Amended Statement of Claim before the Panel's appointment to the case. Therefore, in accordance with the Code Rule 12309(a), Mooney and Schmiedeke's Amended Statement of Claim became part of the record.

On August 8, 2016, NPC and Cannella filed a joint objection to the Panel's Order granting Claimants' Motion for Consolidation Reconsideration. On August 10, Jones also filed an objection to the case consolidation, and Claimants filed an opposition to the objections to the Order granting the Motion for Consolidation Reconsideration. On August 18, Claimants filed a letter to address NPC, Cannella and Jones' objections to



the consolidation. By Order dated October 8, 2016, the Panel denied all objections to the consolidation thereby affirming its July 11, 2016 Order consolidating the cases.

On September 28, 2016, RAA advised that the District Court dismissed RAA's request for declaratory relief and ordered RAA to submit to FINRA's arbitration forum, and stated that it would file an appeal of the District Court's decision to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

On November 29, 2016, the parties agreed to the appointment of a panel in case 16-00746. On December 2, FINRA Dispute Resolution Services advised that, pursuant to the parties' agreement, the master consolidated case would be 16-00746 and case number 14-02936 would be closed as the subordinate case. Accordingly, the Panel in case 16-00746 heard and decided all issues.

On January 12, 2017, the Panel held a pre-hearing conference with the parties following the consolidation of arbitration cases 14-02936 and 16-00746. By Order that same date, the Panel directed Mooney and Schmiedeke to file a Second Amended Statement of Claim within 30 days, incorporating all claims and parties, and ordered respondents to file Statements of Answer 20 days thereafter, and all submissions filed became part of the record.

On January 26, 2017, RAA filed a notice requesting that FINRA Dispute Resolution Services accept its Conditional Submission Agreement ("CSA"). On February 6, Mooney and Schmiedeke filed an opposition to RAA's request. On February 10, RAA filed a reply in support of its CSA. By Order dated March 17, 2017, the Panel determined that RAA's CSA is acceptable and should be deemed filed by FINRA Dispute Resolution. The Panel further stated that RAA's CSA is identical to the FINRA Submission Agreement except it references the District Court case challenging FINRA's arbitration jurisdiction and states that rights raised in the court case are not waived by submitting to arbitration.

On April 27, 2017, Jones filed a Motion to Dismiss under FINRA Code Rule 12206 ("Jones' Motion to Dismiss"). No responses were received.

On May 30, 2017, NPC filed a Motion to Dismiss pursuant to Code Rules 12206 and 12504 ("NPC's Motion to Dismiss"), and request for monetary sanctions of at least \$50,000.00. On July 14, Mooney and Schmiedeke filed an opposition the motion. On August 3, Mooney and Schmiedeke filed a Supplemental Opposition to NPC's Motion to Dismiss ("Supplemental Opposition"). On August 14, NPC filed an opposition to the Supplemental Opposition. On August 18, Mooney and Schmiedeke filed a reply in support of their Supplemental Opposition. On August 21, NPC withdrew its request for dismissal pursuant to Rule 12206, without prejudice, from NPC's Motion to Dismiss.

On June 6, 2017, Cannella filed a Motion to Dismiss Pursuant to FINRA Rule 12206 and a Motion to Dismiss Pursuant to Rule 12504 ("Cannella's Motions to Dismiss"). On July 5 and 21, Mooney and Schmiedeke filed oppositions to Cannella's motions, respectively. On July 13 and 26, Cannella filed replies in support of his Motions to Dismiss, respectively. On July 31, Mooney and Schmiedeke filed a Supplemental Request for Judicial Notice in Support of the Oppositions to Cannella's Motions to

Dismiss Pursuant to FINRA Rules 12206 and 12504 ("Supplemental Response"). On August 10, Cannella filed an opposition to the Supplemental Response. On August 15, Mooney and Schmiedeke filed a reply in support of their Supplemental Response.

On June 9, 2017, Mooney and Schmiedeke filed a Motion for Leave to File Third Amended Statement of Claim ("Motion for Third Amended Claim"). On June 19, NPC filed an opposition to Mooney and Schmiedeke's motion. No other responses were received. On June 26, Mooney and Schmiedeke filed a reply in support of their Motion for Third Amended Claim. On July 19, the Panel held a pre-hearing conference to hear oral argument on this motion, among other matters. By Order dated July 20, 2017, the Panel granted Mooney and Schmiedeke's motion and the Third Amended Statement of Claim became part of the record.

In the Third Amended Statement of Claim, the Schmiedeke Trust was added as a claimant. However, the Schmiedeke Trust did not file with FINRA Dispute Resolution a properly executed Submission Agreement. The Panel found that since Schmiedeke signed the Submission Agreement and is the trustee of the Trust, the Trust is required to submit to arbitration pursuant to the Code and is therefore bound by the determination of the Panel on all issues submitted.

On June 26, 2017, Claimants and Jones filed a notice of Stipulation and Dismissal of Jones without prejudice. The notice also stated that Jones' Motion to Dismiss under Rule 12206 is vacated, and that Jones agreed to cooperate and participate as an officer and corporate representative of USA. Therefore, the Panel found that USA had notice of the claim even though it did not file a Statement of Answer.

By Order dated July 24, 2017, the Panel requested the parties file a supplemental pleading to address whether *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) ("ANZ case"), which contains an analysis of statutes of limitation and statutes of repose under federal securities statutes, has any application to this case. On August 7, Cannella and NPC filed briefs regarding the application of the ANZ case to their respective motions to dismiss. On August 14, Claimants filed an Omnibus Supplemental Response regarding the ANZ case and, on August 18, NPC filed a reply in support of its earlier brief.

On August 7, 2017, Claimants filed a Motion for Leave to File Fourth Amended Statement of Claim ("Motion for Fourth Amended Claim"). On August 23, proposed party ICC filed an opposition to Claimants' motion. On August 28, Claimants filed a reply in support of their Motion for Fourth Amended Claim.

By Order dated August 10, 2017, the Panel advised the parties that they could provide briefs to address the application of the case of *Jones v. Royal Administration Services, Inc.* (9<sup>th</sup> Cir., August 9, 2017, No. 15-17328) ("Jones Case") to the pending motions to dismiss. On August 21, Claimants filed a supplemental brief regarding the application of the Jones Case on NPC and Cannella's motions to dismiss. No other responses were received.

On August 24, 2017, the Panel heard oral argument on NPC's and Cannella's respective motions to dismiss. By order that same day, the Panel granted NPC's Motion

to Dismiss pursuant to FINRA Rule 12504(a)(6)(B) on the ground that Claimants' claimed that NPC was involved in a single sale of a TIC investment, City Centre, to Schmeideke that closed in November 2004, however, the Panel found that NPC was not associated with either Schmeideke nor the City Centre TIC account, security or conduct at issue in this claim.

Also by Order that same day, the Panel granted Cannella's Motion to Dismiss pursuant to FINRA Rule 12206(a) on the ground that USA was the broker-dealer for two TICs sold to Schmeideke and two TICs sold to Mooney, and that all four sales occurred between January and November 2005. The Panel noted that FINRA Rule 12206(a) provides: "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. The panel will resolve any questions regarding the eligibility of a claim under this rule." The Panel found that the claim against Cannella was filed in 2014, well beyond the six years from November 2005. The Panel also noted that Claimants also claimed that Tweed Financial failed to supervise the sales of the four TICs, all of which occurred more than six years before this FINRA claim was filed. Accordingly, the Panel found that the claim against Cannella is dismissed under Rule 12206.

On September 8, 2017, Claimants filed a Motion to Vacate Order under FINRA Rule 12504(a), Reconsider Order under FINRA Rule 12504(a) and Withdraw all Claims under FINRA Rule 12206(b) ("Motion to Reconsider"). On September 18, NPC and Cannella filed oppositions to the motion. On September 20, Claimants filed a reply in support of their Motion to Reconsider. On October 4, NPC filed a sur-reply to the motion, and Claimants filed a response on October 9.

On September 20, 2017, RAA advised that the Ninth Circuit issued its decision reversing and remanding the Judgment of the District Court compelling RAA to arbitrate Claimants' claims and directed the District Court to enter final judgment in favor of RAA. RAA further stated that FINRA has no jurisdiction over Claimants' claims against RAA in this arbitration and should be considered dismissed without prejudice. On October 2, Claimants advised that pursuant to FINRA Rule 12206(b), and in light of the Panel's decision to grant Cannella's motion to dismiss pursuant to Rule 12206, Claimants elected to withdraw all claims without prejudice against all respondents, including RAA. On October 10, RAA filed a notice advising that the Ninth Circuit issued a decision advising that RAA cannot be compelled to arbitration and therefore RAA is not subject to the Code, any decision by FINRA or the Panel with regard to Claimants' claims in this case.

By Order dated October 13, 2017, the Panel determined that RAA was no longer a party to this arbitration pursuant to the Ninth Circuit's decision. The Panel also ordered Claimants to advise whether they will withdraw their pending Motion for Fourth Amended Claim and/or withdraw their pending Motion to Reconsider. The Panel also directed Claimants to advise if they dismissed Tweed with or without prejudice and requested the status of USA in the case. On October 20, Claimants advised that they withdrew their Motion for Fourth Amended Claim, wished to pursue their Motion to Reconsider the Panel's order granting NPC's Motion to Dismiss and dismissed Tweed and USA without prejudice.

On March 14, 2018, the Panel held a pre-hearing conference to hear oral argument on Claimants' Motion to Reconsider the Panel's order granting NPC's Motion to Dismiss, among other motions. By Order dated March 18, 2018, a majority of the Panel both granted Claimants' Motion to Reconsider and NPC was reinstated as a respondent in the case, and dismissed Tweed and USA without prejudice, among other rulings.

On June 28, 2018, Claimants filed a second Motion for Leave to File Fourth Amended Statement of Claim (Second Motion for Fourth Amended Claim). On July 9, proposed party Lund filed a response to Claimants' motion and proposed party ICC filed an objection to Claimants' motion. On July 11, NPC filed an opposition to Claimants' motion. On July 16, Claimants filed a reply in support of their Second Motion for Fourth Amended Claim. On July 25, the Panel held a pre-hearing conference to hear oral argument on Claimants' motion. By Order dated July 26, 2018, a majority of the Panel granted Claimants' motion. Accordingly, the Fourth Amended Statement of Claim became part of the record and Lund and ICC became respondents in this case.

On November 2, 2018, NPC filed a Renewed Motion to Dismiss and Request for Monetary Sanctions ("Renewed Motion to Dismiss and for Sanctions"). On December 21, Schmiedeke and Schmiedeke Trust (hereinafter collectively referred to as "Schmiedeke") filed an opposition to NPC's motion, requested attorneys' fees and costs under Rule 12504(a)(10) and filed declarations by Schmiedeke and Mr. D, Schmiedeke's securities industry standard of care expert. On January 7, NPC filed a Motion to Strike Declaration of Mr. D ("Motion to Strike") and a reply in support of their Renewed Motion to Dismiss and for Sanctions. On January 21, 2019, Schmiedeke filed an opposition to NPC's Motion to Strike. On January 28, NPC filed a reply in support of its motion.

On November 28, 2018, ICC and Lund filed a Motion to Dismiss pursuant to Rule 12206 ("ICC and Lund's Motion to Dismiss"). On January 4, 2019, Schmiedeke filed an opposition to the motion. On January 14, ICC and Lund filed a reply in support of their Motion to Dismiss. On February 13, the Panel held a pre-hearing conference to hear oral argument on NPC's Renewed Motion to Dismiss and for Sanctions and Motion to Strike, and ICC and Lund's Motion to Dismiss. By Order dated February 15, 2019, the Panel denied NPC's Renewed Motion to Dismiss and for Sanctions and Motion to Strike, and stated that since the full Panel did not agree to grant ICC and Lund's Motion to Dismiss, as required by the Code, the motion was also denied.

On November 27, 2019, ICC and Lund advised that the parties had reached a settlement and that Lund intends to file a motion for expungement. On December 4, NPC advised that it does not oppose Lund's expungement request and will not participate in the expungement hearing. On December 10, Schmiedeke advised that once they receive final payments of the full settlement amount they will dismiss all claims. On December 31, Schmiedeke advised that the matter settled and dismissed ICC, Lund and NPC with prejudice.

On January 29, 2020, Lund filed a Motion for Expungement requesting that this matter, occurrence number 1994136, along with another unrelated FINRA arbitration case, occurrence number 1517418, be expunged from his CRD records. Claimants did not file a response.

The Panel conducted a recorded hearing on May 13, 2020 via video conference so the parties could present oral argument and evidence on Lund's expungement request. Schmiedeke did not participate in the expungement hearing and did not contest Lund's expungement request.

The Panel reviewed Lund's BrokerCheck® Report.

The Panel also reviewed the settlement documents entered into between Schmiedeke, NPC, ICC and Lund, considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement. The Panel noted that the settlement was not conditioned on Schmiedeke not opposing the expungement request. The Panel also noted that Lund contributed \$37,500.00 out of the \$105,000.00 total settlement. Despite Lund's contribution to the settlement amount, the Panel determined expungement was still appropriate because Lund was attempting to avoid extensive legal fees and costs, as well as the uncertainty of arbitration. The Panel believes that Lund did not do anything wrong, and that the asserted claim is false.

In recommending expungement, the Panel relied upon the following documentary or other evidence: Lund's hearing exhibits 1 – 32; the case file, including the pleadings and motions; and Lund's testimony during the expungement hearing.

#### **Subordinate Case 14-02936**

On April 23, 2015, Tweed filed a motion requesting the Panel's permission to file a First Amended Statement of Answer. No responses were filed. By Order dated July 1, 2015, the Panel granted Tweed's motion and his First Amended Statement of Answer became part of the record.

On February 23, 2016, Mooney and Schmiedeke dismissed Langer without prejudice and reserved the right to call her at the hearing as a witness.

### **FINDINGS**

The Panel has determined to deny Lund's expungement request for occurrence number 1517418. A prior arbitration panel had determined that Lund was liable for damages in that separate case. This Panel based its decision on FINRA Expungement Training which states that expungement should not be recommended when there is an adverse arbitration award.

The Panel has provided an explanation of the decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

The Award in this matter may be executed in counterpart copies.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the expungement hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Cannella's Motion to Dismiss pursuant to Rule 12206 of the Code is granted by the Panel without prejudice to any right Claimants have to file in court; Claimants are not prohibited from pursuing their claims in a court pursuant to Rule 12206(b) of the Code.
2. The Panel recommends the expungement of all references to the above-captioned arbitration, occurrence number 1994136, from registration records maintained by the CRD, for Respondent Jim Andrew Lund (CRD# 1713921), with the understanding that, pursuant to Notice to Members 04-16, Respondent Jim Andrew Lund 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 12805 of the Code, the Panel has made the following Rule 2080 affirmative findings of fact:

The claim, allegation, or information is false.

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

Lund's CRD records state that he sold an unsuitable investment to Schmiedeke. The Panel reviewed the documents relating to Schmiedeke's account, including his net worth, and found that he is a qualified investor. Based on the offering memorandum and other documents relating to the investment, the Panel concluded that Schmiedeke had vast experience in making TIC investments and Section 1031 exchanges. The Panel also found that on this investment, Lund did substantial due diligence. Based on these findings, the Panel concluded that the investment was suitable.

3. The Panel denied Lund's expungement request for occurrence number 1517418 from his CRD records.
4. The Panel did not consider or rule on Langer's expungement request since Langer was dismissed without prejudice and did not further pursue expungement.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Office of Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee

= \$ 1,575.00

*\*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 parties, ICC, NPC and RAA are assessed the following:

#### **ICC**

Member Surcharge	= \$ 1,900.00
Member Process Fee	= \$ 3,750.00

#### **NPC**

Member Surcharge	= \$ 1,900.00
Member Process Fee	= \$ 3,750.00

#### **RAA**

Member Surcharge	= \$ 1,900.00
Member Process Fee	= \$ 3,750.00

### **Postponement Fees**

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

April 16 - 20, 2018, postponement by Schmiedeke and Schmiedeke Trust	= \$ 1,125.00
September 11 – 14, 2018, postponement by Panel	= WAIVED
November 18 – 22, 2019, postponement by Schmiedeke, Schmiedeke Trust, NPC, Lund and ICC	= WAIVED

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Total Postponement Fees	= \$ 1,125.00
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The Panel has assessed \$1,125.00 of the postponement fees jointly and severally to Claimants.

### **Discovery-Related Motion Fee**

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with one (1) arbitrator @ \$200.00/decision	= \$ 200.00
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One (1) decision on a discovery-related motion on the papers with three (3) arbitrators @ \$600.00/decision	= \$ 600.00
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Schmiedeke and Schmiedeke Trust submitted one (1) discovery-related motion  
ICC and Lund submitted one (1) discovery-related motion

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Total Discovery-Related Motion Fees	= \$ 800.00
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The Panel has assessed \$400.00 of the discovery-related motion fees jointly and severally to Schmiedeke and Schmiedeke Trust.

The Panel has assessed \$300.00 of the discovery-related motion fees to NPC.

The Panel has assessed \$100.00 of the discovery-related motion fees jointly and severally to ICC and Lund.

### **Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Nine (9) pre-hearing session with the Panel @ \$1,125.00/session			= \$10,125.00
Pre-hearing conferences:	January 12, 2017	1 session	
	March 23, 2017	1 session	
	July 19, 2017	1 session	
	August 24, 2017	1 session	
	March 14, 2018	1 session	
	July 25, 2018	1 session	
	November 12, 2018	1 session	
	February 13, 2019	1 session	
	April 18, 2019	1 session	
One (1) hearing session on expungement request @ \$1,125.00/session			= \$ 1,125.00
Hearing Date:	May 13, 2020	1 session	
<hr/> Total Hearing Session Fees			= \$11,250.00

The Panel has assessed \$1,125.00 of the hearing session fees jointly and severally to Mooney and Schmiedeke.

The Panel has assessed \$2,250.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$1,125.00 of the hearing session fees jointly and severally to Schmiedeke and Schmiedeke Trust.

The Panel has assessed \$3,375.00 of the hearing session fees to NPC.

The Panel has assessed \$1,125.00 of the hearing session fees to Lund.

The Panel has assessed \$1,125.00 of the hearing session fees jointly and severally to RAA and NPC.

The Panel has assessed \$1,125.00 of the hearing session fees to ICC.

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



**ARBITRATION PANEL**

Benjamin F. Breslauer	-	Public Arbitrator, Presiding Chairperson
Virginia Alice Suveiu	-	Public Arbitrator
Betty Jean Jackson	-	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.

**Concurring Arbitrators' Signatures**

***Benjamin F. Breslauer***

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Benjamin F. Breslauer  
Public Arbitrator, Presiding Chairperson

**06/04/2020**

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

***Virginia Alice Suveiu***

\_\_\_\_\_  
Virginia Alice Suveiu  
Public Arbitrator

**06/05/2020**

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

***Betty Jean Jackson***

\_\_\_\_\_  
Betty Jean Jackson  
Public Arbitrator

**06/05/2020**

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

June 05, 2020

\_\_\_\_\_  
Date of Service (For FINRA Office of Dispute Resolution office use only)