

## **AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

---

In the Matter of the Arbitration Between

Name of Claimant

Robert E. Mundy

and

Case Number 96-00566

Name of Respondent

Financial Network Investment Corporation

---

### **REPRESENTATION OF PARTIES**

Robert E. Mundy ("Claimant") was represented by Waldine H. Olson, Esq. of Schmid, Mooney & Frederick, P.C. located in Omaha, NE.

Financial Network Investment Corporation ("Respondent") was represented by Rodney K. Vincent of Vincent Law Offices located in Lincoln, NE.

### **CASE INFORMATION**

The Statement of Claim was filed by the Claimant on or about February 7, 1996.

The Amended Statement of Claim was filed by the Claimant on or about April 16, 1996.

The Second Amended Statement of Claim was filed by the Claimant on or about August 28, 1996.

Replies to the Counter-Claim and Setoff were filed by the Claimant on or about April 19, 1996 and October 7, 1996.

The Submission Agreement of the Claimant was signed on January 25, 1996.

The Statement of Answer to the Statement of Claim, Counter-Claim and Setoff was filed by the Respondent on or about March 29, 1996.

The Statement of Answer to the Amended Statement of Claim, Counter-Claim and Setoff was filed by the Respondent on or about May 3, 1996.

The Statement of Answer to the Second Amended Statement of Claim, Counter-Claim and Setoff was filed by the Respondent on or about September 25, 1996.

The Submission Agreement of the Respondent was signed on March 7, 1996 by Thomas A. Wiltrakis, Sr. Vice President and General Counsel of Financial Network Investment Corporation.

### HEARING INFORMATION

The hearing was held on December 11, 1996 for two (2) sessions and on December 12, 1996 for three (3) sessions in Omaha, NE.

### CASE SUMMARY

Claimant Robert Mundy alleged that he entered into a written Representative Agreement on or about June 21, 1991 with Respondent Financial Network Investment Corporation whereby it was agreed that Claimant was to conduct business as a Registered Representative. At a later date, the Agreement was replaced and superseded by an Independent Contractor Agreement (the "Agreement"). Claimant solicited and sold insurance policies as an independent contractor of Respondent for insurance companies including Sun Life Assurance Company of Canada ("Sun Life") for which Respondent acted as a dealer, underwriter or broker. On June 23, 1992, Sun Life issued a life insurance policy with a face value of \$10,000,000 to Jeffrey J. Prosser, as the insured and naming the Jeffrey J. Prosser Irrevocable Trust dated May 28, 1992, as the beneficiary and owner. The life insurance policy provided for annual premiums in the amount of \$135,875. Since Claimant sold the life insurance policy, he was allegedly entitled to, and did receive, commissions on the sale. As alleged, through no fault of Claimant and due to events beyond the Claimant's control, the insured and owner allowed the policy to lapse effective on or about November 3, 1994. On or about November 10, 1994, Sun Life initiated a demand for a chargeback of \$33,969, an amount equaling 25% of the first annual premium, against Claimant's earned commissions. Despite refusal by the Claimant, the Respondent and Sun Life unilaterally charged the amount of \$33,969 as a setoff against commissions earned by Claimant on the sale of other insurance policies through Respondent. In addition, Claimant sold another life insurance policy with a face value of \$1,000,000 from Sun Life on or about April 29, 1994 to Ronald Popp. After the insured and owner allowed the policy to lapse, the Respondent charged the amount of \$2,218.44 as a setoff against commissions earned by Claimant on the sales of other insurance policies through Respondent. The chargebacks were allegedly made pursuant to a purported chargeback policy of Sun Life, as to which Claimant had no prior notice or knowledge. Claimant contended that the Respondent breached the Independent Contractor Agreement by unilaterally charging and setting off the amounts of \$33,969 and \$2,218.44. Claimant contended that in the alternative, Respondent was unjustly enriched by the wrongful setoffs against the Claimant's commissions.

Respondent Financial Network Investment Corporation denied the allegations set forth in the Statement of Claim and amendments. The Respondent specifically stated the Agreement provided that Claimant would indemnify and hold harmless Respondent from losses, damages, liabilities and expenses arising from the failure of Claimant's clients to fulfill any of their obligations and further provided that Respondent may retain and apply toward the liquidation of any such indebtedness or liability any and all commissions and other sums otherwise payable to Claimant by Respondent. According to the Respondent, Claimant did receive from Respondent first year commissions in the amounts of \$130,012.56 on the sale of the Prosser life insurance policy and \$7,730.99 on the sale of the Popp policy. Respondent claimed that when the Claimant's clients failed to fulfill their obligations to pay premiums, Sun Life exercised its contractual right to require its agents, Respondent and Claimant, to refund unearned first year commissions in the amounts of \$33,969 and \$2,218.44 by charging these amounts against Respondent's future commissions. Respondent further claimed that it requested Claimant to honor the Agreement and indemnify Respondent from the failure of Claimant's clients to fulfill their obligations by refunding his unearned commissions. Respondent alleged that Claimant wrongfully refused to repay the unearned commissions and to indemnify Respondent so Respondent exercised the provisions in the Agreement allowing Respondent to retain and apply toward the liquidation of the indebtedness the Claimant owed the Respondent. In its Counter-Claim and Setoff, Respondent sought costs for defending itself in response to Claimant's civil lawsuit filed in District Court along with a setoff of the damages requested by the Claimant.

Claimant maintained the provision indicating that Claimant did not earn his first year commissions unless the policy remained in force for 36 months was known only to Respondent and Sun Life, not to Claimant; therefore, Claimant denied he was bound by the alleged agreement to which he was not a party. Claimant denied that Respondent had a contract right to charge the alleged indebtedness against commissions earned and payable to Claimant for the sale of other insurance policies.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$36,187.44 in actual damages plus pre-award interest as provided by the laws of the State of Nebraska. Claimant also requested that the Counter-Claim be dismissed.

Respondent requested that the claims asserted against it by the Claimant be denied in their entirety and requested an award for a setoff and judgement against the Claimant in the amounts of \$36,187.44; an award for \$8,350 in damages relating to the lawsuit in District Court and as award for attorneys' fees, costs and expenses.

### **OTHER ISSUES CONSIDERED & DECIDED**

In the initial Statement of Claim, the Claimant named Sun Life Assurance Company of Canada as a Respondent, a non-member of the National Association of Securities Dealers, Inc. As a non-

member of the NASD, Sun Life Assurance Company of Canada was not compelled by the Code of Arbitration Procedure (the "Code") to participate in this arbitration case. Since Sun Life Assurance Company of Canada declined to voluntarily submit to arbitrate this dispute by letters dated March 12, 1996 and May 21, 1996, it was removed as a party to this action. At the hearing, Claimant orally and voluntarily dismissed its claims against Sun Life Assurance Company of Canada.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD Regulation, Inc. Office of Dispute Resolution.

### **AWARD**

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

1. The claims asserted by Claimant Robert E. Mundy against Respondent Financial Network Investment Corporation are hereby denied and dismissed in their entirety with prejudice;
2. The Respondent Financial Network Investment Corporation is hereby awarded a setoff in the amount of \$36,197.44 against Claimant Robert E. Mundy;
3. Any relief not specifically granted herein is hereby denied in its entirety;
4. The parties shall bear their own costs including attorneys' fees except for forum fees specifically addressed below.

### **FORUM FEES**

Forum fees are calculated at the rate of \$600 per hearing session. There were five (5) sessions x \$600 = \$3,000 in forum fees. Pursuant to Section 10205(b) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10205(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation, Inc.") shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Robert E. Mundy. In accordance with Section 10205(c) and 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall also retain the non-refundable filing fee in the

amount of \$500, the \$200 member surcharge and the \$600 hearing session deposit previously submitted by Respondent Financial Network Investment Corporation.

Pursuant to Section 10205(c) of the Code, Claimant Robert E. Mundy is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,740 in additional forum fees. Respondent Financial Network Corporation is hereby liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$60 in additional forum fees.

**Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.**

Signed:

Dated:

Patrick E. Hartigan, Esq.  
Patrick E. Hartigan, Esq.  
Industry Arbitrator, Chairman

January 27, 1997

Steven R. Christensen  
Steven R. Christensen  
Industry Arbitrator, Panelist

January 21, 1997

James A. Ricketts  
James A. Ricketts  
Industry Arbitrator

January 22, 1997

Date served by the NASD Regulation, Inc.: January 27, 1997