

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant

Richard G. Russell Jr. Revocable Living Trust

Case Number: 20-01517

vs.

Respondent

UBS Financial Services Inc.

Hearing Site: Los Angeles, California

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: Customer vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant Richard G. Russell Jr. Revocable Living Trust (“Claimant”): Jacob H. Zamansky, Esq., Zamansky, LLC, New York, New York.

For Respondent UBS Financial Services Inc. (“Respondent”): Anthony J. Borrelli, Esq., Riker Danzig Scherer Hyland & Perretti LLP, Morristown, New Jersey.

CASE INFORMATION

Statement of Claim filed on or about: May 13, 2020.

Claimant signed the Submission Agreement: April 26, 2020.

Statement of Answer filed by Respondent on or about: September 17, 2020.

Respondent signed the Submission Agreement: June 4, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: fraud; misrepresentation; unsuitability; unsuitable product; breach of fiduciary duty; negligence; and breach of contract under the federal securities laws, FINRA regulations, California state securities laws and applicable common law. The causes of action relate to an options strategy product from Respondent called the Yield Enhancement Strategy (“YES”).

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. Equitable relief of rescission of all trading losses, mandates and disgorgement of all margin interest and fees received by Respondent;
2. Compensatory damages of approximately \$250,000.00 including recovery of all trading losses, margin interest and fees received by Respondent and well-managed account damages;
3. Recovery and pre- and post-award interest, costs, expenses, attorneys' fees, expert fees and forum fees of this arbitration; and
4. Punitive damages in such amount as this Panel deems appropriate and just.

In the Statement of Answer, Respondent requested:

1. An award against Claimant dismissing the Statement of Claim in its entirety and with prejudice;
2. Expungement of this matter from the Central Registration Depository ("CRD") records of Unnamed Parties Steven Westerman ("Westerman") and Scott Michael Rosenberg ("Rosenberg"), and any and all associated persons who may be affected by this claim; and
3. Such other and further relief as the Panel deems just and proper.

At the hearing, Claimant requested:

1. Net out-of-pocket losses including specified amounts for trading losses, YES fees, and YES margin losses in the amount of \$216,381.97;
2. Pre-judgment interest in the amount of \$51,119.00;
3. Attorneys' fees with a 33.3% contingency in the amount of \$89,166.00;
4. Costs and expenses in the amount of \$10,000.00; and
5. Punitive damages.

OTHER ISSUES CONSIDERED AND DECIDED

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

The Panel conducted recorded hearings by videoconference from May 23-27, 2022.

On May 27, 2022, the Panel issued an Order requesting the parties to submit their statements and/or claims as to damages. In response to the Order, Respondent submitted a letter on May 31, 2022, requesting dismissal of Claimant's claims in their entirety and expungement on behalf of Unnamed Parties Steven Westerman and Scott Michael Rosenberg. By a letter dated June 7, 2022, Claimant noted that he does not oppose Unnamed Parties Steven Westerman and Scott Michael Rosenberg's expungement requests.

The Panel reviewed Unnamed Parties Steven Westerman and Scott Michael Rosenberg's BrokerCheck® Reports.

In recommending expungement, the Panel relied upon the following documentary or other evidence: pleadings; evidence presented at the hearing; hearing exhibits; hearing testimony; and Unnamed Parties Steven Westerman and Scott Michael Rosenberg's BrokerCheck® Reports.

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

AWARD

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

1. Respondent is liable for and shall pay to Claimant the sum of \$210,000.00 in compensatory damages.
2. Unnamed Party Scott Michael Rosenberg's (CRD Number 2754292) request for expungement of the above-captioned arbitration (Occurrence Number 2077617) from registration records maintained by the CRD is denied.
3. The majority of the Panel recommends the expungement of all references to the above-captioned arbitration (Occurrence Number 2078605) from registration records maintained by the CRD for Unnamed Party Steven Westerman (CRD Number 4690987) with the understanding that, pursuant to Notice to Members 04-16, Unnamed Party Steven Westerman 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 of Arbitration Procedure ("Code"), the majority of the Panel has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The majority of the Panel has made the above Rule 2080 finding based on the following reasons:

Having carefully attended and weighed the very well-presented evidence and testimony, the majority of the Panel has determined the following as to the allegations lodged to the Westerman and Rosenberg's BrokerCheck® Reports:

As to Rosenberg—No Expungement
As to Westerman—Expungement

Claimant was most certainly disappointed in the performance of his investments in the strategy sponsored by Respondent known as YES. While we are awarding damages

against Respondent, we do not find that Claimant's financial advisor, Westerman, lied to him.

We note that Claimant signed and initialed all the relevant investment documents, and we also note evidence that Claimant has held himself out as an advisor to private equity enterprises interested in the healthcare industry, where Claimant has substantial expertise as a former C-level executive of a publicly traded healthcare company.

We note that on several occasions, Westerman (Claimant's financial advisor), offered viable options for exiting the problematic strategy that was the basis for the claim. There is evidence and testimony that Westerman arranged for dollar-value financial services from Respondent for Claimant, delivered without charge, along with three fee reductions. And to the best of our knowledge and belief, Claimant still is a client of Westerman, albeit at a reduced level.

We received evidence that Westerman had as many as eight to ten other clients invested in the problematic strategy. We did not receive any evidence that any of Westerman's other clients filed claims against him.

4. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and attorneys' fees, are denied.

Dissent of Arbitrator Cherie Lewis

Arbitrator Lewis respectfully dissents from the recommendation in the majority opinion that Occurrence Number 2078605, related to Westerman, be expunged.

The burden of proof has not been met to reach a finding that the claim, allegation, or information (hereinafter "the claim") is "false." The statements in the majority opinion regarding the conduct of Westerman, the conduct of Claimant, and the interactions of Westerman and Claimant arguably do not directly pertain to the issues of whether the claim is "false." Even if these statements were considered to directly pertain to the issue of the falsity of the claim, these statements would not meet the burden of proof required to reach a finding that the claim is "false."

Furthermore, a finding that the claim is "false" is inconsistent with the awarding of compensatory damages to the Claimant in the not insignificant amount of \$210,000.00 from Respondent. If the claim was "false", the Panel would not have awarded \$210,000.00 to Claimant from Respondent. The evidence shows that Westerman was Respondent's employee, who interacted the most frequently with Claimant during the relevant time period. It would be illogical and legally indefensible to award Claimant the amount of \$210,000.00 in damages from Respondent, while simultaneously expunging the record of Respondent's employee who had the most frequent contact with Claimant during the relevant time period.

The evidence on record shows that the interactions between Westerman and Claimant included, but were not limited to, emails and telephone calls (Claimant's exhibits 8-11, 15-18, 20-23, 25-30, 33-37, 39; Respondent's exhibits 7, 9-19, 23, 27, 29-35, 37-39, 41-48, 50-51, 53-55; hearing testimony of Westerman; and hearing testimony of Claimant).

This minority dissent is supported by the pleadings, evidence presented at the hearing, hearing testimony, and the BrokerCheck® Report. In conclusion, Arbitrator Lewis respectfully dissents from the recommendation in the majority opinion that Occurrence Number 2078605, related to Westerman, be expunged.

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 = \$ 1,425.00

**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 a party, Respondent is assessed the following:

Member Surcharge = \$ 1,700.00

Member Process Fee = \$ 3,250.00

Late Pre-Hearing Cancellation Fees

Fees apply when a pre-hearing conference is cancelled within three business days of the scheduled conference:

December 1, 2020, cancellation requested by parties = \$ 300.00

Total Late Pre-Hearing Cancellation Fees = \$ 300.00

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees to Claimant.

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees to Respondent.

Postponement Fees

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

May 16-20, 2022, postponement requested by parties = WAIVED

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 Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with the Panel @ \$1,125.00/session = \$ 2,250.00

Pre-Hearing Conferences: September 11, 2020 1 session

June 21, 2022 1 session

Eight (8) hearing sessions @ 1,125.00/session		= \$	9,000.00
Hearings:	May 23, 2022	2 sessions	
	May 24, 2022	2 sessions	
	May 25, 2022	2 sessions	
	May 26, 2022	1 session	
	May 27, 2022	1 session	

Total Hearing Session Fees	= \$	11,250.00
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The Panel has assessed \$5,625.00 of the hearing session fees to Claimant.

The Panel has assessed \$5,625.00 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

Cherie S. Lewis	-	Public Arbitrator, Presiding Chairperson
Joseph Howard Cooper	-	Public Arbitrator
Darrell Gene Smith	-	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

Joseph Howard Cooper

Joseph Howard Cooper
Public Arbitrator

07/18/2022

Signature Date

Darrell Gene Smith

Darrell Gene Smith
Public Arbitrator

07/18/2022

Signature Date

Dissenting Arbitrator's Signature

Cherie S. Lewis

Cherie S. Lewis
Public Arbitrator, Presiding Chairperson

07/18/2022

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.

July 19, 2022

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