

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

FILED
11/9/2021 4:44 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2021L010952

CREDIT SUISSE SECURITIES (USA) LLC,)
)
Applicant,)
)
v.)
)
MARK HUTCHINSON, DAVID HIRSCH,)
PAUL VANDEN HEUVEL, JAMES WHITNEY,)
MICHAEL SAKACH, MARY DICHRISTOFANO,)
JAMES KELLY, and MICHAEL BOARD,)
)
Respondents.)

15537937

Case No.: 2021L010952

**APPLICATION TO VACATE AND/OR MODIFY AND/OR CORRECT ARBITRATION
AWARD OR, IN THE ALTERNATIVE, TO MODIFY OR CORRECT AN
ARBITRATION AWARD**

Applicant Credit Suisse Securities (USA) LLC (“Credit Suisse”), in accordance with the Illinois Uniform Arbitration Act, 710 ILCS 5/1, *et seq.*, including 710 ILCS 5/12, 5/13, and 5/15, proceeding adverse to Respondents Mark Hutchinson, David Hirsch, Paul Vanden Heuvel, James Whitney, Michael Sakach, Mary DiChristofano, James Kelly, and Michael Board, hereby applies to this Court to vacate, or, in the alternative, to modify and/or correct, an arbitration award rendered on November 5, 2021, by a Panel of Arbitrators of the Financial Industry Regulatory Authority Office of Dispute Resolution (“FINRA”) in the matter of a dispute between Credit Suisse and the Respondents. Credit Suisse shows the Court as follows:

Parties, Jurisdiction, and Venue

1. Applicant Credit Suisse is a limited liability company organized and existing under the laws of the State of Delaware. Credit Suisse maintains its principal place of business in New York, New York. Credit Suisse is licensed to conduct business in Illinois and conducts business from an office in Chicago, Cook County, Illinois.

2. Respondent Mark Hutchinson, an individual, upon information and belief, resides at 137 Palm Drive, Barrington, IL 60010.

3. Respondent David Hirsch, an individual, upon information and belief, resides at 41 Steeplechase Road, Barrington Hills, IL 60010.

4. Respondent Paul Vanden Heuvel, an individual, upon information and belief, resides at 714 Milburn Street, Evanston, IL 60201.

5. Respondent James Whitney, an individual, upon information and belief, resides at 120 S. Fairview Avenue, Park Ridge, IL 60068.

6. Respondent Michael Sakach, an individual, upon information and belief, resides at 600 Turner Avenue, Glen Ellyn, IL 60137.

7. Respondent Mary DiChristofano, an individual, upon information and belief, resides at 735 S. Burton Place, Arlington Heights, IL 60005.

8. Respondent James Kelly, an individual, upon information and belief, resides at 1834 School Street, Chicago, IL 60657.

9. Respondent Michael Board, an individual, upon information and belief, resides at 19 Pinewood Lane, Belleville, IL 62226.

10. Respondents are all former employees of Credit Suisse.

11. On September 25, 2016, Respondents initiated an arbitration against Credit Suisse by filing a Statement of Claim with FINRA, FINRA Arbitration Number 16-02825.

12. Respondents amended their Statement of Claim multiple times. The final amendment, and the operative Statement of Claim, was the Fourth Amended Statement of Claim, filed on August 23, 2019.

13. An Arbitration Award was rendered on November 5, 2021. A copy of the Arbitration Award is attached as Exhibit A.

14. Jurisdiction on this Court is conferred by 710 ILCS 5/16.

15. The Arbitration took place in Chicago, Cook County, Illinois. Respondents participated throughout the Arbitration, including attending hearing and testifying in Chicago, Cook County, Illinois. Venue is therefore proper in Cook County pursuant to 710 ILCS 5/17.

Background

16. Credit Suisse employed Respondents as Relationship Managers (“RMs”) in the Chicago, Cook County, office of Credit Suisse’s Private Banking business (“PBUSA”).

17. As their title implies, as RMs Respondents managed the relationships between PBUSA and its clients – high-net-worth individual and institutions who placed their assets and banking business with Credit Suisse.

18. Throughout the course of Respondents’ employment with Credit Suisse, RM compensation was governed by the Credit Suisse Relationship Manager Compensation Guide (“RM Comp Guide”). The RM Comp Guide set forth the terms under which Respondents could earn production-related compensation and could become eligible for deferred contingent awards.

19. During their employment, Respondents received contingent deferred awards as incentive compensation, which were governed by a Credit Suisse Master Share Plan and various award certificates (collectively, the “Plan Documents”).

20. The award certificates not only evidenced the contingent deferred awards, but they also set forth the contractual terms and conditions under which any contingent deferred awards would vest and settle. During the arbitration, the parties stipulated that the relevant provisions of all the award certificates at issue in the arbitration were substantively similar, and the parties

entered as exhibits certain award certificates that they stipulated were representative of all award certificates at issue. Exhibit B contains excerpts from the relevant vesting and settlement provisions of one such representative award certificate, which was marked and entered into evidence as Exhibit J-1117 by the Arbitration Panel.

21. The terms and conditions of vesting and settlement were of critical importance because a contingent deferred award is in most instances nothing more than an award of a set number of “phantom” shares of Credit Suisse stock. These “phantom” shares did not mature into actual shares of Credit Suisse stock until the contractual settlement date, and only if all of the contractual conditions of vesting and settlement were met.

22. The parties arbitrated the question of whether Respondents voluntarily resigned their Credit Suisse employment, or whether their Credit Suisse employment was terminated without cause. The Arbitration Award indicates that the Panel determined that Respondents were terminated without cause. Credit Suisse does not seek to vacate, and/or modify, and/or correct that determination.

23. Credit Suisse does seek to vacate, and/or modify, and/or correct several other determinations made by the Arbitration Panel, because the Panel exceeded its powers in making those determinations.

The Arbitrators Exceeded Their Powers in Awarding Attorneys’ Fees

24. The Panel exceeded their powers in awarding attorneys’ fees to each Respondent.

25. The Arbitration Award identifies two bases for awarding attorneys’ fees to each Respondent: (a) “pursuant to the IWPCA” – i.e., the Illinois Wage Payment and Collection Act – and (b) “common law.” (Ex. A, ¶¶ 17 – 24).

26. Respondents Hutchinson, Hirsch, Vanden Heuvel, Kelly, and Board did not assert IWPCA claims in the operative Fourth Amended Statement of Claim. Indeed, the Arbitration Panel ruled that Respondents Hutchinson, Hirsch, Vanden Heuvel, Kelly and Board were not permitted to assert IWPCA claims. The arbitrators therefore exceeded their powers in basing an award of attorneys' fees on the IWPCA as to Respondents who did not assert a claim under the IWPCA, pursuant to the Arbitration Panel's decision prohibiting those Respondents from asserting claims under the IWPCA.

27. Further, the contingent deferred awards are not "final compensation" that could have been "due at separation" under the IWPCA. Specifically, the value of the contingent deferred awards could not be calculated or known at the time of termination, because the value is based upon and determined by the value of the contingent deferred shares in the stock market at the time of settlement, which occurs well after the time of termination pursuant to the governing documents.

28. In the alternative, the arbitrators awarded upon a matter not submitted to them by basing an award of attorneys' fees to Respondents Hutchinson, Hirsch, Vanden Heuvel, Kelly and Board based on the IWPCA, since those Respondents did not assert any claim under the IWPCA.

29. The "common law" basis for awarding attorneys' fees to all Respondents was Respondents' contention and argument that Credit Suisse allegedly sought attorneys' fees in the arbitration. First, Credit Suisse did not seek its attorneys' fees for the defense of Respondents' claims. Second, to clarify the record, Credit Suisse formally withdrew any and all potential requests for attorneys' fees in the arbitration. A copy of Credit Suisse's formal filing withdrawing any and all demands for attorneys' fees is attached as Exhibit C.

30. Credit Suisse formally withdrew any and all demands for attorneys' fees before the end of its case-in-chief and, thus, before the end of the evidentiary presentation at the arbitration

and, thus, before the dispute was submitted to the arbitrators for decision. Indeed, Credit Suisse formally withdrew any and all demands for attorneys' fees numerous months before the dispute was submitted to the arbitrators for decision.

31. Consequently, the issue of attorneys' fees was not submitted to the arbitrators for decision. The arbitrators therefore exceeded their powers in awarding attorneys' fees pursuant to the "common law."

32. In the alternative, the arbitrators have awarded attorneys' fees pursuant to the "common law" upon a matter not submitted to them.

The Arbitrators Exceeded Their Powers By Awarding Compensatory Damages, Attorneys' Fees and Penalties to Respondents Whitney, Sakach and DiChristofano Pursuant to the IWPCA

33. Three Respondents – Whitney, Sakach, and DiChristofano – worked together as a team called the Family Wealth Management team. They alleged entitlement to certain year-end bonuses for the years 2014 and 2015. Credit Suisse awarded Whitney, Sakach and DiChristofano year-end bonuses for both 2014 and 2015, and deferred a portion of those bonuses into contingent deferred awards. Whitney, Sakach, and DiChristofano contended that a smaller portion of the year-end bonuses they received should have been deferred into contingent deferral awards, and a larger portion of the year-end bonuses should have been paid in cash. Indeed, for 2015, Whitney, Sakach and DiChristofano contended that the entire year-end bonus should have been paid in cash. Whitney, Sakach and DiChristofano further contended that the cash portions of their year-end bonuses they sought were "wages" under the IWPCA.

34. With regard to bonuses, the IWPCA and its implementing regulations very clearly and very plainly limit the scope of the IWPCA to "earned" bonuses, and very clearly and very plainly provide that "discretionary" bonuses fall outside the scope and purview of the IWPCA.

The IWPCA therefore very clearly and very plainly does not provide for any award of penalties or attorneys' fees for "discretionary" bonuses.

35. Respondents Whitney, Sakach and DiChristofano all testified at length about the year-end bonuses at issue. All three testified very clearly and very plainly that the year-end bonuses were discretionary. Other evidence presented confirmed the admissions by Whitney, Sakach and DiChristofano that the year-end bonuses were discretionary.

36. Consequently, the testimony and evidence presented to the arbitrators was unanimous and undisputed that the year-end bonuses at issue for Respondents Whitney, Sakach and DiChristofano were discretionary. The IWPCA and its implementing regulations do not allow for redress or recovery of any type, particularly the awarding of penalties and attorneys' fees, for discretionary bonuses. The arbitrators therefore exceeded their powers in awarding damages, penalties and attorneys' fees to Whitney, Sakach and DiChristofano pursuant to the IWPCA.

The Arbitrators Exceeded Their Powers By Re-Writing Governing Contracts

37. As explained above in the Background section, Respondents received contingent deferred awards as incentive compensation, which were governed by the Plan Documents. The award certificates not only evidenced the contingent deferred awards, but they also set forth the contractual terms and conditions under which any contingent deferred awards would vest and settle. Exhibit B contains excerpts from the relevant vesting and settlement provisions of one representative award certificate, which was marked as Exhibit J-1117 and entered into evidence by the arbitrators.

38. The Arbitration Award indicates that the Panel determined that Respondents were terminated without cause. The award certificates specify the process for vesting and settlement of the contingent deferred awards. The Respondents' claims were based on the award certificates.

Credit Suisse's defenses were based on the award certificates. The award certificates were therefore the governing documents governing Respondents' claims for purpose of both liability and damages.

39. The award certificates, exemplified by Exhibit B, provide that when an RM such as Respondents are terminated without cause, all vesting dates are accelerated, such that all unvested contingent deferred awards "immediately vest" on the termination date. But the award certificates clearly and plainly and unmistakably provide the settlement dates – i.e., the dates an RM actually receives the phantom shares of stock – do not accelerate. Rather, the "vested Phantom Shares shall settle for Registered Shares on the Applicable Settlement Date on which they would have settled pursuant to Section 3 had you remained employed ...":

(d) Termination Without Cause or Due to Your Disability. If your employment with the Group is terminated by the Group without Cause or due to your Disability, any of your then unvested Phantom Shares shall immediately vest and all of your vested Phantom Shares shall settle for Registered Shares on the applicable Settlement Date on which they would have settled pursuant to Section 3 had you remained employed and continued to vest in the Phantom Shares on the Scheduled Vesting Date, in accordance with, and subject to, the terms and conditions set forth in the Plan Documents.

(Exhibit B at 5865).

40. The compensatory damages awarded to all Respondents in the Arbitration Award re-write this governing document. The compensatory damages awards all calculate the value of the contingent deferred awards at issue as of each Respondent's termination date, not according to the settlement dates. There is no other proper way to interpret or apply these governing documents.

41. Plainly stated, the Arbitration Panel was provided the governing document, considered the governing document, and effectively re-wrote the governing document to eliminate the governing language requiring that settlement dates remain unchanged. The arbitrators exceeded their powers in re-writing the governing document to delete mandatory governing provisions.

42. The arbitrators were also presented undisputed testimony and evidence with regard to Respondents Whitney and Sakach, including a governing document that they re-wrote.

43. Whitney and Sakach entered into a binding compensation package and agreement with Morgan Stanley that included “make whole” compensation expressly designed to “replace” the contingent deferred awards Whitney and Sakach sought, and were awarded, in the arbitration.

44. Exhibits D and E contain copies of relevant excerpts of “Replacement MSCIP Award” letters documenting the make whole replacements that were marked as Exhibits R-2352 and R-2355 and accepted into evidence by the arbitrators. These documents both provide in pertinent part:

The Firm will grant you a one-time award under the Morgan Stanley Compensation Incentive Plan (“MSCIP”) intended to replace your forfeited Credit Suisse stock and/or stock option and nonqualified deferred cash award(s) (“Replacement MSCIP Award”). The grant value of your Replacement MSCIP Award will be determined based on the aggregate value of your Credit Suisse stock and/or stock option and nonqualified deferred cash award(s) that are actually forfeited, but will not exceed \$1,183,721.75. The valuation will be performed as of your employment commencement date (or, if such day is not a trading day, the immediately following trading day).

The value of your forfeited Credit Suisse stock award(s) will be determined based on the volume weighted average price (VWAP) of Credit Suisse common stock on the valuation date. The value of your forfeited Credit Suisse nonqualified deferred cash award(s) will be determined based on the documented value of such award(s) that are actually forfeited.

and

The Replacement MSCIP Award is offered by the Firm and accepted by you as fully satisfying any loss that you may suffer as a result of your termination of employment from Credit Suisse. To the extent such Credit Suisse award is not forfeited or is otherwise subsequently reinstated or reimbursed to you, whether by Credit Suisse or otherwise, in whole or in part, you have a continuing obligation to immediately notify your Branch/Complex Manager of such event and you have no entitlement to all or the applicable portion of the Replacement MSCIP Award, even if already granted, and, unless prohibited by applicable law, such award will be immediately canceled or treated in such a manner as the Firm determines to make the Firm whole, as applicable. Failure to provide timely notice of such event will constitute a breach of your obligations to the Firm, and may result in disciplinary action, up to and including, termination of employment.

(Exhibits D and E, p. 1).

45. Credit Suisse will explain in its supporting brief that the Replacement MSCIP Awards, documented by Exhibits D and E, are replacement contacts, negotiated and accepted and binding on both sides, representing a compromise of potential rights. The arbitrators exceeded their powers by re-writing these governing documents to render them nullities.

COUNT I: VACATUR AND/OR MODIFICATION AND/OR CORRECTION
OF ARBITRATION AWARD

46. Credit Suisse incorporates by reference the preceding paragraphs of this Application as if fully set forth herein.

47. The arbitrators exceeded their powers in rendering the Arbitration Award with regard to (a) awarding attorneys' fees to all Respondents based on the IWPCA; (b) awarding attorneys' fees to all Respondents based on "common law"; (c) awarding damages, attorneys' fees and penalties pursuant to the IWPCA to Respondents Whitney, Sakach and DiChristofano for their claims regarding year-end bonuses for 2014 and 2014; (d) re-writing the governing award certificates and awarding compensatory damages in contravention of the plain and express language of that governing document; and (e) rewriting the governing Replacement MSCIP Award documentation and awarding compensatory damages in contravention of the plain and express language of that governing document to Respondents Whitney and Sakach.

48. Based upon the foregoing, Credit Suisse is entitled to have this Court vacate and/or modify and/or correct the Arbitration Award pursuant to the Illinois Uniform Arbitration Act, 710 ILCS 5/12(3), and to order all appropriate relief to which Credit Suisse is entitled pursuant to the Illinois Uniform Arbitration Act.

COUNT II: MODIFICATION OR CORRECTION OF ARBITRATION AWARD

49. Credit Suisse incorporates by reference the preceding paragraphs of this Application as if fully set forth herein.

50. Credit Suisse joins Count II in the alternative with Count I.

51. The arbitrators have awarded upon matters not submitted to them with regard to (a) the award of attorneys' fees pursuant to the IWPCA with regard to Respondents Hutchinson, Hirsch, Vanden Heuvel, Kelly, and Board, because those Respondents did not assert any claims under the IWPCA; and (b) the award of attorneys' fees to all Respondents pursuant to "common law" because Credit Suisse withdrew any and all demands for attorneys' fees before the dispute was submitted to the arbitrators for decision.

52. Based upon the foregoing, Credit Suisse is entitled to have this Court modify or correct the Arbitration Award pursuant to the Illinois Uniform Arbitration Act, 710 ILCS 5/13(2), and to order all appropriate relief to which Credit Suisse is entitled pursuant to the Illinois Uniform Arbitration Act.

Further Submissions

53. Credit Suisse shall submit a supporting Brief in Support of its Application to Vacate Arbitration Award setting forth the legal precedents and authorities and arguments supporting this Application, and attaching all relevant testimony and exhibits.

Dated: November 9, 2021

Respectfully submitted,

CREDIT SUISSE SECURITIES (USA) LLC

By: /s/ Brian E. Spang
One of Its Attorneys

Brian E. Spang (ARDC #6243937)
Epstein Becker & Green P.C.
227 W. Monroe Street, Suite 3250
Chicago, Illinois 60606
Telephone: (312) 499-1400
bspang@ebglaw.com

Firm I.D. No. 18494