

Modified Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Adam Gross

Case Number: 21-00392

vs.

Respondent
HSBC Securities (USA) Inc.

Hearing Site: New York, New York

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: Associated Person vs. Member

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant Adam Gross: Daniel J. Kaiser, Esq., Kaiser Saurborn & Mair, P.C., New York, New York.

For Respondent HSBC Securities (USA) Inc.: Ira G. Rosenstein, Esq., Morgan, Lewis, & Bockius LLP, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: February 12, 2021.

Adam Gross signed the Submission Agreement: February 12, 2021.

Statement of Answer filed by Respondent on or about: April 23, 2021.

HSBC Securities (USA) Inc. signed the Submission Agreement: May 25, 2021.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: expungement of Form U5.

In the Statement of Answer, Respondent did not contest Claimant's expungement request.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested expungement of the termination explanation language on Form U5.

In the Statement of Answer, Respondent requested that all costs and fees be assessed to Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

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

An Award was previously rendered on September 3, 2021. Claimant filed a petition in the United States District Court, Southern District of New York ("Court") to vacate the arbitration award. By Order & Opinion dated February 8, 2022, the Court granted Claimant's motion to vacate the award and remanded the matter to the Panel for further proceedings.

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

AWARD

After considering the pleadings, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are denied in their entirety.

ARBITRATORS' EXPLANATION OF DECISION ON REMAND

PROCEDURAL HISTORY

This matter arose on a claim filed by Adam Gross ("Claimant") against HSBC Securities (USA), Inc. ("Respondent"). Claimant sought expungement of certain entries made on his Form U5 by Respondent and the substitution of alternative language.

An Initial Pre-Hearing Conference was held telephonically on June 2, 2021. Both parties participated. Among other items the parties agreed that a full evidentiary hearing would be conducted on August 27, 2021. The parties requested that the hearing be conducted virtually using the Zoom audio-visual platform. The arbitration panel reserved the entire day for the hearing.

The hearing was held at the time and in the manner specified. After presenting one witness, Claimant elected to rest. Respondent, which did not object to the claim, did not offer any testimony. Neither did it retract the statements which it had earlier placed on the Form U5 or indicate that they were incorrect in any way. After argument, the hearing record was closed. It contained the pleadings, two exhibits offered by Claimant, the testimony of one witness, Claimant, and argument by counsel.

The arbitration panel issued a unanimous award denying relief to Claimant. The award was served on Claimant on September 3, 2021. Thereafter Claimant moved to vacate the award. Claimant filed an application with the United States District Court for the Southern District of

New York. By Order dated February 8, 2022, the Court vacated the award and remanded this matter to FINRA for further consideration. Gross v. HSBC, Dkt. No. 1:21-CV-08636 (PAC) (Paul A. Crotty, U.S.D.J., Feb. 8, 2022).

Following receipt of the Court's Order, Claimant's counsel wrote to FINRA by letter dated February 9, 2022, informing it of the remand. The letter went on to state: "Claimant respectfully requests that the panel review the record from the hearing conducted on August 27, 2021, and expunge Mr. Gross' U-5 consistent with the Court's decision." There has been no more recent contact from Claimant, except for a general inquiry by letter dated March 11, 2022.

In the absence of any request to re-open the evidentiary record, to receive any further argument, either written or oral, and in the absence of any request for an explained decision pursuant to FINRA Rule 12904(g), the panel has reviewed the entire record and issues the following Decision and Award.

FACTS

Claimant was employed by Respondent. In the summer of 2020, Claimant heard rumors that a reduction in force was about to be implemented using a benefit package to encourage voluntary resignations from its workforce. Claimant declined to accept the benefit package and resign voluntarily. As a result, he continued in his employment with Respondent.

In August of that year, Claimant was investigated for alleged misconduct. Claimant was interviewed by Respondent. Claimant put forth his version of events centering on his view that with respect to the incident being investigated, he was merely engaging in networking. Claimant's explanation was rejected, and he was terminated. Claimant's Form U5, completed by Respondent, stated:

Employee discharged as a result of using a prohibited electronic communication platform to communicate with a prospect regarding a hedge fund not approved for sale by the Firm.

The actual Form U5 was introduced in evidence as Claimant's Exhibit No. 2. The Form U5 contained two statements relating to Claimant's discharge. The first entry, containing Respondent's written narration, stated:

Employee discharged as a result of violations of internal policies and procedures. The second entry was in response to question 7F on the Form U5. Respondent selected one of three multiple choice, pre-printed form options in response to Form U5. Respondent checked the "Yes" box in responding to whether the individual had voluntarily resigned, been discharged or permitted to resign from your firm, after allegations were made that accused the individual of: (1). Violating investment-regulated statutes, regulations, rules or industry standards of conduct. This was the pre-printed multiple choice item selected by Respondent. In addition, as required by the form, Respondent added the following narrative passage which was referred to in the Statement of Claim:

Employee discharged as a result of using a prohibited electronic communication platform to communicate with a prospect regarding a hedge fund not approved for sale by the Firm.

So, Respondent's stated reason for the termination appears to rest on four elements. 1. Violating internal policies; 2. Using a prohibited means of communication; 3. Communication with a "prospect" using the prohibited means; and 4. The communication related to a hedge fund not approved for sale by Respondent.

During his testimony, Claimant acknowledged that he had used WeChat, an unauthorized electronic communication platform. He also admitted that during this conversation the discussion related to a hedge fund which was not approved for sale by HSBC. While Respondent's internal policies were not introduced into evidence or specifically addressed in testimony, it is a fair inference that by admittedly using an "unauthorized means of communication" a breach of such internal policies had been established. The only apparent variance between Respondent's comments on the Form U5 and Claimant's recollection is that Claimant denies that the individual with whom he spoke was a prospect.

Claimant states that the individual with whom he spoke was neither a client nor a prospect. He referred to that individual using the terms "client" and "prospect" interchangeably. He asserts that she was merely someone with whom he was "networking." There was no definitional material entered into the record for that term. Instead, Claimant relies on his own conclusory view that because he was engaged in "networking" she therefore was neither a "client" nor a "prospect." He reiterates this conclusion by stating that he was networking, not actively soliciting business.

Claimant also testified about the settlement of his claims with HSBC; and on other matters, he put forth his own speculative theories, without any documentation or first-hand testimony, relating to (a) how he believed his WeChat contact had come to the notice of HSBC; (b) his belief as to a possible theory explaining why HSBC had singled him out for harsh treatment; and (c) his difficulty in finding new employment - a difficulty he believes results from the information on his Form U5.

Claimant's entire testimony was offered in a period of 34 minutes. At the conclusion of his testimony, the Panel asked for additional witnesses if any were to be offered. There were none. Claimant rested his case relying on his own testimony and two exhibits, his settlement agreement with HSBC and his Form U5.

DISCUSSION

The Applicable Standard. Requests for expungement involving customer disputes are governed by FINRA Rule 2080. Although that provision sets out specific standards to be used in considering expungement in that context, the instant request does not involve any customer complaint or even any customer involvement. This is an intra-industry matter arising from an employment-related issue. Rule 2080 does not have any application to this matter. In fact, there does not appear to be any FINRA Rule governing expungement requests in a case of this type.

Although not a formal rule, The Arbitrator's Guide, a FINRA Publication intended to provide guidance to its arbitrators, indicates that in intra-industry cases, if information on the Form U5 is proven to be false, it may be expunged. *FINRA Dispute Resolution Services*, "Arbitrator's Guide" (2021) pp. 78-79. In his opening statement Claimant's counsel framed Claimant's position in the same way, stating that the information in the Form U5 is false and therefore should be expunged. So, the issue presented to the Panel seems to call for a simple determination as to

whether the information set forth in the Form U5 Section 3 and 7F should be expunged because it is false¹.

The Burden of Proof. Absent the guidance of a specific Rule to govern this proceeding, the panel concludes that to the extent possible it will follow the typical rule in civil matters that the moving party shoulders the burden to prove his case and support his prayer for relief by a preponderance of the evidence.

It is true that there was no testimony offered to contradict Claimant. On the other hand, Respondent's statements on the Form U5 are in the record. Respondent participated in the hearing. Although it did not object to Claimant's requested expungement, neither did it retract its earlier statements or indicate that they were erroneous in any way. It was left to Claimant to establish that the offending language in the Form U5 is false.

Format of the Award. FINRA Rule 12904 sets forth the format in which awards are to be rendered. In most instances, the FINRA process does not require that an award be supported by any explanation so long as the ruling set forth in the award is clear. There are some exceptions to this format, including for example, the requirement for an explanation in cases involving customer issues where an expungement request is granted. See FINRA Rule 12805. Where the request is denied, however, there is no such requirement. The parties may also request that an award be explained. See FINRA Rule 12904(g). However, no such request has been made in this case: not prior to the original hearing; not in counsel's letter of February 9, 2021; and not at anytime since. Nevertheless, in deference to the Court, the panel offers this Decision and Award.

Analysis

As noted in the facts above, all of the elements set forth by Respondent in the Form U5 seem to be admitted except one: was Claimant engaging with a "prospect" while he admittedly utilized a prohibited means to have a discussion relating to a hedge fund not authorized to be sold by Respondent. Claimant has the burden to prove that this allegation is false.

In his testimony, Claimant used the terms "client" and "prospect" interchangeably. In the Panel's view, however, they are distinctly different concepts. A "prospect" is a possible client in either the near term or in the future. A "client," however, has some existing relationship. Thus "prospect", the term used by Respondent, casts a much broader net and is a term of greater reach.

The Panel does not conclude that Claimant was intentionally obfuscating the issue. However, his lack of precision is troubling, especially where, as here, he has the burden of establishing falsity by a preponderance of the evidence.

¹ In his original filing, Claimant sought to have the panel insert alternate language on the Form U5 to replace expunged material. The panel noted that it lacked authority to grant that form of relief. In its Order the Court acknowledged this limitation; Claimant has not repeated his request for the insertion of substitute language nor has he sought to correct the panel's understanding of the limits of its authority. Therefore, the originally requested language substitution, in the panel's understanding, has been fully resolved and is not included as a subject of the remand.

That lack of precision is also evident in his conclusory statement that he was merely networking, not soliciting. This defense was raised and rejected during Respondent's investigation. In general usage the term "networking" can be understood, at least by some, to be a solicitation for sales or an effort to identify prospects for business. Even if we assume that Claimant and Respondent attributed different meanings and limits to the term "networking," it does not lead, inevitably, to the conclusion that Respondent's statements are false. More was required than a vague, conclusory assertion by Claimant resting on an undefined term. However, nothing more was offered.

We also note that Respondent spoke only of using the prohibited means to "communicate with a prospect." The concept of "networking" was first introduced by Claimant in an attempt to overcome the concept that the individual he spoke with was a "prospect." Having put his entire strategy in that one basket, however, Claimant failed to provide proof as to the meaning of that term. He offered no definition, no citation, no example except for his own, individual view.

Therefore, considering this single issue of disagreement between the parties, the Panel concludes that Claimant has failed to meet his burden. He has failed to establish that the factual allegations set forth by Respondent on the Form U5 are false. For that reason, his request to have those statements expunged from his Form U5 is denied.

FEES

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	= \$ 1,575.00
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**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 that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent HSBC Securities (USA) Inc. is assessed the following:

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

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:

One (1) pre-hearing session with the Panel @ \$1,125.00/session	= \$ 1,125.00
Pre-Hearing Conference: June 2, 2021 1 session	

One (1) hearing session on expungement request @ \$1,125.00/session	= \$ 1,125.00
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Hearing: August 27, 2021 1 session

Decision on the papers: =\$ 300.00

Total Hearing Session Fees =\$ 2,550.00

The Panel has assessed the total hearing session fees to Claimant.

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

ARBITRATION PANEL

Peter E. Gillespie	-	Public Arbitrator, Presiding Chairperson
David J. Weisenfeld	-	Public Arbitrator
Joseph F. Kelley	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Peter E. Gillespie

Peter E. Gillespie
Public Arbitrator, Presiding Chairperson

03/25/2022

Signature Date

David J. Weisenfeld

David J. Weisenfeld
Public Arbitrator

03/26/2022

Signature Date

Joseph F. Kelley

Joseph F. Kelley
Non-Public Arbitrator

03/26/2022

Signature Date

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March 31, 2022

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