

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimant  
Guillermo Lopez Perez

Case Number: 16-02549

vs.

Respondents  
OFS Securities, Inc.  
Oriental Financial Services Corp.

Hearing Site: San Juan, Puerto Rico

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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. Members

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

**REPRESENTATION OF PARTIES**

For Claimant Guillermo Lopez Perez: Peter J. Mougey, Esq. and Michael Bixby, Esq., Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., Pensacola, Florida and John F. Nevares, Esq., John F. Nevares & Associates, Attorneys at Law, San Juan, Puerto Rico.

For Respondents OFS Securities, Inc. (“OFS”) and Oriental Financial Services Corp. (“Oriental”): Alfredo Fernandez Martinez, Esq., Pedro Hernandez-Freire, Esq., and Carlos Baralt Suarez, Esq., Delgado Fernandez, LLC, San Juan, Puerto Rico.

**CASE INFORMATION**

Statement of Claim filed on or about: August 29, 2016.

Counsel for Claimant signed the Submission Agreement: August 29, 2016.

Claimant signed the Submission Agreement: January 18, 2021.

Statement of Answer filed by Respondent Oriental on or about: December 30, 2016.

Respondent Oriental signed the Submission Agreement: January 12, 2017.

Joinder with Respondent Oriental’s Statement of Answer filed by Respondent OFS on or about: January 19, 2017.

Respondent OFS signed the Submission Agreement: January 12, 2017.

### **CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; violation of industry rules, breach of contract, and negligence; fraud; violation of §12(a)(2) of the Securities Act of 1933; false inducements to inaction; negligent supervision; and violation of Article 1802 of the Civil Code of Puerto Rico, 31 Laws of Puerto Rico Annotated [L.P.R.A.] §§5141, 3020 and 3021. The causes of action relate to Claimant's investments in Puerto Rican securities and closed-end bond funds.

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

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested: damages according to proof, but not less than \$15,000,000.00; interest on Claimant's losses or any award made herein, at the highest applicable rate; costs, reasonable legal fees and expenses; punitive damages; and such other and additional damages and relief (whether disgorgement of profits, unjust enrichment, rescission, restitution, non-monetary, declaratory judgment, equitable or otherwise) which the Panel deems just and equitable.

In their Statement of Answer, Respondents requested dismissal of Claimant's claims.

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

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

In their August 6, 2019, Partial Motion to Dismiss Ineligible Claims pursuant to Rule 12206 of the Code of Arbitration Procedure ("Code") ("Motion to Dismiss"), and their September 10, 2019 reply in support thereof, Respondents asserted, among other things, that, to the extent Claimant failed to plead the timeliness of claims seeking damages on investment losses regarding investments purchased before August 29, 2010, those claims should be partially dismissed because any fraudulent and/or negligent conduct in the purchases purportedly giving rise to those claims took place before August 29, 2010. In his September 5, 2019, response, Claimant asserted, among other things, that the "date of purchase" is not the event or occurrence, and that his claims should not be dismissed because Respondents made continuing strategy recommendations and assurances, and the losses did not occur (and thus the claim could not have accrued) until 2013 at the earliest. On September 25, 2019, the Panel heard oral arguments from the parties and thereafter issued an Order that denied Respondents' Motion.

On November 1, 2019, the Commonwealth of Puerto Rico, Court of First Instance, San Juan Superior Division ("the Court") issued an Order preliminarily enjoining this matter from proceeding. Accordingly, FINRA stayed the case.

On March 6, 2020, the Court issued an Order dissolving the preliminary injunction. Accordingly, FINRA reactivated the case.

In his August 28, 2020 Motion for Sanctions Regarding Respondents' Spoliation of Evidence ("Motion for Sanctions"), and his September 9, 2020 reply in support thereof, Claimant asserted that Respondents deliberately destroyed more than 10,000,000 emails from the time period relevant to this matter. Claimant requested a default judgment and assessment of all fees relating to the Motion to Respondents, or, alternatively, that the Panel draw adverse inferences against Respondents and assess substantial monetary sanctions against them. In their October 5, 2020 response, Respondents asserted, among other things, that they had a systematic approach to document preservation and document retention that was followed without individual intervention to willfully destroy any relevant evidence. On October 14, 2020, following oral argument by the parties, the Panel issued an Order that granted Claimant's Motion. Specifically, the Panel ordered any and all reasonable attorneys' fees and costs associated with Claimant's motions to compel discovery relating to electronically stored information ("ESI") and the spoliation of same be assessed 100% to Respondents, including, but not limited to, those fees and costs associated with the neutral auditor involved in this matter. Additionally, the Panel reserved ruling on any and all other damages, adverse inferences or other relief that may be just and proper under the circumstances until the final arbitration hearing. The Panel's decision for additional relief with regard to sanctions is set forth in the Award section below.

On September 16, 2020, following a telephonic conference with the parties, the Panel issued an Order rescheduling this matter as a virtual hearing. In making this decision, the Panel took into account that the hearing in this matter was cancelled over a year ago; Claimant is elderly; this case was filed in 2016; and Respondents obtained a Court Order requiring FINRA to stay this case back in November 2019 for what should have been a timely in-person hearing at that time.

In his November 6, 2020, Motion to Preclude Respondents from Offering Evidence and Testimony, and his November 23, 2020 reply in support thereof, Claimant asserted that if Respondents were permitted to present a defense, they would be entitled to cross-examine Claimant and make any arguments they want, but because of Respondents' spoliation, Claimant will be left handicapped and without access to the most significant evidence necessary to establish Respondents' wrongdoing or rebut Respondents' arguments. Claimant therefore requested that the Panel preclude Respondents from presenting evidence or a defense on liability, and that they be precluded from cross-examining Claimant's witnesses. In their November 16, 2020, opposition, Respondents asserted, among other things, that granting the Motion would give preferential treatment to Claimant, deny Respondents the opportunity to present evidence of its harm caused by Claimant's destruction of relevant evidence as ordered by the Panel, and carry the most severe penalty of denying Respondents of their due process right to a final hearing. On December 9, 2020, the Panel issued an Order that denied Claimant's Motion, without prejudice. The Order stated that the Panel would hear all evidence and testimony at the final arbitration hearing and maintain the discretion of excluding evidence and/or making any adverse inferences as may be necessary at the appropriate time. The Order further stated that the evidence, testimony and/or lack thereof may also allow the Panel to further determine the scope of the sanction award, given the Panel's prior findings and rulings.

Following Claimant's case-in-chief, Respondents filed a Motion to Dismiss Counts I through VII of Claimant's Statement of Claim. Claimant was provided an opportunity following the evidentiary hearing to file a Response to Respondent's Motion to Dismiss, which it did on February 5, 2021. On February 8, 2021, the parties presented their closing arguments and arguments relating to Respondents' Motion to Dismiss. Respondents' Motion to Dismiss Claimant's Statement of Claim was based on the following:

- Count I - Breach of Fiduciary Duty. Respondents allege it should be dismissed for failure to identify and allege the source of the fiduciary duty;
- Count II - Violation of Industry Rules, Breach of Contract and Negligence. Respondents allege Claimant never established in his case-in-chief the provision of those contracts that confer a right to enforce them or right to file same;
- Count III – Fraud. Respondents allege Claimant did not adequately plead fraud or present evidence of intent of same and further is time barred by the applicable statute of limitations;
- Count IV - Section 12(a)(2) of the Securities Act of 1933. Respondents allege said claim failed to allege or prove Claimant had purchased shares in a registered primary offering of securities from his representative or Respondents, and that it is time barred by the applicable statute of limitations; and
- Count V - False Inducement to Inaction, Count VI - Negligent Supervision, and Count VII - Article 1802 of the Civil Code of Puerto Rico. Respondents allege each of these claims should be dismissed for failure to comply with the applicable statutes of limitations.

The Panel's decision on this Motion is set forth in the Award section below.

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 hearing, and due deliberation following the hearing, the Panel has decided in full and final resolution of all the issues submitted for determination as follows:

1. Respondents' Motion to Dismiss Claimant's Statement of Claim is granted, with prejudice, as to Count III - Fraud; Count IV - Section 12(a)(2) of the Securities Act of 1933; Count V - False Inducement to Inaction; Count VI - Negligent Supervision; and Count VII - Article 1802 of the Civil Code of Puerto Rico VI, and VII based on failure to meet the applicable statute of limitations under Puerto Rico law, the relevant statutes and/or common law alleged.
2. Respondents' Motion to Dismiss Claimant's Statement of Claim is denied as to Count I – breach of fiduciary duty; and Count II - Violation of Industry Rules, Breach of Contract and Negligence. However, after hearing and weighing all the evidence adduced at arbitration, it finds no liability on Counts I and II of Claimant's Statement of Claim. Therefore, Counts I and II of Claimant's Statement of Claim are denied in their entirety.
3. There is no doubt this Panel feels strongly regarding Respondents' spoliation of evidence. As such, although this Panel did not find Respondents liable for Claimant's claims in this matter, it is clear that their conduct should not go unnoticed or unaddressed accordingly. One should not be rewarded for bad acts, and Respondents are no exception. At the same

time, this Panel is puzzled by the inability of Claimant’s accountants to produce all but one of his financial statements in discovery, which just happened to be the most pivotal of his financial statements – Claimant’s 2013 Financial Statement. Claimant’s failure to produce his 2013 financial statement was both curious and concerning, but not enough evidence was adduced at this arbitration to know whether such failure was intentional, in contrast to Respondents’ conduct, which is no less than clear and convincing as to its spoliation of evidence. Interestingly, both parties failed to produce certain documents for the year 2013. There is no question it was a crucial time period for both parties in this case. Although the Panel does not know what it did not have the opportunity to see, it is satisfied that through testimony and evidence in this matter a rightful and just decision was reached. Having previously found gross negligence and willful misconduct by Respondents in connection with spoliating evidence and prolonged discovery abuse, the Panel hereby assesses sanctions pursuant to Rules 12511 and 12212 of the Code. Specifically, Respondents are jointly and severally liable and shall pay to Claimant the sum of \$195,000.00 in attorneys’ fees and \$45,000.00 in costs for all work associated with Claimant’s various motions to compel discovery and the August 28, 2020 Motion for Sanctions. As an additional penalty and in recognition of Respondents’ flagrant discovery violations and spoliation of evidence, Respondents’ are assessed all of FINRA’s fees associated with this matter, including all pre-hearing and evidentiary hearing session fees, as set forth in the Fees section below.

- 4. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and other related attorneys’ fees and costs, are 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 = \$ 2,250.00

*\*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 Oriental is assessed the following:

Member Surcharge = \$ 4,025.00

Member Process Fee = \$ 7,000.00

**Discovery-Related Motion Fees**

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

Two (2) decisions on discovery-related motions on the papers with one (1) Arbitrator @ \$200.00/decision = \$ 400.00

One (1) decision on a discovery-related motion on the papers = \$ 400.00

with two (2) Arbitrators @ \$200.00/decision/Arbitrator

Claimant submitted three (3) discovery-related motions decided on the papers

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Total Discovery-Related Motion Fees = \$ 800.00

The Panel has assessed the total \$800.00 discovery-related motion fees jointly and severally to Respondents.

**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), which lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) pre-hearing sessions with a single Arbitrator @ \$450.00/session = \$ 1,800.00

Pre-hearing Conferences: February 28, 2019 1 session  
April 8, 2019 1 session  
May 2, 2019 1 session  
May 23, 2019 1 session

Fifteen (15) pre-hearing sessions with the Panel @ \$1,500.00/session = \$ 22,500.00

Pre-hearing Conferences: January 19, 2017 1 session  
June 4, 2019 1 session  
July 11, 2019 1 session  
July 22, 2019 1 session  
September 18, 2019 1 session  
September 20, 2019 1 session  
September 25, 2019 1 session  
October 24, 2019 1 session  
April 29, 2020 1 session  
May 12, 2020 1 session  
June 5, 2020 1 session  
July 28, 2020 1 session  
September 15, 2020 1 session  
October 14, 2020 1 session  
December 9, 2020 1 session

Twenty-One (21) hearing sessions @ \$1,500.00/session = \$ 31,500.00

Hearing Dates: January 18, 2021 2 sessions  
January 19, 2021 2 sessions  
January 20, 2021 2 sessions  
January 21, 2021 2 sessions  
January 22, 2021 2 sessions  
January 25, 2021 2 sessions  
January 26, 2021 2 sessions  
January 27, 2021 2 sessions  
January 28, 2021 2 sessions  
January 29, 2021 1 session  
February 8, 2021 2 sessions

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Total Hearing Session Fees	= \$ 55,800.00
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As set forth in the Award section above, the Panel has assessed the total hearing session fees of \$55,800.00 jointly and severally to Respondents.

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

**ARBITRATION PANEL**

Erika Deutsch Rotbart	-	Public Arbitrator, Presiding Chairperson
John G. Sciandra	-	Public Arbitrator
Robert Sullivan Tyler	-	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**

***Erika Deutsch Rotbart***

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Erika Deutsch Rotbart  
Public Arbitrator, Presiding Chairperson

**02/12/2021**

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

***John G. Sciandra***

\_\_\_\_\_  
John G. Sciandra  
Public Arbitrator

**02/11/2021**

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

***Robert Sullivan Tyler***

\_\_\_\_\_  
Robert Sullivan Tyler  
Public Arbitrator

**02/11/2021**

\_\_\_\_\_  
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.

February 12, 2021

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