

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Charles A. Hailey
Karen G. Hailey

Case Number: 20-00320

vs.

Respondent

Westpark Capital, Inc.

Hearing Site: Richmond, Virginia

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: Customers vs. Member

This case was decided by a majority-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimants Charles A. Hailey, and Karen G. Hailey: Andrew R. Park, Esq. Park Sensenig LLC, Richmond, Virginia. and Craig J. Curwood, Esq., Curwood Law Firm, PLC, Richmond, Virginia.

For Respondent Westpark Capital, Inc.: Julie E. Kamps, Esq., Law Offices of Julie E. Kamps, Esq., Los Angeles, California.

CASE INFORMATION

Statement of Claim filed on or about: January 28, 2020.

Charles A. Hailey signed the Submission Agreement: January 20, 2020.

Karen G. Hailey signed the Submission Agreement: January 20, 2020.

Statement of Answer filed by Respondent on or about: April 21, 2020.

Westpark Capital, Inc. signed the Submission Agreement: April 20, 2020.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: breach of fiduciary obligations; breach of contract; negligence/professional negligence; violations of the Virginia

Securities Act and blue sky statutes; violations of federal securities law; common law fraud/misrepresentations and, omissions; unsuitability, including both quantitative and qualitative, specifically including overconcentration and use of significant margin; failure to supervise; violations of state and federal rules and regulations; agency, respondeat superior and control person liability; and general equitable principle that apply in arbitration.

The causes of action relate to private placements in Monster Digital, Inc., Miramar Labs, Inc., Protagenic Therapeutics, Inc. stock, the volume of trading in other securities and the purchase of precious metals.

Unless specifically admitted 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, Claimants requested damages in excess of \$400,000.00; rescission of securities still held by Claimants; disgorgement of all commissions, fees and charges charged to the Claimants by Respondent; pre-judgment and post-judgment interest at the Virginia rate of 6%; costs of arbitration, including attorneys' fees, expert witness fees, and filing fees; assessment of all hearing session costs against Respondent; exemplary damages; and any other relief in law or equity as the Panel finds just.

In the Statement of Answer, Respondent requested that Claimant's request be denied in its entirety; that Claimants take nothing; and that the Panel enter an award against the Claimants for expungement of this claim; forum fees; filing fees; costs; expenses; and such other and further relief deemed necessary by the Panel.

At the conclusion of the hearing, Claimants requested the following relief against Respondent.:

1. An award of \$904,000 attributable to Protagenic comprised of (i) the \$200,000 initial purchase; and (ii) restitution/d disgorgement of the additional (above the purchase price) \$704,000 current value of Protagenic as represented by Respondent in its opening statement and in its Damage Summary Alternative 1, and the Claimants reiterate their tender to Respondent of all shares in Protagenic (as previously stated during the hearing);
2. An award of \$209,476.36 attributable to the purchase of Monster Digital, and Claimants agree to tender to Respondent any Monster Digital warrants/holdings they have.
3. An award of \$28,579.11 attributable to the purchase of Miramar Labs;
4. An award of \$355,600 attributable to the loss incurred in GFS Associates, and Claimants reiterate their tender to Respondent of the gold coins received from GFS (as previously stated during the hearing);
5. An award of \$262,037.71 attributable to the net loss (accounting for monies recovered) incurred in Omega Knight LLC;

6. An Award of \$105,750.57 as disgorgement of all commissions and fees received by Respondent, directly or indirectly, in connection with trading in the Claimants' accounts and with the purchase of Protagenic, Monster Digital, and Miramar Labs;
7. An award of a total of \$33,545 as expert witness fees for Mr. Lowry (\$17,545 per his testimony and per April 22, 2021 Supplemental Attorney's Fees and Costs Application), Dr. Oberlender (\$10,000 per his testimony), and Mr. Jones (\$6,000 per his testimony);
8. An award of \$317,922.25 as attorneys' fees and \$4,851.06 as expenses, pursuant to the Virginia Securities Act, See Va. Code § 13.1-522(A), and the Panel's inherent authority;
9. An award of three times compensatory damages awarded as punitive damages pursuant to the Panel's inherent authority and Virginia, New York (Fawcett located), Florida (Fawcett's managers located), or California law (Westpark headquartered);
10. Post-award interest at the Virginia rate of 6%; and
11. That all hearing session fees be assessed against Respondent

OTHER ISSUES CONSIDERED AND DECIDED

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

The Panel has provided an explanation of the 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 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 Claimants the sum of \$545,727.12 in compensatory damages. This represents (1) the purchase prices of the three private placements, less the amount they recovered through the sale of some shares of Monster Digital; and (2) commissions earned on the purchase and sale of publicly traded securities in their Westpark accounts.
2. Respondent is liable for and shall pay to Claimants the sum of \$33,545.00 in costs.
3. Respondent is liable for and shall pay to Claimants the sum of \$215,160.00 in attorneys' fees pursuant to Virginia Code § 13.1-522(A).
4. Claimants must return any unsold stock certificates, warrants, and related documents to Respondent and must cooperate in good faith with Respondent to effect the transfer of all private placement assets purchased through Respondent. Respondent is fully responsible for any costs associated with the transfer of these securities.

5. Respondent's request for expungement is denied.
6. Any and all claims for relief not specifically addressed herein, including any requests for exemplary damages, are denied.

ARBITRATORS' EXPLANATION OF DECISION

Preface

This was an unusually difficult case. The two principal actors, Charles Hailey and his broker at Westpark, Lawrence Fawcett, were not available to testify. Mr. Hailey has medical reasons. Mr. Fawcett was terminated from Westpark and surrendered his license to work in the securities industry. The Haileys raised numerous legal theories of recovery regarding several different types of investments. Westpark vigorously contested all of the theories for liability and all of the damage calculations. The Panel heard seven days of testimony and argument and received six thick binders full of exhibits. Numerous other exhibits were submitted electronically. The parties presented sharply conflicting testimony on both liability and damages from expert witnesses.

One issue was not in dispute: Mr. Fawcett swindled Mr. Hailey by "selling away" investments in gold just as he was transitioning from family breadwinner to dependent. Westpark was understandably concerned that the Panel could be swayed by sympathy or blinded by hindsight. This award is based entirely on whether Westpark's actions were appropriate based upon what its agents knew or should have known about Mr. Fawcett and his relationship with the Haileys in real time.

Throughout this proceeding, counsel for both parties engaged in vigorous and detailed examination and cross-examination of witnesses with professionalism and courtesy. Their conduct was admirable.

The parties did not request a reasoned decision. The Panel devoted uncompensated time to drafting this brief summary because it believes a significant award in a complex case merits some explanation.

General Findings

Charles Hailey

Westpark proved that Mr. Hailey was a sophisticated investor with a history of speculative investments, including one very large (\$900,000) investment in a private fund. However, Mr. Hailey's speculation prior to the Westpark/Fawcett relationship was limited to real estate and related industries. Mr. Hailey's wife, Nan (Karen), and daughter, Lyndsay, recited instances in which Mr. Hailey was conservative with funds, but his speculation in real estate and subprime lending was well documented.

Claimant's medical expert witness—who did not examine Mr. Hailey until well after he terminated his relationship with Westpark—testified that Mr. Hailey was suffering from a medical condition during the time that Lawrence Fawcett served as his broker, and that the medical condition impaired his ability to process complex information and made him susceptible to fraud. However, the expert conceded that, in 2016 and 2017, a lay person most likely could not have

detected his condition. Westpark offered no testimony to refute this expert opinion and there was no reason for it to have done so. Westpark cannot be faulted for failing to detect a condition, which, if it existed at the time, was not evident.

Westpark's Supervision of Lawrence Fawcett

The crux of Westpark's argument was that it had an adequate policy on supervision and followed the policy. There were no "red flags" that would have justified heightened supervision under this policy. And, when Westpark learned that Mr. Fawcett was "selling away" (soliciting trades from Westpark customers for products not offered by Westpark), it initiated an investigation which led to Mr. Fawcett's termination. Westpark's highly qualified expert witness testified that Westpark's actions were "not unreasonable" in light of the facts and circumstances and that Westpark's supervision was not negligent.

The Hailey's argued that Westpark took a laissez-faire approach to supervision, ignoring warning signs of trouble. Their highly qualified expert concluded that Westpark's failure to follow up on these "red flags" was negligent.¹ This is the better view. The incidents the Panel found most troubling included the following:

- Westpark hired Mr. Fawcett without an in-person interview, despite his brief and checkered history as a broker.² Although members of the five-person hiring committee testified, they never made clear why they hired someone with such a weak track record in the first place.
- Westpark permitted Mr. Fawcett to work from his home in Queens, New York, even though Westpark maintained an office in Manhattan. The two members of Westpark's Boca Raton, Florida, office assigned to supervise Mr. Fawcett had FINRA infractions on their records that did not inspire confidence.
- Six months after Westpark hired Mr. Fawcett, FINRA required him to participate in an in-person interview. Two months later, Mr. Fawcett settled an arbitration claim filed by a client at Salomon Whitney by agreeing to pay \$30,000.00 out of personal funds. Westpark evidently did not regard the claim, interview, or settlement as cause for concern.
- For its only in-home inspection of Mr. Fawcett, Westpark hired Bernerd E. Young, who had been banned from the securities industry for participating in a Ponzi scheme.³ Not

¹ Westpark's counsel emphasized that the Hailey's expert offered his opinion before Westpark had a chance to present evidence that its supervision was adequate. The timing was unavoidable: the claimant presents its case first. Furthermore, Westpark's witnesses did not refute the key points underlying this expert's conclusion.

² Mr. Fawcett twice failed his Series 7 (General Securities Representative Qualification Examination), then moved from firm to firm six times in four years. One of the firms terminated him for "failure to provide services to the firm for he was engaged." Another was subsequently expelled by FINRA.

³ SEC August 2, 2013 Admin Proceeding File No. 3-15003. The administrative law judge found: "Each Respondent's conduct became egregious and exhibited a reckless degree of scienter after a period of negligence. Each Respondent's participation in statements designed to cover up SIB's parlous financial condition at the end of 2008 is an aggravating factor." The Commission upheld the decision and the Court of Appeals for the District of Columbia dismissed Mr. Young's appeals as untimely. Westpark presented evidence to suggest that Mr. Young was merely an innocent bystander who ended up in the

surprisingly, Mr. Young noted that Mr. Fawcett had a personal fax machine but did not inquire how it was being used. Nor did he follow up when Mr. Fawcett described Bullhammer, which he listed on his application as an account used for tax purposes, as a software program. No one from Westpark followed up either. Mr. Fawcett used the fax machine to send false information to Mr. Hailey. He used the back account to accept funds from Mr. Hailey for purchases of gold from other firms.

Simply put, Westpark accorded Mr. Fawcett far more freedom and trust than he had earned. The consequences were predictable.

Churning in the accounts of Mr. and Mrs. Hailey

The level of activity in the accounts of both Charles and Karen Hailey was unsuitable for any investor. It was geared first and foremost to generate commissions. Westpark should not have permitted this churning and is responsible for returning commissions to the Haileys.

Private Placements

Mr. Fawcett had no experience with private placements prior to joining Westpark. Mr. Hailey had invested in only one private fund, which was real estate-related and was recommended by people whom he and Karen Hailey knew well from their years of experience in Richmond, Virginia, real estate. The three private investments recommended by Mr. Fawcett were far outside of Mr. Hailey's range of sophistication, and, therefore unsuitable for him. Given their lack of liquidity, the private placements also were unsuitable for someone of Mr. Hailey's advanced years. Like the churning in the Haileys' accounts, the private placements lined up with Mr. Fawcett's best interests, not those of the Haileys.

Selling Away

With regard to these transactions, sympathy and objectivity pull hard in opposite directions. Mr. Fawcett leveraged his Westpark relationship with Mr. Hailey (and with at least one other investor) to induce the transfer of large sums of money to a non-Westpark account for purchases of gold from firms with no relationship to Westpark. Mr. Fawcett never indicated that Westpark authorized this activity. Mr. Fawcett falsely claimed that he earned no commissions from these sales.

As Westpark's expert on the industry practices correctly noted, no level of supervision can prevent a broker from selling away without a firm's knowledge. A firm cannot stop a broker from using a personal phone, computer, or bank account to transact business. Even heightened supervision stops well short of 24-hour surveillance. Consequently, Westpark is not legally responsible for losses incurred by Mr. Hailey from Mr. Fawcett's selling away.

Attorneys' Fees

The Haileys alleged that Westpark was responsible for damages incurred with respect to three types of investments and prevailed on two of these claims. The Panel therefore awards the Haileys two-thirds of their legal fees and related costs.

wrong place at the wrong time through no fault of his own and remained a respected figure in the securities industry. The actor appears to have been blinded by sympathy in this case is Westpark itself.

Treble and Punitive Damages

Westpark was negligent, not reckless or malicious. The evidence does not justify an award of treble or punitive damages.

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 = \$ 1,425.00

**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 that employed the associated person at the time of the event giving rise to the dispute. Accordingly, as a party, Respondent Westpark Capital, 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 a single Arbitrator @ \$450.00/session = \$ 450.00
Pre-Hearing Conference: February 26, 2021 1 session

One (1) pre-hearing session with the Panel @ \$1,125.00/session = \$ 1,125.00
Pre-Hearing Conference: May 12, 2020 1 session

Sixteen (16) hearing sessions with the Panel @ \$1,125.00/session = \$ 18,000.00
Hearings: March 1, 2021 2 sessions
March 2, 2021 2 sessions
March 3, 2021 2 sessions
March 4, 2021 2 sessions
March 5, 2021 2 sessions
April 19, 2021 2 sessions
April 21, 2021 2 sessions
April 22, 2021 2 sessions

Total Hearing Session Fees = \$ 19,575.00

The Panel has assessed \$6,727.50 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$12,847.50 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

Geoffrey A. Drucker	-	Public Arbitrator, Presiding Chairperson
Carol A. Schuyler	-	Public Arbitrator
Tony J Lawrence	-	Non-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

Geoffrey A. Drucker

Geoffrey A. Drucker
Public Arbitrator, Presiding Chairperson

05/24/2021

Signature Date

Carol A. Schuyler

Carol A. Schuyler
Public Arbitrator

05/24/2021

Signature Date

Tony J Lawrence

Tony J Lawrence
Non-Public Arbitrator

05/24/2021

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.

May 25, 2021

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