

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

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In the Matter of the Arbitration Between:

Claimant

Juan Burgos Rosado

Case Number: 14-00170

vs.

Respondents

UBS Financial Services, Inc.

UBS Financial Services Incorporated of Puerto Rico

Doel Rafael Garcia

Carlos Ubinas

Sumaya De Los Angeles Musa

Hearing Site: San Juan, Puerto Rico

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Nature of the Dispute: Customer vs. Members and Associated Persons

This case was decided by an all-public panel.

**REPRESENTATION OF PARTIES**

For Claimant Juan Burgos Rosado: Harold D. Vicente-Gonzalez, Esq. and Harold D. Vicente-Colon, Esq., Vicente & Cuevas, San Juan, Puerto Rico and Francisco Pujol, Esq., Francisco Pujol Law Office, PSC, San Juan, Puerto Rico.

For Respondents Doel Rafael Garcia ("Garcia") and Carlos Ubinas ("Ubinas"): Salvador J. Antonetti-Stutts, Esq., O'Neill & Borges, LLC, San Juan, Puerto Rico.

For Respondents UBS Financial Services, Inc. ("UBS"), UBS Financial Services Incorporated of Puerto Rico ("UBSPR") and Sumaya De Los Angeles Musa ("Musa"): Roberto Quinones, Esq., McConnell Valdes LLC, San Juan, Puerto Rico and Brian F. Amery, Esq., Bradley B. Rounsville, Esq. and Jaime H. Scivley, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

**CASE INFORMATION**

Statement of Claim filed on or about: January 16, 2014.

Juan Burgos Rosado signed the Submission Agreement: December 23, 2013.

Statement of Answer filed by Respondents UBS, UBSPR, Garcia, Ubinas and Musa on or about: May 14, 2014.

Respondent UBS signed the Submission Agreement: March 5, 2014.

Respondent UBSPR signed the Submission Agreement: March 21, 2014.

Respondent Musa signed the Submission Agreement: March 24, 2014.

Respondent Ubinas signed the Submission Agreement: March 25, 2014.  
Respondent Garcia signed the Submission Agreement: March 27, 2014.

Motion to Bar Defenses and Facts at the Hearings filed by Claimant on or about: August 6, 2014.

Opposition to Claimant's Motion to Bar Defenses and Facts at the Hearings filed by Respondents UBSPR, UBS, Garcia, Ubinas and Musa on or about: August 25, 2014.

Reply to Opposition to Claimant's Motion to Bar Defenses and Facts at the Hearings filed by Claimant on or about: September 3, 2014.

### **CASE SUMMARY**

Claimant asserted the following causes of action: (1) violations of Section 10(b) of the Securities Exchange Act, Rule 10b-5 of the Securities Exchange Commission, NYSE and FINRA rules, and the securities laws and other laws and regulations of Puerto Rico; (2) securities fraud; (3) violation of Article 1802 of the Civil Code of Puerto Rico 31 Laws of Puerto Rico Annotated [L.P.R.A.] Section 5141; (4) breach of contract; and (5) breach of policies, law(s), rules, regulations and norms for the financial protection of elderly or handicapped persons. The causes of action relate to, among other things, Claimant's investment in Puerto Rico closed-end mutual funds ("CEFs") concentrated in Puerto Rico bonds and the use of loan proceeds to purchase securities.

Unless specifically admitted in their Answer, Respondents UBSPR, UBS, Garcia, Ubinas, and Musa denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested: compensatory damages in the amount of \$1,033,596.10, plus legal interest thereon from the date of filing of the Statement of Claim through the date of full payment; disgorgement of commissions, interest and/or service for loan fees; rescission; punitive damages of not less than \$1,000,000.00; costs and expenses, including filing fees, consulting fees and arbitration fees; attorneys' fees; and any amounts needed to liquidate the debit or loan-payable balances in Claimant's accounts after reimbursement to Claimant of his net worth in the accounts as of July 31, 2013.

In their Statement of Answer, Respondents UBSPR, UBS, Garcia, Ubinas and Musa requested that the Statement of Claim be dismissed and requested expungement of this matter from the Central Registration Depository ("CRD") records of Respondents Ubinas, Musa and Garcia.

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

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

On or about August 6, 2014, Claimant filed a Motion to Bar Defenses and Facts at the Hearings ("Motion to Bar") in which Claimant asserted that the Panel should bar

Respondents from presenting at the hearings all of the defenses and facts known by Respondents but deliberately omitted by them in their Answer to the Statement of Claim.

On or about August 25, 2014, Respondents UBSPR, UBS, Garcia, Ubinas and Musa filed their Opposition to Claimant's Motion to Bar asserting, among other things, that their Statement of Answer included relevant facts and defenses to the Statement of Claim.

On or about September 3, 2014, Claimant filed his Reply to Opposition to Claimant's Motion to Bar asserting, among other things, that Respondents' Statement of Answer does not comply with FINRA Rule 12308(b) of the Code Of Arbitration Procedure (the "Code").

On September 23, 2014, the Panel issued an Order that denied Claimant's Motion to Bar.

On or about March 20, 2015, Claimant filed a notice of dismissal, with prejudice, of all claims asserted against Respondents Garcia, Ubinas and Musa. Therefore, the Panel made no determination with respect to the claims asserted against Respondents Garcia, Ubinas and Musa in the Statement of Claim.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

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

1. Claimant opened an account with Respondents in or about December 2011 at age 66. On recommendation of his UBS registered representative, Respondent Musa (the "Broker"), he purchased \$325,000.00 of UBS Puerto Rico CEFs. The CEFs were leveraged perpetual baskets largely of Puerto Rico agency bonds; had significant tax advantages and an interest rate averaging in excess of 6%; and were legally available only to residents of Puerto Rico. UBS documents state that these securities were suitable as one component of a well-balanced portfolio. Money for Claimant's purchase came almost entirely from a maturing Certificate of Deposit ("CD") at a credit union. Claimant was seeking a commitment for return of his capital after some 3-5 years and a better return than renewed CDs would pay. Some months later, Claimant purchased some \$200,000.00 of additional CEFs largely with the proceeds from the sale of a house. Claimant's business activities consisted largely of purchasing, repairing and renting or re-selling distressed properties. He also owned some commercial rental property in the form of a building that he had built. These activities generated an annual income in excess of \$100,000.00. In January 2013, Claimant purchased some \$600,000.00 of additional CEFs with the proceeds of another maturing CD. Purchased CEFs are still in Claimant's account, and although the underlying bonds have not defaulted and continue to pay interest to Claimant, the CEFs have sharply declined in

value, there is no market, and Claimant has suffered unrealized losses of some \$737,000.00. In this arbitration, Claimant asks for those losses, interest, punitive damages, expenses, attorneys' fees and that forum fees be assessed against Respondents. Respondents ask that all claims be dismissed and fees be assessed against Claimant.

The record shows, and the Panel finds, that Claimant moved from Puerto Rico to an Hispanic area of the Bronx as a young man. Always having been handy, he labored repairing and fixing up properties in the area. Having a very frugal nature, he spent little and saved his money, purchased a run-down bodega, improved and operated it, and later purchased distressed cars, fixed them and had them imported into Puerto Rico for resale. After some 15 years in the Bronx, he returned to Puerto Rico with a sizeable savings nest-egg. Looking for business opportunities, he determined that with his handiness and hard labor he could repair and renovate real properties for rent or resale. Having once borrowed money, and realizing that his amortization payments were mostly interest, he determined to borrow no more and financed his business activities himself from savings, which he maintained in banks and credit unions. He continued to do so until, in the month before he opened the account in question, a dangerous fall from a tall ladder while cutting a broken tree limb at a property rendered him incapable of continuing.

Claimant's lifetime pattern has been one of frugality, saving and employment of resulting capital and his own labor in business opportunities that he understands can earn a good return. He was not a securities investor, and although he has some English, it is limited and does not include much investment terminology. The evidence shows that he received a brochure concerning these CEFs, in English, and that his monthly statements were in English and could not be issued in Spanish as he requested.

We find that, at the time Claimant first invested, the market for these CEFs, being limited to residents of Puerto Rico, was necessarily thin; that it had been to a large extent saturated and liquidity was limited; that UBS, though not required to do so, had essentially made a market until it determined to reduce its inventory of CEFs. In the process of reducing its exposure in the CEFs by some 75%, UBS undertook an internal push for its brokers to sell its inventory to customers. Claimant, whom we find to be the quintessential conservative investor, if "investor" describes him at all, was solicited to buy these securities, which UBS stated to be suitable for a well-balanced portfolio, putting 100% of his available money into them. Evidence shows that some other brokers received internal "excessive concentration" memos when concentrations in these securities hit some 50% in their accounts; the Broker here testified she never received such a memo on this account. But a memo is not needed for us to determine, as we do, that this account was extremely over-concentrated and clearly unsuitable for Claimant.

Claimant normally receives his monthly statements around the middle of the following month. When he received a statement subsequent to his last \$600,000.00 purchase, he noticed a drop in account value. He was greatly concerned and sought advice from others including a friend who was a former broker and who testified that Claimant could not understand that he had an investment that could decline in value and not something

that would necessarily return his full principal at the end of a specified time. Claimant scheduled an appointment with his Broker, took the friend, and was told the same thing by the Broker. But she assured him that fluctuations in value were expected and normal and that the value would come back. She further said, upon being asked, that if she had a million dollars she would invest in the CEFs. Claimant was still uncomfortable but neither the friend nor the Broker, properly, would tell him what he should do. He was reassured, however, when he received his April statement in mid-May and there had been an increase in value. That value fluctuated over the following few months.

Claimant had another meeting with his Broker and the friend in June and again received reassurances, with the upshot that he retained the account. In the last week of August 2013, a Barron's cover article about risks in the Puerto Rican economy appeared, and that with several other factors led to a precipitous drop in value of the portfolio of some \$205,000.00 plus. Claimant met with his Broker and her branch office manager in early September, when the account balance was some \$816,000.00, and among other things the manager explained that even a skinny cow could give milk. Claimant expressed concern that the cow would die, but nevertheless held on and continues to do so, even after the account lost another \$310,000.00 in September and any market for the CEFs, already minimal, effectively ceased.

Respondents argue that Claimant was on notice in April 2013 that the account was not what he thought and that he "ratified" it by not selling then and thereby assumed the risk and the subsequent losses, which were caused by market forces beyond their control. We find, however, that while Claimant knew then that he did not have what he had thought, he reasonably did not know or understand what he in fact had. Fluctuations in the account value were unnerving but Claimant was assured they were normal and that he should not worry. He did not know that UBS was disposing or had disposed of its own inventory; he did not know that brokers were under pressure to sell these CEFs and to encourage customers with them in their accounts to keep them, even to the extent of offering loans against them to customers who needed cash so the securities themselves would not go on the market. Claimant did not know that there was little functional market liquidity and that his portfolio could become locked in and that he might not have ready access to his money. So while we do generally ascribe to the concept of an investor assuming the risk of an account after sufficient notice of its risk, we do not think it applies to this Claimant in the circumstances of April 2013. Certainly in September 2013, however, he was on notice through newspapers and other widely available sources that the Puerto Rican economy was in some trouble and its bonds and these CEFs were under pressure. In fact, later that Fall, when Respondents instituted a buy-back program in the absence of a functioning market, Claimant testified he considered selling his portfolio, carried at the time on his statements as worth some \$450,000.00. His Broker only offered some \$90,000.00 for it and he declined to sell.

Having carefully weighed the evidence, which is considerable and only some of which is outlined above, we hold that this account was unsuitable for Claimant, at age 66 essentially a first-time senior investor with no experience; that a proper effort to know her customer would have revealed that to his Broker; that the account was grossly over-concentrated; that any proper UBS branch office or other review should have detected such obvious unsuitability; and that any proper and required supervision could have prevented Claimant's losses or at least limited them greatly. The record instead shows

that UBS intentionally transferred some of its risk in its CEF inventory to its customers, one of whom was Claimant. We enter this Award accordingly.

Claimant's March 2015 statement shows the account as worth some \$398,000.00 with unrealized losses of \$737,000.00 at that time. It is uncontested that Claimant has received some \$190,000.00 in dividend payments during the life of the account. We do not see that he can retain those dividends, which are the fruit of an unsuitably risky and therefore more lucrative portfolio. Instead, we apply what we understand to be a rate of return more commensurate with an appropriate risk to the amount we find to have been lost due to Respondents' violations of applicable securities industry rules, and include that in our rounded award.

2. Upon Claimant's tender to transfer his entire portfolio to Respondents UBS and UBSPR, jointly and severally, within 30 days of receipt of this award, Respondents UBS and UBSPR, jointly and severally, shall pay to Claimant the sum of \$1,000,000.00 in full and complete satisfaction of all of his claims, of which sum \$602,000.00 is compensatory damages and interest and \$398,000.00 is payment for his portfolio. Claimant's request for post-award interest is denied.
3. The parties shall bear their own attorneys' fees and costs.
4. If the Arbitrators have provided an explanation of their decision in this award, the explanation is for the information of the parties only and is not precedential in nature.
5. Respondents' request for expungement of the CRD records of Respondents Garcia, Ubinas and Musa were not reiterated by Respondents at the final hearing and subsequently deemed moot by the Panel.
6. Any and all claims for relief not specifically addressed herein, including Claimant's request for punitive damages, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial Claim Filing Fee	= \$ 1,800.00
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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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as parties, Respondents UBS and UBSPR are assessed the following:

UBS	
Member Surcharge	= \$ 2,800.00

Pre-Hearing Processing Fee	= \$ 750.00
Hearing Processing Fee	= \$ 5,000.00
 <u>UBSPR</u>	
Member Surcharge	= \$ 2,800.00
Pre-Hearing Processing Fee	= \$ 750.00
Hearing Processing Fee	= \$ 5,000.00

## **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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session	= \$ 900.00
Pre-hearing conferences: February 5, 2015	1 session
February 11, 2015	1 session
One (1) Pre-hearing session with the Panel @ \$1,200.00/session	= \$ 1,200.00
Pre-hearing conference: July 7, 2014	1 session
Fifteen (15) Hearing sessions @ \$1,200.00/session	= \$18,000.00
Hearing Dates:	
April 20, 2015	2 sessions
April 21, 2015	3 sessions
April 22, 2015	3 sessions
April 23, 2015	3 sessions
April 24, 2015	3 sessions
April 25, 2015	1 session
<b>Total Hearing Session Fees</b>	<b>= \$20,100.00</b>

The Panel has assessed the total hearing session fees in the amount of \$20,100.00 jointly and severally to Respondents UBS and UBSPR.

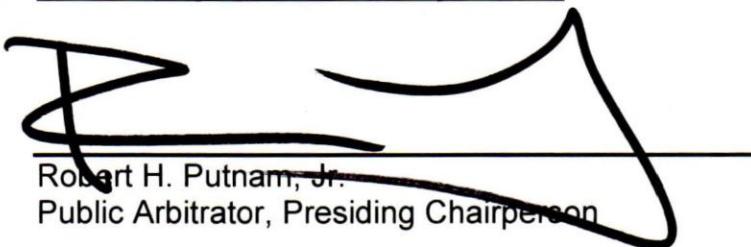
All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Robert H. Putnam, Jr.	-	Public Arbitrator, Presiding Chairperson
Ron Pekoe	-	Public Arbitrator
Herbert Branitsky	-	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**



Robert H. Putnam, Jr.  
Public Arbitrator, Presiding Chairperson

**5-18-15**

Signature Date

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Ron Pekoe  
Public Arbitrator

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Signature Date

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Herbert Branitsky  
Public Arbitrator

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Signature Date

May 19, 2015

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

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Herbert Branitsky	-	Public Arbitrator

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Public Arbitrator, Presiding Chairperson

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Ron Pekoe  
Public Arbitrator

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Herbert Branitsky  
Public Arbitrator

Signature Date



Signature Date



Signature Date

May 19, 2015

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Signature Date

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Herbert Branitsky  
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Signature Date

May 19, 2015

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