

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

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In the Matter of the Arbitration Between:

Claimants

David F. Ball and Sally A. Ball

Case Number: 17-03513

vs.

Respondent

Sunset Financial Services, Inc.

Hearing Site: St. Louis, Missouri

***Consolidated with the following case:***

Claimant

Misako Ball

Case Number: 18-01256

vs.

Respondent

Sunset Financial Services, Inc.

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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: Customers vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

**REPRESENTATION OF PARTIES**

For Claimants David F. Ball and Sally A. Ball (“David and Sally Ball”) and Misako Ball (collectively, “Claimants”): Bruce D. Oakes, Esq. and Richard B. Fosher, Esq., Oakes & Fosher, LLC, St. Louis, Missouri.

For Respondent Sunset Financial Services, Inc. (“Respondent”): John W. Shaw, Esq. and Timothy D. Wallner, Esq., Berkowitz Oliver, Kansas City, Missouri.

**CASE INFORMATION**

**17-03513:**

Statement of Claim filed on or about: December 29, 2017.

First Amended Statement of Claim filed on or about: November 28, 2018.  
Second Amended Statement of Claim filed on or about: May 9, 2019.  
Third Amended Statement of Claim filed on or about: June 27, 2019.  
David and Sally Ball signed the Submission Agreements: December 15, 2017 and May 8, 2019.  
Misako Ball signed the Submission Agreement: May 9, 2019.

Preliminary Statement of Answer filed on or about: March 13, 2018.  
Statement of Answer to First Amended Statement of Claim filed on or about: February 28, 2019.  
Statement of Answer to Third Amended Statement of Claim filed on or about: August 7, 2019.  
Respondent signed the Submission Agreement: March 13, 2018.

**18-01256:**

Statement of Claim filed on or about: April 5, 2018.  
Misako Ball signed the Submission Agreement: March 16, 2018.

Preliminary Statement of Answer filed on or about: June 12, 2018.  
Respondent signed the Submission Agreement: June 12, 2018.

**CASE SUMMARY**

**17-03513:**

In the Statement of Claim, as amended, Claimants asserted the following causes of action: breach of fiduciary duty, common law fraud, breach of contract, negligence/negligent misrepresentation/omission, unjust enrichment, and negligent supervision. The causes of action related to Claimants' allegation that one of Respondent's registered representatives recommended unsuitable direct participation programs ("DPPs"), generating high commissions and fees at their expense.

Unless specifically admitted in the Statement of Answer, as amended, Respondent denied the allegations made in the Third Amended Statement of Claim and asserted various affirmative defenses.

**18-01256:**

In the Statement of Claim, Misako Ball asserted the following causes of action: breach of fiduciary duty, common law fraud, breach of contract, negligence/negligent misrepresentation/omission, unjust enrichment, and negligent supervision. The causes of action related to Misako Ball's allegation that one of Respondent's registered representatives recommended unsuitable non-traded real estate investment trusts and DPPs, generating high commissions and fees at her expense.

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

## **RELIEF REQUESTED**

### **17-03513:**

In the Statement of Claim, as amended, Claimants requested approximately \$1,200,000.00 in compensatory damages, reasonable attorneys' fees and costs, pre-judgment interest, punitive damages in an amount the Panel feels is appropriate under the circumstances, filing and forum fees incurred herein, and for such other and further relief which the Panel deems just and proper under the circumstances

In the Statement of Answer, as amended, Respondent requested that the Panel enter an Award in its favor and against Claimants, together with its attorneys' fees, and that all costs of this proceeding be assessed against Claimants.

### **18-01256:**

In the Statement of Claim, Misako Ball requested approximately \$300,000.00 in compensatory damages; reasonable attorneys' fees and costs, pre-judgment interest, punitive damages in an amount the Panel feels is appropriate under the circumstances, filing and forum fees incurred herein, and for such other and further relief which the Panel deems just and proper under the circumstances.

In the Preliminary Statement of Answer, Respondent requested an Order requiring Misako Ball to amend her Statement of Claim to include a more definitive statement of facts within thirty days of the Order, staying Respondent's time to answer such Amended Statement of Claim until thirty days after it is served with the amended claim, staying any FINRA mandated responsibilities of Respondent for a period of at least thirty days after Respondent's time to answer, and awarding Respondent such other and further relief as is deemed just and proper; that the Panel enter an Award in its favor and against Misako Ball, together with its attorneys' fees; and that all costs of this proceeding be assessed against Misako Ball.

### **17-03513:**

After the hearing, David and Sally Ball filed a Final Prayer for Relief requesting compensatory damages, based on various methods of calculation, ranging from \$358,596.00 to \$1,935,963.00; attorneys' fees in the amount of one-third of the gross recovery; interest at the Missouri legal rate of 9%; costs in the amount of \$17,118.95 and forum fees; and punitive damages in a multiple of the compensatory damages or in an amount which the Panel deems just and proper.

Also after the hearing, Misako Ball filed a Final Prayer for Relief requesting compensatory damages, based on various methods of calculation, ranging from \$61,006.00 to \$376,187.00; attorneys' fees in the amount of one-third of the gross recovery; interest at the Missouri legal rate of 9%; costs in the amount of \$13,862.21 and forum fees; and punitive damages in a multiple of the compensatory damages or in an amount which the Panel deems just and proper.

## **OTHER ISSUES CONSIDERED AND DECIDED**

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

On October 24, 2018, Respondent filed a Motion to Dismiss, pursuant to Rule 12206 of the Code of Arbitration Procedure (“Code”), (“First Motion to Dismiss”). On November 26, 2018, David and Sally Ball filed a Response to the First Motion to Dismiss. On December 10, 2018, Respondent filed a Reply in Support of the First Motion to Dismiss. In an Order dated December 13, 2018, the Panel held the First Motion to Dismiss in abeyance until the hearing.

On November 28, 2018, David and Sally Ball filed a Motion to File First Amended Statement of Claim (“Motion to File First ASOC”). On December 10, 2018, Respondent filed an Opposition to the Motion to File First ASOC. On December 17, 2018, David and Sally Ball filed a Reply to the Opposition to the Motion for First ASOC. In an Order dated February 8, 2019, the Panel granted the Motion to File First ASOC.

On May 9, 2019, David and Sally Ball filed a Motion to Join Parties and File Second Amended Statement of Claim (“Motion to File Second ASOC”), seeking to add Misako Ball as a party. On May 20, 2019, Respondent filed an Opposition to the Motion to Join and File Second ASOC. On May 28, 2019, David and Sally Ball filed a Reply to the Opposition to the Motion to Join and File Second ASOC. In an Order dated June 10, 2019, the Panel granted the Motion to Join and File Second ASOC. Accordingly, Case Numbers 17-03513 and 18-01256 proceeded under Case Number 17-03513, a consolidated matter.

On June 27, 2019, Claimants filed a Motion to File Third Amended Statement of Claim, to which no response was filed. In an Order dated July 18, 2019, the Panel granted the Motion to File Third Amended Statement of Claim.

On January 21, 2020, Respondent filed a Motion to Dismiss, pursuant to Rule 12206(a) of the Code, (“Second Motion to Dismiss”). On February 27, 2020, Claimants filed a Response to the Second Motion to Dismiss. On March 6, 2020, Respondent filed a Reply in Support of the Second Motion to Dismiss. In its Order dated March 13, 2020, the Panel took the Second Motion to Dismiss under advisement. On April 20, 2020, the Panel heard oral arguments on the Second Motion to Dismiss. In an Order dated the same day, the Panel declined to rule on the Second Motion to Dismiss prior to the hearing.

On October 8, 2020, Claimants filed a Motion to Proceed With the Hearing on the Merits via Zoom Teleconference in the Event the Hearing on the Merits is Adjourned Due to Covid-19 (“Motion for Virtual Zoom Hearing”). On October 14, 2020, Respondent filed an Opposition to the Motion for Virtual Zoom Hearing. On October 19, 2020, Claimants filed a Reply to the Opposition to the Motion for Virtual Zoom Hearing. On October 26, 2020, the Panel heard oral arguments on the Motion for Virtual Zoom Hearing. In an Order dated the same day, the Panel granted the Motion for Virtual Zoom Hearing.

At the hearing, Respondent reasserted the Second Motion to Dismiss. On the record, the Panel denied the Second Motion to Dismiss.

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 David and Sally Ball the sum of \$247,185.00 in compensatory damages.
2. Respondent is liable for and shall pay to David and Sally Ball the sum of \$82,395.00 attorneys' fees pursuant to *First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105 (S.D.N.Y. 1994).
3. Respondent is liable for and shall pay to Misako Ball the sum of \$43,150.00 in compensatory damages.
4. Respondent is liable for and shall pay to Misako Ball the sum of \$14,383.33 in attorneys' fees pursuant to *First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105 (S.D.N.Y. 1994).
5. Respondent is liable for and shall pay to David and Sally Ball the sum of \$17,118.95 in costs.
6. Respondent is liable for and shall pay to Misako Ball the sum of \$13,862.21 in costs.
7. Respondent is liable for and shall pay to David and Sally Ball the sum of \$600.00 as reimbursement for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services in Case Number 17-03513.
8. Respondent is liable for and shall pay to Misako Ball the sum of \$300.00 as reimbursement for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services in Case Number 18-02156.
9. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and treble damages, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial Claim Filing Fee = \$ 2,000.00

\*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 is assessed the following:

Member Surcharge	= \$	2,475.00
Member Process Fee	= \$	6,175.00

**Postponement Fees**

Postponements granted during these proceedings for which fees were assessed or waived:

January 22-25, 2019, postponement jointly requested by the parties	= \$	1,300.00
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Total Postponement Fees	= \$	1,300.00
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The Panel has assessed \$650.00 of the postponement fees jointly and severally to David and Sally Ball.

The Panel has assessed \$650.00 of the postponement fees to Respondent.

**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
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David and Sally Ball submitted one (1) discovery-related motion  
Respondent submitted one (1) discovery-related motion

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Total Discovery-Related Motion Fees	= \$	400.00
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The Panel has assessed \$200.00 of the discovery-related motion fees jointly and severally to David and Sally Ball.

The Panel has assessed \$200.00 of the discovery-related motion fees to Respondent.

**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:

One (1) pre-hearing session with a single Arbitrator @ \$450.00/session	= \$	450.00
Pre-Hearing Conference: June 25, 2019	1 session	

Two (2) pre-hearing sessions with the Panel @ \$1,300.00/session	= \$	2,600.00
Pre-Hearing April 24, 2018	1 session	
Conferences: June 10, 2019	1 session	

Three (3) pre-hearing sessions with the Panel @ \$1,400.00/session	= \$	4,200.00
Pre-Hearing April 20, 2020	1 session	
Conferences: October 26, 2020	1 session	
November 30, 2020	1 session	

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= \$ 19,600.00

Fourteen (14) hearing sessions @ \$1,400.00/session

Hearings:	December 7, 2020	3 sessions
	December 8, 2020	2 sessions
	December 9, 2020	2 sessions
	December 10, 2020	2 sessions
	December 11, 2020	2 sessions
	February 1, 2021	2 sessions
	February 2, 2021	1 session

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Total Hearing Session Fees = \$ 26,850.00

The Panel has assessed \$11,750.00 of the hearing session fees jointly and severally to David and Sally Ball.

The Panel has assessed \$1,850.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$13,250.00 of the hearing session fees to Respondent.

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

**ARBITRATION PANEL**

Leah Murray Albert	-	Public Arbitrator, Presiding Chairperson
Joan M. Esserman	-	Public Arbitrator
David E. Crawford	-	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**

***Leah Murray Albert***

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Leah Murray Albert  
Public Arbitrator, Presiding Chairperson

**02/22/2021**

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Signature Date

***Joan M. Esserman***

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Joan M. Esserman  
Public Arbitrator

**02/23/2021**

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

***David E. Crawford***

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David E. Crawford  
Public Arbitrator

**02/23/2021**

\_\_\_\_\_  
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 23, 2021

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