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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROSEN CAPITAL PARTNERS, LP et al., Plaintiffs and Respondents, v. MERRILL LYNCH PROFESSIONAL CLEARING CORP., Defendant and Appellant.	B239404 (Los Angeles County Super. Ct. No. BS132957)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Affirmed.

Greenberg Traurig, Karin Leeann Bohmholdt, Paul Julien Schumacher, Terry R. Weiss; Wilmer Cutler Pickering Hale and Dorr and Matthew Donald Benedetto for Defendant and Appellant.

Quinn, Emanuel, Urquhart & Sullivan, Harold Barza, Harry A. Olivar, Jr., Valerie Roddy and Jason F. Lake for Plaintiffs and Respondents.

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In this case, appellant Merrill Lynch Professional Clearing Corp. (Merrill), challenges a judgment confirming an arbitration award against it. Appellant argues that the award must be vacated because the arbitrators failed to make necessary disclosures and because they exceeded their powers. Respondents are hedge funds Rosen Capital Partners, LP and Rosen Capital Institutional LP (the Funds). We affirm.

FACTS AND PROCEDURE

According to appellant, "Kyle Rosen is the president and portfolio manager of Rosen Capital Management LLC . . . , the SEC registered investment adviser that managed the . . . Funds . . . ." Further, according to appellant: "Mr. Rosen's strategy for the Funds involved capitalizing on inefficiencies in the options market by earning the excess premium that resulted from those inefficiencies. Mr. Rosen sought to keep the Funds 'market neutral' by selling both puts and calls on the S&P 500 Index, while earning premium payments on each transaction." (Fn. omitted.)[1] A call option is "an option in the holder to purchase specified securities at a specified price for a specified period of time." (Bloomenthal & Wolff, 3 Securities and Federal Corporate Law, § 2:91 (accessible on Westlaw, database updated Dec. 2012).) A put (the converse of a call) gives the holder "the right to require the purchase of a security at a specified price for a specified period of time." (*Ibid*.)

Appellant served as a prime broker for the Funds and describes its role as follows: "The prime broker 'clears and executes trades [and] is responsible for margin requirements for the customer.' [Citation.] Because prime brokers permit margin trading '[t]he brokerage bears the risk that its customers default on margin loans that could become undersecured due, for example, to a precipitous decline in the value of the posted collateral.'" "'The prime broker's role is usually ministerial -- it allows the customer to open an account with it, and allows the executing broker to make trades for the benefit of the customer in the prime broker's name.' (*SFM Holdings, Ltd. v. Banc of America Securities, LLC* (11th Cir. 2010) 600 F.3d 1334, 1338.)" (Boldface omitted.)

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1 This paragraph is quoted from appellant's prehearing brief in arbitration.

Rosen's due diligence questionnaire provided to appellant before Rosen transferred the Funds to it described the Funds' strategy as "equally effective in a bull or bear market. However, when the market is volatile, significantly more trading is required in order to maintain our pre-determined level of desired exposure." Appellant became Rosen's prime broker in September 2008. Rosen and appellant executed agreements containing an arbitration provision. According to Rosen, he agreed to move the Funds to appellant based on its representations that the Funds would be governed only by Regulation T (Reg. T) -- a regulation issued by the Board of Governors of the Federal Reserve System, which imposes "initial margin requirements and payment rules on certain securities transactions." (12 C.F.R. § 220.1(a) (2012).)

This case is about losses the Funds suffered between October 6 and October 8, 2008. Rosen claimed the losses were due to misconduct of appellant, and appellant claimed the losses were due to market movements. In May 2009, Rosen initiated an arbitration with the Financial Industry Regulatory Authority (FINRA), alleging causes of action for breach of contract; breach of the covenant of good faith and fair dealing; breach of commercial standards of fair dealing under the New York Uniform Commercial Code; fraud; and negligence.

The arbitration was conducted by three arbitrators -- Arthur Berggren, Katharine Coleman, and Holly Banafsheh. The arbitrators provided the parties disclosures and a summary of their background, and the parties agreed to the composition of the panel. Under FINRA's Code of Arbitration for Customer Disputes, an arbitrator has a continuing duty to disclose "interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination" in the proceeding. (FINRA rule 12405(b).) Berggren's and Coleman's disclosures, which appellant contends were insufficient, are described more fully in the Discussion.

In the arbitration proceeding, the Funds' principal claim was that their October 6 through October 8 losses were caused by appellant's requirements that they comply with margins other than Reg. T and that they refrain from opening any new positions in the market. Appellant vigorously disputed the claims, arguing it never promised to apply only Reg. T. It argued that it instead had its own risk policies contained within its contracts with Rosen. Appellant further argued that Rosen "jettisoned his 'market neutral' strategy for an unhedged bet that the market would rebound." Appellant argued that its agreements with Rosen prohibit the Funds from recovering damages based on market movements. Appellant also argued that Rosen could have changed prime brokers or liquidated his positions even if he had been prohibited from opening new positions.

The following evidence is included in the excerpts of the arbitration in the appellate record. Prior to moving the Funds to appellant, Rosen had accounts governed by Reg. T at Bear Stearns. Rosen briefly traded at Goldman Sachs but left the day after he was told a margin other than Reg. T would be applied to the Funds. Rosen moved the Funds to appellant only after securing its promise that his Funds would be governed only by Reg. T and no other margin requirements.

On October 6, 2008, appellant's employee Randall Chalfin issued a "risk call" to Rosen requiring him to reduce his margin even though Rosen was in compliance with Reg. T. Appellant defines a risk call as a "directive[] from a prime broker to an investor to reduce risk either by depositing cash or closing positions." Later that date, Chalfin prohibited Rosen from opening any new positions, warning him that they could "only wire in funds or reduce [their] positions." According to Rosen, the instruction was "very clear" that he could take no new positions, which effectively meant he could not follow his strategy for the Funds. To comply with Chalfin's order, Rosen was forced to reverse trades he had made earlier that day.

John Bell, appellant's employee and the person who persuaded Rosen to move the Funds to appellant, called Rosen that evening and said he would "fix" the situation so Rosen could trade the following day. The next day, Bell again called Rosen and said he had not been able to speak to all the necessary people, apologized, and promised "it [would] be his top priority. . . ." This exchange continued, but appellant never lifted the trading restriction imposed on October 6, 2008. Then, on October 8 and October 9, 2008, Rosen was told that appellant's "risk team want[ed] this entire position liquidated." Appellant threatened to liquidate the Funds if Rosen did not.

Appellant's employees denied or at least could not remember prohibiting Rosen from opening new positions. Appellant acknowledged that it would be a violation of its risk policy if its representatives told Rosen that he could only add cash or reduce positions but prohibited him from opening on new positions. An email among appellant's employees indicated that the Funds were "on Reg. T margin." Appellant's employees questioned why they "agreed to back off of [different] margin treatment. . . ." Another email showed appellant would begin "implement[ing] new increased margins . . ." on October 6, 2008.

The arbitrators must have credited Rosen's testimony that the losses were due to appellant's conduct and rejected appellant's argument that the losses were due to market movements as the arbitration panel awarded the Funds $63,665,202 in compensatory damages. On July 15, 2011, the Funds petitioned to confirm the arbitration award. On August 4, 2011, appellant cross-petitioned to vacate the arbitration award. Appellant argued the arbitrators failed to make required disclosures, and the award is irrational and outside the arbitrators' powers.

The trial court rejected appellant's arguments and entered judgment confirming the arbitration award.

DISCUSSION

There are limited grounds upon which a court may vacate an arbitration award. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1340.) Code of Civil Procedure section 1286.2, subdivision (a)(6) describes these limited grounds and includes circumstances when an arbitrator "failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware" and when "the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted" (*id.*, subd. (a)(4)).[2] If either of the foregoing grounds is demonstrated, the arbitration award must be vacated. (*Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 844-845.)

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[2] All statutory citations are to the Code of Civil Procedure.

We review de novo the trial court's conclusions that the arbitrators did not exceed their powers and that they did not fail to make necessary disclosures. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 383 (*Haworth*).) As we explain, appellant fails to show the arbitration award must be vacated.

1. Appellant Does Not Show Arbitrator Coleman or Berggren Failed to Make a Required Disclosure

Appellant argues that Arbitrators Coleman and Berggren failed to disclose numerous required disclosures.[3]

Haworth, supra, 50 Cal.4th 372 is instructive on the relevant standard to evaluate appellant's argument. In *Haworth,* our Supreme Court considered whether a former judge, serving as an arbitrator, was required to disclose that 10 years earlier he had been publicly censured based on his statements to court employees. The high court applied the test that an arbitrator must disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial." (§ 1281.9, subd. (a).) Then, borrowing from discussions of judicial ethics, *Haworth* explained arbitral impartiality as follows: "'Impartiality' entails the 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.' (ABA Model Code Jud. Conduct (2007), Terminology, at p. 4.) In the context of judicial recusal, '[p]otential bias and prejudice must clearly be established by an objective standard.' [Citations.] 'Judges, like all human beings, have widely varying experiences and backgrounds. Except perhaps in extreme circumstances, those not directly related to the case or the parties do not disqualify them.' [Citation.]" (*Haworth, supra,* at p. 389.)

As relevant here, the high court further explained that: "'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-

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3 The agreements contain a provision stating that all disputes shall be governed by New York law. Appellant argues vacatur is required under California law. Appellant requests this court "simply to apply the [applicable] California law. . . ." The Funds argue that vacatur is not required under New York law. For purposes of this appeal, we assume that California law applies as appellant argues.

informed, thoughtful observer."' [Citation.] '[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard.' [Citations.]" (*Haworth*, *supra*, 50 Cal.4th at p. 389.) "'An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased *for or against a party for a particular reason*.' [Citation.]" (*Ibid*.)

Applying that standard, none of the alleged nondisclosures require vacating the arbitration award. We discuss each separately, providing additional background when necessary.

A. Class Action Settlement

Appellant argues that the arbitration award must be vacated because Arbitrator Coleman failed to disclose that she invested in "a Merrill Lynch-sponsored partnership" that resulted in a class action settlement. According to appellant, "a person could reasonably doubt the impartiality of Arbitrator Coleman when she had already been involved in a dispute with a Merrill Lynch affiliate, especially in a case in which the . . . Funds sought over $77 million." We first provide additional background and then discuss appellant's argument.

In 2001, Arbitrator Coleman and approximately 700 other investors participated in a class action settlement of a lawsuit naming ML/EQ Real Estate Portfolio, L.P. (ML/EQ) as a defendant and alleging causes of action for breach of fiduciary duty and breach of contract. ML/EQ held income-producing real properties and mortgage loans secured by commercial, industrial and residential properties. According to the second amended class action complaint, ML/EQ is a Delaware public registered limited partnership. MLH Real Estate Associates, a "subsidiary of Merrill Lynch & Company, is the Associate General Partner of the ML/EQ Partnership. Its duties are primarily investor relations and servicing. MLH . . . is not named as a Defendant herein." Merrill Lynch, Pierce, Fenner & Smith, Inc., was a "selling agent" and received commissions on the investment.

The key issue as framed by the operative pleading in the ML/EQ class action litigation was whether ML/EQ followed a partnership agreement in distributing moneys to members of the class. According to the operative pleading, "[d]efendants have failed to distribute millions of dollars of 'distributable cash' to the Limited Partner, as required by ML/EQ's Partnership Agreement. Defendants have been improperly retaining distributable cash in the Joint Venture and have been accumulating interest thereon. They have done so to maintain a 'private reserve' for themselves, ready to be tapped when Defendants' obligation under their investment guarantee comes due. In addition, Defendants have mischaracterized much of the cash they have distributed to the Limited Partners as distributions of 'sale or financing proceeds,' rather than as distributions of 'distributable cash.'" The lawsuit was settled for $1.4 million of which $754,306 was distributed to the class.

Contrary to appellant's argument, no reasonable person could question Arbitrator Coleman's impartiality in the current dispute based on her participation as an unnamed class member in the dispute with ML/EQ.[4] The 2001 lawsuit did not involve appellant, the only defendant involved in the current proceeding. Moreover, the Merrill entity involved in the ML/EQ litigation -- MLH Real Estate Associates -- was not named as a defendant. The lawsuit settled over a decade ago, for a relatively small amount due to each claimant. The issues involved in the ML/EQ litigation concerned a partnership distribution of money, which differ from the claims against appellant in the current case. Under these circumstances, a reasonable person aware of these facts would not question Coleman's impartiality based on her receipt of funds from the class action settlement in the ML/EQ litigation.

Contrary to appellant's argument *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 does not compel a different conclusion. In that case, the "arbitrator was

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4 In its arbitrator disqualification criteria, FINRA states that an arbitrator is disqualified if the arbitrator was a party in two or more investment-related civil actions of arbitration claims within the last 10 years. However, being an unnamed party to a class action is excluded from this rule.

contemporaneously engaged in the private representation of lawyers and law firms on issues of professional responsibility and representing a law firm in a case involving an attorney fee dispute." (*Id*. at p. 66.) Here, Arbitrator Coleman was not contemporaneously engaged in litigation. Nor did the litigation resulting in the class action settlement involve the same type of claims as the present litigation. The former involved allegations that a partnership failed to distribute cash as called for in the agreements, and the latter involved a claim that appellant prohibited Rosen from following his investment strategy by imposing improper margin requirements and prohibiting him from opening new positions. In short, Coleman's failure to disclose the class action settlement does not require vacating the arbitration award.[5]

B. Arbitrator Coleman's Former Spouse's Employment

Arbitrator Coleman divorced in May 2001. A record of a political donation on Watchdog.net indicates that Coleman's former spouse was employed by Merrill Lynch Realty in November 1986. An electronic profile indicated Coleman's former spouse was an associate broker at companies including Merrill Lynch Realty. Appellant represents that Merrill Lynch Realty was an affiliate of Merrill in 1987, and we assume that to be true for purposes of this appeal.

Based on Arbitrator Coleman's former spouse's employment at Merrill Lynch Realty, appellant argues Coleman failed to make a timely disclosure of her former

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5 FINRA's arbitrator's manual supports this conclusion as under those rules an arbitrator is required to disclose whether he or she complained against any party in another action "during the past five (5) years." Thus, even assuming appellant were a party, the disclosure was not required because the lawsuit was settled more than five years prior to the arbitration. Appellant also cites to a blank arbitrator application dated October 2010 in which the arbitrator is asked whether he or she filed any investor complaints. Appellant fails to show the relevance of this application as there is no indication that Arbitrator Coleman failed to fully complete her arbitrator application or that any such failure resulted in incomplete disclosures. (See *STMicroelectronics, N.V. v. Credit Suisse* (2d Cir. 2011) 648 F.3d 68, 76-77 [FINRA application form is not prepared with reference to any particular matter and blank application form unhelpful in evaluating arbitrator's alleged nondisclosures].)

spouse's affiliation with Merrill and, as a result, the arbitration award must be vacated. Appellant relies on section 1281.9, subdivision (a)(6), which provides that an "[a]rbitrator shall disclose . . . . [¶] . . . [¶] . . . '[a]ny professional . . . relationship the . . . arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding." Appellant further argues that under FINRA rules, an arbitrator must disclose an immediate family member's employment with a company that is "'affiliated with an entity that is engaged in the securities business.'"

Neither section 1281.9 nor FINRA rule 12405 requires the disclosure of a *former* spouse's employment. Arbitrator Coleman's former spouse's employment was not a substantial business relationship between an arbitrator and a party. (*Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468, 476-477 ["Only 'significant or substantial business relationships between the neutral arbitrator and a party or his representative must be disclosed to the other party, to avoid the appearance of impropriety'"].) Moreover, Coleman's ex-spouse's employment was so long ago and was not even remotely proximate in time to the current proceeding. It cannot support the conclusion a reasonable person would find Coleman biased.

C. Arbitrator Coleman's Experience in the Securities Industry

Appellant argues the arbitration award must be vacated because Arbitrator Coleman did not disclose her background in the securities industry, which included knowledge of prime brokerage arrangements. As we explain, an informed, objective person would not reasonably entertain a doubt as to Coleman's impartiality based on her knowledge of the securities industry.

Arbitrator Coleman revised her FINRA disclosure during the pendency of this arbitration, but her updated disclosures were not provided to the parties. Whereas her initial disclosure indicated she possessed securities 7, 27, and 63 licenses, her amended disclosures expanded on her experience in the securities industry explaining: "While at Magnus Capital[,] I held 7, 27, and 63 licenses. In my duties at Magnus I had occasion to develop skills in controversy regarding earn-out and retention agreements, promissory notes, supervision, suitability, selling away, wrongful and constructive termination, sexual harassment, elder abuse, punitive damages, breach of contract, fraud, prime broker agreements, shorting and purchasing options and other securities, stocks, REITs, sale of mortgage portfolios, insurance, suitability, margin/risk calls and trade executions." Coleman was at Magnus Capital from 1993 to 2000.

Appellant argues that Arbitrator Coleman's experience with prime brokers and hedge funds created a potential for bias because Coleman was familiar with the issues raised in this case. Appellant further argues that Coleman's failure to disclose her experience with prime broker agreements, options trading, margin risk calls, and hedge funds could cause a person to reasonably entertain a doubt that she would be impartial. We disagree.

"The disclosure requirements were intended to ensure the impartiality of the arbitrator, not to mandate disclosure of 'all matters that a party might wish to consider in deciding whether to oppose or accept the selection of an arbitrator.' [Citation.]" (*Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 646.) Here, the parties were aware that Arbitrator Coleman was a securities industry arbitrator and that she held the same licenses as Rosen. The additional information that she had experience with prime broker agreements, options trading, and risk calls indicates that she had knowledge of the subject matter of the Funds' claims but does not suggest Coleman lacked impartiality. There was no evidence Coleman had personal knowledge of disputed facts or misconceptions of the facts of this case. (Cf. *STMicroelectronics, N.V. v. Credit Suisse, supra*, 648 F.3d at p. 77 [alleged nondisclosure that arbitrator served as expert on legal issues did not require vacating arbitration award].) Experience alone does not demonstrate partiality. Appellant does not show objectively a person aware of these facts would reasonably entertain a doubt that Coleman would be able to be impartial in this case.

D. Arbitrator Coleman's Loss of Money in an Investment

Appellant argues that Arbitrator Coleman improperly failed to disclose that she lost $1.4 million in her investment in "R.E. Loans, a private investment that was limited only to certain qualified investors, and that was devastated by the same 2008 crisis that impacted the . . . Funds. . . ." Assuming Coleman lost this money, that does not support an inference she was biased in this case. There is no connection between R.E. Loans and the Funds. The record reveals no similarity between R.E. Loans and the Funds. No reasonable person could doubt Coleman's impartiality in this case because her unrelated investment lost money.

In its prehearing arbitration brief, appellant argued "[t]he Fall of 2008 witnessed one of the greatest declines in U.S. stock market history. The retirement savings of a generation of Americans were wiped out and countless experienced investors lost everything." That Arbitrator Coleman was among these investors who lost money does not demonstrate a reasonable person could reasonably form a belief Coleman was biased. Appellant fails to show vacatur is warranted on this ground.

E. Arbitrators Coleman and Berggren Jointly Serving on an Arbitration Panel

Appellant argues that the award must be vacated because Arbitrators Coleman and Berggren failed to disclose that in mid-2010, they began serving together in another FINRA arbitration. Question No. 18 on the FINRA disclosure form asked the prospective arbitrator: "Have you had a social or professional relationship with any other arbitrator assigned to this case?" Appellant does not dispute that Coleman initially answered this question correctly, but argues she was required to update her disclosures. Appellant argues, "Because the arbitrators served together without revealing this fact to the parties, a person could reasonably entertain a doubt that the arbitrators would be able to be impartial because the arbitrators may receive information from each other that influences each others' thinking on the issues presented in the Arbitration."

That Arbitrators Coleman and Berggren were subsequently appointed as arbitrators in another case is not a fact that would cause a reasonable person to "entertain a doubt that the proposed neutral arbitrator would be able to be impartial." (§ 1281.9, subd. (a).) "An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased for or against a party for a particular reason." (*Haworth, supra,* 50 Cal.4th at p. 389.) As one court explained: "[W]e do not think that the fact that two arbitrators served together in one arbitration at the same time that they served together in another is, without more, evidence they were predisposed to favor one party over another in either arbitration." (*Scandinavian Reinsurance Co. Ltd. v. Saint Paul* (2d Cir. 2012) 668 F.3d 60, 74.)

F. Arbitrators Coleman's and Berggren's Service in Cases Involving Appellant's Affiliates

In November 2009, Arbitrators Coleman and Berggren were assigned to the current case. Then on June 23, 2010, Coleman was assigned to a case between Merrill Lynch, Pierce, Fenner & Smith, Inc., and Paul G. Gomez. On October 8, 2010, Berggren completed an oath in another case naming Merrill Lynch, Pierce, Fenner & Smith, Inc., as the defendant.

Appellant argues that the arbitration award must be vacated because both Arbitrators Coleman and Berggren served concurrently in other arbitrations involving Merrill affiliates. Appellant relies on section 1281.9, subdivision (a)(4), which requires an arbitrator to disclose "[t]he names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party not a party to the pending arbitration as 'claimant' or 'respondent' if the party is an individual and not a business or corporate entity."

That appellant's affiliates were parties in other arbitrations does not show section 1281.9 was violated. (*Hayden v. Robertson Stephens Inc*. (2007) 150 Cal.App.4th 360, 367.) In this context, an affiliate is included in the definition of party "only if the affiliate is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding." (*Ibid*.) Here, there was no evidence that any Merrill entity other than appellant was involved in the transaction, contract, or facts that gave rise to the issues in this proceeding.

2. Appellant Does Not Show the Arbitrators Exceeded Their Powers

Appellant argues that the award was irrational and exceeded the arbitrators' powers because appellant did not cause the $63,665,202 losses, which were instead caused by the market. Appellant claims that because Rosen was permitted to liquidate the options held by the Funds, damages cannot be awarded against it based on the Funds' losses from maintaining those options. Appellant further argues that the remedy -- compensatory damages of over $63 million -- is not rationally related to the parties' contract, emphasizing that the agreements prohibited calculating damages based on market losses.[6]

Although appellant correctly argues that an arbitrator exceeds his power if he fashions a remedy not rationally related to the contract or arbitrarily remakes a contract, the award in this case did neither. (*O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1055-1056.) The award shows the arbitrators must have credited Rosen's theory that the Funds' losses resulted from appellant's imposition of an improper margin requirement and an improper prohibition on trading. Rosen's theory was supported by his testimony. That the arbitrators did not credit appellant's alternative theory -- that the losses were caused by market movements -- does not show the award was irrational or exceeded the arbitrators' powers.[7] Even if Rosen could have closed-out of his preexisting options, the arbitrators may have concluded Rosen's decision to retain those options was due to

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6 The agreement states: "In no event shall any Merrill Lynch Entity be held liable for damages or for any loss of any kind caused, directly or indirectly, by . . . market movements, . . . or other conditions beyond such Merrill Lynch Entity's control or reasonable anticipation."

7 Appellant pursued this theory in the arbitration proceeding. In its prehearing brief, appellant argued Rosen "could . . . have reduced or liquidated his positions to protect his investors from a falling and volatile market. Doing so would have preserved his clients' capital . . . ." "Instead, Mr. Rosen chose to remain long [in] the market as it continued to decline." Appellant argued orally that "upon the October 6 freeze, assuming it happened, the best thing to do as a fiduciary to the funds was to immediately liquidate the entire portfolio and start trading." Appellant also argued that under the contracts, it could not be liable for any loss caused by market movements.

appellant's instruction prohibiting him from purchasing new options. The contractual provision prohibiting calculating damages based on market losses is not relevant as there is no indication that is what the arbitrators did.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.