

NASD Arbitration & Mediation

National Association of Securities Dealers, Inc. * 515 E. Las Olas Boulevard * Suite 1100 * Fort Lauderdale, FL 33301 * Phone 954-522-7391
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N.A.S.D.R. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Vincent James Fisk

95-04985

Name of Respondents

Lehwald, Orosey & Pepe, Inc., Henry W. Lehwald,
John Orosey, Gerard Pepe, and
Lehwald Orosey & Pepe, Inc. 401K Savings

REPRESENTATION

For Claimant, Vincent James Fisk ("Fisk"): Robert Wayne Pearce, Esq. and Barbara L. Wolf, Esq., Fort Lauderdale, Florida.

For Respondents, Lehwald, Orosey & Pepe, Inc. ("LOP"), Henry W. Lehwald ("Lehwald"), John Orosey ("Orosey"), Gerard Pepe ("Pepe"), and Lehwald Orosey & Pepe, Inc. 401K Savings ("LOP 401K"): Gary A. Chernay, Esq. and Robert M. Weinberger, Esq. from North Palm Beach, Florida.

CASE INFORMATION

- Statement of Claim filed on: October 20, 1995.

Claimant's Submission Agreement signed on: October 14, 1995.

Statement of Answer and Counterclaim filed by Respondents on: December 19, 1995.

Submission Agreements signed by all Respondents on: January 5, 1996.
(by Henry W. Lehwald, Chairman, on behalf of the firm)

Claimant's Answer to the Counterclaim filed on: December 20, 1995.

HEARING INFORMATION

On August 19, 20, and 21, 1996, and on October 15 and 16, 1996, hearings lasting ten (10) sessions were conducted in Fort Lauderdale, Florida.

CASE SUMMARY

Claimant alleged that the claim arose in connection with the termination of Vincent James Fisk as a sales representative of LOP by its principals, Lehwald, Orosey and Pepe; that Fisk was terminated after he refused to sign over his own pension plan check to LOP and demanded a copy of the Summary Description of the Pension Plan; that Fisk claimed that LOP and its principals terminated him in retaliation for his attempts to enforce his rights under ERISA; that Respondents defamed him by stating as the reason for termination on the form U-5 LOP filed with the self regulatory agencies, "Failure to perform job according to industry standards with theft involved." Claimant further made allegations under ERISA and at common law for defamation and requested compensatory damages, punitive damages, and other costs in connection with the arbitration proceeding.

Respondents denied all allegations of wrongdoing contained in the Statement of Claim and stated that this is essentially a claim for two separate causes of action, the first is a claim for defamation based upon statements made in the filing of the form U-5 and the second claim involves allegations of ERISA violations. Respondents alleged a defense to the defamation claim by stating that there was no malice in their decision to make the statement in the U-5 form based on the proposition that these statements were privileged and with regard to the ERISA violations Respondents stated that the NASD lacks jurisdiction over ERISA Claims and that Respondents did not concede jurisdiction to the NASD in this case. Respondents further asserted a counterclaim stating that on or about July 20, 1994, LOP loaned to Claimant the sum of \$9,000.00 and that Claimant failed and refused to repay the \$9,000.00 advanced to him by LOP. Respondents requested that that sum, together with prejudgment interest accrued thereon be rendered as a final award. Additionally, Respondents stated that, concerning the award of attorneys' fees, that such an award may only be made by a Circuit Court for the State of Florida and not this panel, and that therefore, this panel should not consider the affidavit for fees submitted by Claimant's attorneys.

RELIEF REQUESTED

Claimant requested compensatory damages in excess of \$390,000.00, consequential damages in excess of \$545,000.00, statutory penalties, punitive damages at common law, together with prejudgment interest, attorneys' fees and costs incurred in connection with this proceeding. Claimant also requested entry of a directive from the Panel requiring Lehwald, Orosey & Pepe, Inc. to file a corrected U-5 to fairly and accurately address the alleged misinformation set forth in its 1994 filed U-5 and to further issue appropriate retractions to all such other persons and regulatory agencies in receipt of the alleged misleading 1994 U-5.

Respondents requested that all claims be dismissed and requested relief on their Counterclaim.

OTHER ISSUES CONSIDERED & DECIDED

1. On November 8, 1996 the NASD received from Respondents a Verified Emergency Motion to Disqualify James Fisk's Attorneys, to Dismiss his Claim with Prejudice, to Set a Briefing Schedule and Hearing. The Panel, having carefully reviewed the foregoing along with Claimant's Response decided, on December 5, 1996, to deny the Motions.

2. 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. In either case, the parties have agreed to receive conformed copies of the Award, while the originals remain on file with the NASDR.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All Respondents, LOP, Lehwald, Orosey, Pepe and LOP 401K, are found liable, jointly and severally and shall pay to the Claimant the amount of \$97,000.00 which includes costs, interest and attorneys' fees.
2. The above amount also takes into account Respondents' Counterclaim for \$9,000.00 which is hereby granted;
3. That portion of the Claimant's July 28, 1994 U-5, CRD, employment records and any NASD disclosures which contain the reason for termination as "Discharged" and provides the explanation "Failure to perform job according to industry standards with theft involved" shall be expunged. The U-5 and all other pertinent employment records shall reflect that the claimant left voluntarily;
4. Claimant's request for punitive damages is hereby denied.
5. All other claims are denied.

OTHER COSTS

Apart from the Forum Fees addressed below, the parties shall each bear all other costs incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Section 10332(c) (formerly Section 43c) of the Code of Arbitration Procedure, the Panel has assessed Forum Fees in the amount of \$10,000.00 (ten (10) hearing sessions X \$1,000.00).

1. Claimant shall pay Forum Fees in the amount of \$5,000.00 payable to the NASDR, Inc.
2. Respondents are jointly and severally assessed Forum Fees in the amount of \$5,000.00 for which the NASDR shall retain the \$300.00 previously deposited by Respondents in partial settlement thereof leaving a balance due to the NASDR by Respondents of \$4,700.00.

3. The NASDR shall retain the non-refundable member surcharge paid by Respondent, LOP, in the amount of \$500.00.
4. The NASDR shall retain the non-refundable filing fee that Respondent, LOP, paid for its Counterclaim.

All fees are payable to the NASDR, Inc.

ARBITRATION PANEL

Concurring Arbitrators' Signatures

/s/

Randy R. Freedman, Esq.

Public/Chairperson

/s/

Leslie Bishop

Industry/Panelist

/s/

Thomas N. Holloway, Esq.

Public/Panelist

Date of Decision: December 23, 1996