

Award
NASD Dispute Resolution

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In the Matter of the Arbitration Between:

Alan Morgenstern, Claimant v. American Express Financial Advisors, Inc. and Marietta L. Johns, Respondents

Case Number: 01-02953

Hearing Site: San Francisco, California

Nature of the Dispute: Associated Person vs. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimant:

Russell G. Porter, Esq.
Porter, Scott, Weiberg & Delehant
Sacramento, California

For Respondents

Julie A. Kole, Esq.
Keesal, Young & Logan
San Francisco, California

CASE INFORMATION

Statement of Claim filed: May 25, 2001

Claimant's Arbitration Brief filed: November 5, 2004

Claimant's Uniform Submission Agreement signed: August 13, 2001

Joint Statement of Answer filed by Respondents, American Express Financial Advisors, Inc. ("American Express") and Marietta L. Johns: October 26, 2001

Respondent American Express' Arbitration Brief filed: November 19, 2004

Respondent American Express' Uniform Submission Agreement signed: July 21, 2001

CASE SUMMARY

Claimant alleged the following claims with respect to his employment with American Express:

- 1) Negligent Misrepresentation Against Respondents American Express and Marietta L. Johns;
- 2) Breach of Contract Against Respondent American Express; 3) Breach of Implied in Fact Contract of Employment Against Respondent American Express; 4) Breach of Covenant of Good

Faith and Fair Dealing Against American Express; 5) Intentional Infliction of Emotional Distress Against Respondents American Express and Marietta L. Johns; 6) Negligent Infliction of Emotional Distress Against Respondents American Express and Marietta L. Johns; and 7) Violation of Statute – California Labor Code Sections 970, 972 Against Respondents American Express and Marietta L. Johns.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents also asserted affirmative defenses.

RELIEF REQUESTED

Claimant requested:

1. General damages according to proof;
2. Special damages according to proof;
3. Costs;
4. Attorney's fees;
5. Punitive damages; and
6. That the damages found be doubled as prescribed by California Labor Code Section 972.

Respondents requested dismissal of Claimant's claims, costs and attorneys' fees, and such other appropriate relief.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Marietta L. Johns did not file with NASD Dispute Resolution ("NASD-DR") a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("the Code") and, having answered Claimant's Claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

During the hearing, Respondent Marietta L. Johns moved to have all claims against her dismissed, based on the ground that no claims could be maintained against her as an individual insofar as all of her alleged actions were undertaken within the course and scope of her employment. Claimant stipulated that this motion be granted. The motion was granted.

During the hearing, Respondent American Express moved to dismiss Claimant's claims for Intentional and Negligent Infliction of Emotional Distress, on the grounds that Claimant elected not to pursue those claims and presented no evidence on those claims. Claimant stipulated that this motion be granted. The motion was granted.

During the hearing, Respondent American Express moved to dismiss Claimant's claims for Breach of Contract, Breach of Implied Contract, and Breach of Covenant of Good Faith and Fair Dealing, on the ground that Claimant was an at-will employee of American Express pursuant to the express terms of his written Group Vice President Agreement. The Panel denied the motion.

During the hearing, Respondent American Express moved to dismiss Claimant's claims for Negligent Misrepresentation and Violation of Labor Code Section 970, on the grounds that Claimant had failed to present evidence of a misrepresentation relating to the terms of his employment by Norm Weaver, and based on Claimant's testimony that everything told to him by Mr. Weaver was true. The Panel denied the motion.

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent American Express is solely liable for and shall pay to Claimant the sum of Seven Hundred Thousand Dollars (\$700,000.00).
- 2) Claimant's claims for punitive damages are denied.
- 3) Each party shall bear its own costs, including attorney's fees.
- 4) All other relief not expressly granted is denied.

FEEs

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$250.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, American Express is a party and the following fees are assessed:

Member Surcharge	= \$1,200.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	<u>= \$2,000.00</u>
Total Member Fees	= \$3,800.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(3) Pre-hearing conference sessions with the Panel @ \$1,000.00/session	=	\$3,000.00
Pre-hearing conferences:		
March 26, 2002	1 session	
August 15, 2002	1 session	
February 12, 2004	1 session	

(14) Hearing sessions @ \$1,000.00/session	=	\$14,000.00
Hearings:		
November 8, 2004	2 sessions	
November 9, 2004	2 sessions	
November 10, 2004	2 sessions	
November 11, 2004	2 sessions	
November 12, 2004	2 sessions	
November 18, 2004	2 sessions	
November 19, 2004	2 sessions	

Total Forum Fees	=	\$17,000.00
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The Panel assessed the \$17,000.00 in forum fees to Respondent American Express.

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 250.00
<u>Less Payments</u>	<u>= \$(1,750.00)</u>
Refund Due Claimant	= \$(1,500.00)

2. Respondent American Express is charged with the following fees and costs:

Member Fees	= \$ 3,800.00
<u>Forum Fees</u>	<u>= \$ 17,000.00</u>
Total Fees	= \$ 20,800.00
<u>Less Payments</u>	<u>= \$(4,300.00)</u>
Balance Due NASD-DR	= \$ 16,500.00

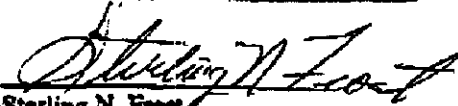
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Arbitration No. 01-02953
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All balances are payable to NASD Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Sterling N. Frost	-	Public Arbitrator, Presiding Chair
Francis O. Spalding	-	Public Arbitrator
Carlos Richard Mangum	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Sterling N. Frost
Chair, Public Arbitrator

12/9/04
Signature Date

Francis O. Spalding
Public Arbitrator

Signature Date

Carlos Richard Mangum
Non-Public Arbitrator

Signature Date

12/21/04
Date of Service

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Arbitration No. 01-02953
Award Page 5 of 5

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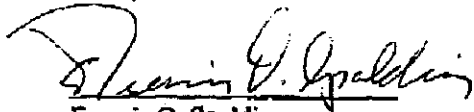
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Francis O. Spalding	-	Public Arbitrator
Carlos Richard Mangum	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Sterling N. Frost
Chair, Public Arbitrator

Signature Date


Francis O. Spalding
Public Arbitrator

12/17/04
Signature Date

Carlos Richard Mangum
Non-Public Arbitrator

Signature Date

12/21/04
Date of Service

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Arbitration No. 01-02933
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All balances are payable to NASD Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Sterling N. Frost	-	Public Arbitrator, Presiding Chair
Francis O. Spalding	-	Public Arbitrator
Carlos Richard Mangum	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Sterling N. Frost
Chair, Public Arbitrator

Signature Date

Francis O. Spalding
Public Arbitrator

Signature Date



Carlos Richard Mangum
Non-Public Arbitrator

12-10-04
Signature Date

12/21/04
Date of Service