

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Investec Ernst & Company (Claimant) v. Kenneth William Wittenberg (Respondent)

Case Number: 03-00440

Hearing Site: New York, New York

Nature of the Dispute: Member vs. Associated Person.

REPRESENTATION OF PARTIES

Claimant Investec Ernst & Company ("Investec") hereinafter referred to as "Claimant": Edwin A. Zipf, Esq., Bressler, Amery & Ross, P.C., Morristown, NJ.

Respondent Kenneth William Wittenberg ("Wittenberg") hereinafter referred to as "Respondent": Mark J. Hyland, Esq., Seward & Kissel, LLP, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: January 17, 2003.

Answer to Counterclaim filed by Claimant on or about: January 22, 2004.

Claimant signed the Uniform Submission Agreement: January 16, 2003.

Statement of Answer and Counterclaim filed by Respondent on or about: June 27, 2003.

Respondent signed the Uniform Submission Agreement: June 28, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: negligent errors and omissions; breach of duty of loyalty; violation of policies and procedures; and contribution and/or indemnification. Unless specifically admitted in its Answer to the Counterclaim, Claimant denied the allegations made in the Counterclaim.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In his Counterclaim, Respondent asserted the following causes of action: indemnification.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$794,575.00, plus interest; and fees

and costs. In its Answer to the Counterclaim, Claimant requested that the Counterclaim be dismissed; and costs and fees.

Respondent requested indemnification; dismissal of Claimant's claims in their entirety; and costs, including attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

By letters dated June 3 and September 21, 2004 the parties were asked to submit mutually agreeable dates for rescheduling the hearings in this matter. On or about October 19, 2004, the Panel requested that the parties provide dates by November 3, 2004 and if no dates were provided by that time, then the Panel would order this matter dismissed without prejudice. On or about December 17, 2004, the Panel decided, in accordance with its previous ruling, to dismiss, without prejudice, this matter for failure to prosecute.

To date, NASD Dispute Resolution has not received any proposed dates. Accordingly, the arbitrators dismissed this matter without prejudice.

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, and the parties' failure to provide new hearing dates, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are dismissed, without prejudice, in their entirety.
2. Respondent's counterclaims are dismissed, without prejudice, in their entirety.
3. Any and all relief not specifically addressed herein is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

| | |
|--------------------------|--------------|
| Initial claim filing fee | = \$1,250.00 |
| Counterclaim filing fee | = \$ 375.00 |

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Investec Ernst & Company is a party.

| | |
|------------------|--------------|
| Member surcharge | = \$2,250.00 |
|------------------|--------------|

Pre-hearing process fee = \$ 750.00
Hearing process fee = \$4,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

April 12-13, 2004, joint adjournment request = Waived

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

| | |
|--|--------------|
| Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00 | = \$ 900.00 |
| Pre-hearing conferences: April 2, 2004 1 session | |
| April 7, 2004 1 session | |
| One (1) Pre-hearing session with Panel @ \$1,200.00 | = \$1,200.00 |
| Pre-hearing conference: November 17, 2003 1 session | |
| Total Forum Fees | = \$2,100.00 |

1. The Panel has assessed \$1,050.00 of the forum fees against Claimant.
2. The Panel has assessed \$1,050.00 of the forum fees against Respondent.

Fee Summary

| | |
|-------------------------------------|--------------|
| 1. Claimant is solely liable for: | |
| Initial Filing Fee | = \$1,250.00 |
| Member Fees | = \$7,000.00 |
| Forum Fees | = \$1,050.00 |
| Total Fees | = \$9,300.00 |
| Less payments | = \$9,450.00 |
| Refund Due Claimant | = \$ 150.00 |
| 2. Respondent is solely liable for: | |
| Counterclaim Filing Fee | = \$ 375.00 |
| Forum Fees | = \$1,050.00 |
| Total Fees | = \$1,425.00 |
| Less payments | = \$1,250.00 |
| Balance Due NASD Dispute Resolution | = \$ 175.00 |

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

| | | |
|-------------------------|---|--|
| Eric J. Sussman, Esq. | - | Non-Public Arbitrator, Presiding Chairperson |
| Fred D. Nicolais | - | Non-Public Arbitrator |
| Richard D. Chusid, Esq. | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



Eric J. Sussman, Esq.
Non-Public Arbitrator, Presiding Chairperson

12/17/04
Signature Date

Fred D. Nicolais
Non-Public Arbitrator

Signature Date

Richard D. Chusid, Esq.
Non-Public Arbitrator

Signature Date

December 22, 2004

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

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| Eric J. Sussman, Esq. | - | Non-Public Arbitrator, Presiding Chairperson |
| Fred D. Nicolais | - | Non-Public Arbitrator |
| Richard D. Chusid, Esq. | - | Non-Public Arbitrator |

Concurring Arbitrators' Signatures

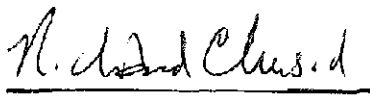
I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Eric J. Sussman, Esq.
Non-Public Arbitrator, Presiding Chairperson

Signature Date

Fred D. Nicolais
Non-Public Arbitrator

Signature Date



Richard D. Chusid, Esq.
Non-Public Arbitrator

12/17/04
Signature Date

December 22, 2004

Date of Service (For NASD Dispute Resolution use only)