

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Berthel Fisher & Company Financial Services, Inc. (Claimant) v. Otto Robert Kozak  
(Respondent)

Case Number: 04-00812

Hearing Site: New York City, New York

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Nature of the Dispute: Member v. Associated Person

**REPRESENTATION OF PARTIES**

Claimant Berthel Fisher & Company Financial Services, Inc. hereinafter referred to as "Claimant": Leslie D. Smith, Esq., Berthel Fisher & Company Financial Services, Inc., Marion, IA.

Respondent Otto Robert Kozak hereinafter referred to as "Respondent": Yitka Kozak, Atlantic Beach, NY. Previously represented by Richard J. Babnick Jr., Esq., Sichenzia Ross Friedman Ference LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: February 5, 2004.

Statement of Answer to Respondent's Counterclaim filed on or about: April 22, 2004

Reply to Amended Counterclaims filed on or about: December 16, 2004.

Claimant signed the Uniform Submission Agreement: February 6, 2003.

Statement of Answer and Counterclaim filed by Respondent on or about: April 6, 2004.

Amended Statement of Answer and Counterclaim filed by Respondent on or about: November 30, 2004.

Respondent signed the Uniform Submission Agreement: April 6, 2004.

**CASE SUMMARY**

Claimant asserted the following cause of action: breach of contract.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim.

In his Counterclaim, Respondent asserted the following cause of action: commissions.

In his Amended Counterclaim, Respondent asserted the following cause of action: breach of contract; violation of NY Labor Law Section 198.

In its Response to the Counterclaim and Amended Counterclaim, Claimant denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$48,521.69, which includes:

1. \$32,800.00 for the principal amount of the Termination Note plus interest at the rate of \$8.99 per day from December 16, 2003 to the date of award,
2. \$4,166.67 for the principal amount of the Initial Note Reminder plus interest at the rate of \$1.14 per day from February 10, 2003 to the date of award,
3. \$10,000.00 for the principal amount of the Follow-up Note plus interest at the rate of \$2.74 per day from February 26, 2003 to the date of award; and

attorneys' fees, costs, and such other relief as deemed fair and equitable.

Respondent Kozak requested dismissal of the Statement of Claim in its entirety with prejudice.

In his Counterclaim, Respondent requested compensatory damages in the amount of \$40,000.00 plus interest from November 25, 2003 to the date of the award, all costs expended in connection with the arbitration proceeding and any further relief the Panel deems just and equitable. In his Amended Counterclaim, Respondent also requested liquidated damages.

Claimant requested that Respondent's Counterclaims be denied, that it be awarded costs, disbursements, and attorneys' fees.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Upon review of the file and the representations made on behalf of the Claimant, the undersigned Arbitrator determined that Respondent has been properly served with the Statement of Claim and received due notice of the hearing and that arbitration in this matter would proceed without said Respondent present, in accordance with the NASD Code of Arbitration Procedure.

The Claimant, the only party to appear at the hearing, has 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, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant compensatory damages and interest in the amount of \$20,374.00.
2. Respondent's Counterclaims are denied 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 | = \$1,000.00 |
| Counter claim filing fee | = \$ 175.00  |

#### **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, Berthel Fisher & Company Financial Services, Inc. is a party.

|                         |               |
|-------------------------|---------------|
| Member surcharge        | = \$ 875.00   |
| Pre-hearing process fee | = \$ 750.00   |
| Hearing process fee     | = \$ 1,000.00 |
| Total Member Fees       | = \$ 2,625.00 |

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

June 7-8, 2005 adjournment requested by Respondent

|                    |             |
|--------------------|-------------|
| Claimant's share   | = \$ 225.00 |
| Respondent's share | = \$ 225.00 |

October 20-21, 2005 adjournment requested by Respondent:

WAIVED

#### **Forum Fees and Assessments**

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

|                                                                                           |             |
|-------------------------------------------------------------------------------------------|-------------|
| One (1) Decision on Discovery-Related Motion on the Papers with the arbitrator @ \$200.00 | = \$ 200.00 |
|-------------------------------------------------------------------------------------------|-------------|

One (1) Pre-hearing session with a single arbitrator @ \$450.00 per session = \$ 450.00  
Pre-hearing conference: November 19, 2004 1 session

One (1) Hearing sessions @ \$450.00 per session = \$ 450.00

Hearing Date: November 21, 2005 1 session

Total Forum Fees = \$ 1,100.00

1. The Arbitrator has assessed \$550.00 of the forum fees to Claimant.
2. The Arbitrator has assessed \$550.00 of the forum fees to Respondent.

### Fee Summary

1. Claimant is solely liable for:

|                                     |                      |
|-------------------------------------|----------------------|
| Initial Filing Fee                  | = \$ 1,000.00        |
| Member Fees                         | = \$ 2,625.00        |
| Adjournment Fee                     | = \$ 225.00          |
| <u>Forum Fees</u>                   | <u>= \$ 550.00</u>   |
| Total Fees                          | = \$ 4,400.00        |
| <u>Less payments</u>                | <u>= \$ 4,075.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 325.00          |

2. Respondent is solely liable for:

|                                     |                    |
|-------------------------------------|--------------------|
| Counterclaim Filing Fee             | = \$ 175.00        |
| Adjournment Fee                     | = \$ 225.00        |
| <u>Forum Fees</u>                   | <u>= \$ 550.00</u> |
| Total Fees                          | = \$ 950.00        |
| <u>Less payments</u>                | <u>= \$ 625.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 325.00        |

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

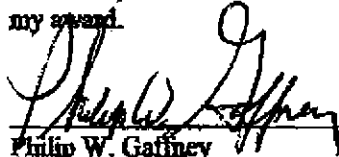
**ARBITRATOR**

Philip W. Gaffney

Non-Public Arbitrator, Presiding Chairperson

**Arbitrator's Signature**

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.



Philip W. Gaffney

Non-Public Arbitrator, Presiding Chairperson



Signature Date

November 29, 2005

Date of Service (For NASD Dispute Resolution use only)