

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

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In the Matter of the Arbitration Between:

Name of the Claimant  
Mark V. Brown

Case Number: 04-08532

Name of the Respondent  
Advest, Inc.

Hearing Site: Tampa, Florida

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Nature of the Dispute: Associated Person vs. Member.

**REPRESENTATION OF PARTIES**

For Mark V. Brown, hereinafter referred to as "Claimant": Bruce W. Barnes, Esq., Bruce W. Barnes, P.A., Clearwater, Florida, until July 19, 2005. Thereafter, Claimant appeared *pro se*.

For Advest, Inc. ("Advest"), hereinafter referred to as "Respondent": Edward Larkin, Esq., Baritz & Colman, LLP, Boca Raton, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: December 20, 2004.

Claimant signed the Uniform Submission Agreement: December 17, 2004.

Statement of Answer, Affirmative Defenses and Counterclaims filed by Respondent Advest on or about: February 18, 2005.

Respondent Advest signed the Uniform Submission Agreement: January 15, 2005.

Reply and Answer and Affirmative Defenses to Counterclaims filed by Claimant on or about: March 14, 2005.

Motion to Dismiss and for Imposition of Sanctions filed by Respondent Advest on or about: November 14, 2005.

Response to Respondent's Motion to Dismiss filed by Claimant on or about: November 28, 2005.

Reply to Claimant's Response to Respondent's Motion to Dismiss filed by Respondent Advest on or about: November 30, 2005.

Renewed Motion to Dismiss and Motion for Summary Judgment filed by Respondent Advest on or about: January 12, 2006.

Response to Respondent Advest's Renewed Motion to Dismiss and Motion for Summary Judgment filed by Claimant on or about: February 2, 2006.

**CASE SUMMARY**

Claimant asserted the following causes of action: 1) defamation; 2) tortious interference; and 3) civil conspiracy. The causes of action relate to the termination of Claimant's employment with Respondent Advest and information contained within Claimant's Form U-5.

Unless specifically admitted in its Answer, Respondent Advest denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Respondent Advest asserted the following causes of action in its Counterclaim: 1) breach of contract/ promissory note; 2) money lent; 3) breach of fiduciary duty; 4) fraud; 5) constructive fraud; 6) unjust enrichment; and 7) indemnification. The causes of action relate to a promissory note between Claimant and Respondent Advest and repayment of alleged monies owed to Respondent from Claimant.

Unless specifically admitted in his Answer to the Counterclaim, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested: 1) unspecified compensatory damages; 2) punitive damages; 3) costs; 4) expungement of the Form U-5; and 5) all other and further relief the undersigned arbitrators (the "Panel") deemed appropriate. Further, in his Answer to Respondent's Counterclaim, Claimant requested that: 1) the Counterclaim of Respondent Advest be dismissed; and 2) Claimant be awarded reasonable attorneys' fees and costs.

Respondent Advest requested that the Panel: 1) dismiss the Statement of Claim in its entirety with prejudice; 2) find that Respondent Advest is entitled to attorneys' fees; and 3) assess all forum fees and costs against Claimant. Respondent Advest requested the following relief in its Counterclaim: 1) \$227,000.00, plus accrued and default interest pursuant to the promissory note; 2) compensatory damages in excess of \$150,000.00 plus pre-judgment interest at the statutory rate; 3) post-judgment interest at the legal rate from the date of entry of the award until satisfaction thereof; 4) costs of collection and this proceeding; 5) punitive damages; 6) referral of Claimant to the NASD for disciplinary action pursuant to Rule 10105; and 7) any other such relief as the Panel deemed fit.

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

On or about December 7, 2005, the Panel entered an order denying Respondent Advest's Motion to Dismiss and for Imposition of Sanctions.

On or about March 9, 2006, the Panel entered an order imposing sanctions against Claimant in the amount of \$1,000.00 for his failure to comply with the Panel's prior discovery orders.

On or about April 7, 2006, the Panel granted Respondent Advest's Renewed Motion to Dismiss and entered an order dismissing Claimant's claims, with prejudice. Additionally, the Panel denied Respondent Advest's Motion for Summary Judgment. This arbitration proceeding proceeded on Respondent's Counterclaim.

Claimant Brown did not appear at the evidentiary hearing conducted on April 25-26, 2006. Upon review of the file, the Panel determined that Claimant Brown received due notice of the hearing, and that arbitration of the matter would proceed without said Claimant present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

The party present at the hearing 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 Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are dismissed, with prejudice.
2. Claimant is liable and shall pay to NASD Dispute Resolution \$1,000.00 in sanctions pursuant to the Panel's March 9, 2006 order.
3. Claimant is liable to Respondent, on the counterclaim, for breach of contract/breach of promissory note and for indemnification and shall pay to Respondent compensatory damages in the amount of \$315,164.71.
4. Any and all claims for relief not specifically addressed herein, including the parties' requests for punitive damages and attorneys' fees, are 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	= \$ 250.00
Counterclaim filing fee	= \$ 1,000.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Advest is a party and a member firm.

Member Surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$2,750.00</u>
Total Member Fees	= \$5,000.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

There were no adjournment fees assessed during these proceedings.

#### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

There were no three-day cancellation fees assessed during these proceedings.

#### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

There were no injunctive relief fees assessed during these proceedings.

**Forum Fees and Assessments**

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

Three (3) Pre-hearing sessions with the Panel @ \$1,125.00 per session = \$ 3,375.00

Pre-hearing conferences: May 2, 2005 1 session  
March 8, 2006 1 session  
April 19, 2006 1 session

Three (3) Hearing sessions @ \$1,125.00 per session = \$ 3,375.00

Hearing sessions: April 25, 2006 2 sessions  
April 26, 2006 1 session

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Total Forum Fees = \$ 6,750.00

The Panel has assessed the total forum fees of \$6,750.00 to Claimant.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs assessed during these proceedings.

**Fee Summary**

Claimant is solely liable for:

Initial Filing Fee	= \$ 250.00
<u>Forum Fees</u>	<u>= \$ 6,750.00</u>
Total Fees	= \$ 7,000.00
<u>Less payments</u>	<u>= \$ 1,425.00</u>
Balance Due NASD Dispute Resolution	= \$ 5,575.00

Respondent Advest is solely liable for:

Counterclaim Filing Fee	= \$ 1,000.00
<u>Member Fees</u>	<u>= \$ 5,000.00</u>
Total Fees	= \$ 6,000.00
<u>Less payments</u>	<u>= \$ 6,000.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

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

**ARBITRATION PANEL**

Maurice M. Feller, Esq.	-	Public Arbitrator, Presiding Chairperson
Noel K. Evans, Esq.	-	Public Arbitrator
Marcy R. Gilroy	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/\_\_\_\_\_  
Maurice M. Feller, Esq.  
Public Arbitrator, Presiding Chairperson

4/30/06  
Signature Date

\_\_\_\_\_/s/\_\_\_\_\_  
Noel K. Evans, Esq.  
Public Arbitrator

5/1/06  
Signature Date

\_\_\_\_\_/s/\_\_\_\_\_  
Marcy R. Gilroy  
Non-Public Arbitrator


5/1/06  
Signature Date

5/1/06  
Date of Service (For NASD Dispute Resolution office use only)

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