

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

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In the Matter of the Arbitration Between:

Management Recruiters of Cleveland-Independence, Inc. Profit Sharing Plan and Trust  
(Claimant) vs. Oppenheimer and Co., Inc. and Ernest A. Mishne (Respondents)

Case Number: 05-02908

Hearing Site: Cleveland, Ohio

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

**REPRESENTATION OF PARTIES**

Claimant Management Recruiters of Cleveland-Independence, Inc. Profit Sharing Plan and Trust hereinafter referred to as "Claimant": Thomas C. Wagner, Esq., Van Duesen & Wagner, LLC, Cleveland, OH.

Respondents Oppenheimer and Co., Inc. ("Oppenheimer") and Ernest A. Mishne ("Mishne") hereinafter collectively referred to as "Respondents": Steven L. Wasserman, Esq. and Todd A. Broski, Esq., Chernett, Wasserman, Yarger & Pasternak LLC, Cleveland, OH.

**CASE INFORMATION**

Statement of Claim filed on or about: May 27, 2005.

Claimant signed the Uniform Submission Agreement: May 10, 2005.

Statement of Answer filed by Respondents on or about: September 8, 2005.

Oppenheimer signed the Uniform Submission Agreement: September 16, 2005.

Mishne signed the Uniform Submission Agreement: August 26, 2005.

**CASE SUMMARY**

Claimant asserted the following causes of action: suitability, misrepresentations, negligence, breach of fiduciary duty, negligent failure to supervise, respondeat superior, and breach of contract. The causes of action relate to internet and technology stocks.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

Claimant requested compensatory damages in an amount in excess of \$100,000.00, punitive damages, costs, and attorneys' fees.

Respondents requested dismissal of the Statement of Claim in its entirety, forum fees, and such other and further relief as the Panel deems just and appropriate.

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

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

1. Respondents are jointly and severally liable for and shall pay to Claimant compensatory damages in the amount of \$69,000.00.
2. Respondents are jointly and severally liable for and shall pay to Claimant attorneys' fees in the amount of \$27,600.00 in accordance with ERISA Section 502(g)(1)[29 USC Section 1132(g)(1)] and the equitable jurisdiction of the Panel.
3. Respondents are jointly and severally liable for and shall pay to Claimant expert witness fees and expenses in the amount of \$6,000.00 in accordance with ERISA Section 502(g)(1)[29 USC Section 1132(g)(1)] and the equitable jurisdiction of the Panel.
4. Any and all relief not specifically addressed herein, including punitive damages, 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	= \$ 225.00
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#### **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, Oppenheimer and Co., Inc. is a party.

Member Surcharge	= \$ 1,100.00
Pre-hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 1,700.00

#### **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 arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$750.00/session	= \$ 750.00
Pre-hearing conference: November 21, 2005 1 session	

Four (4) Hearing sessions with Panel @ \$750.00/session	= \$ 3,000.00
Hearing sessions:	
April 26, 2006	2 sessions
April 27, 2006	2 sessions
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Total Forum Fees	= \$ 3,750.00

1. The Panel has assessed \$3,750.00 of the forum fees jointly and severally to Respondents.

**Fee Summary**

1. Claimant is solely liable for:

<u>Initial Filing Fee</u>	= \$ 225.00
<u>Total Fees</u>	= \$ 225.00
<u>Less payments</u>	= \$ 1,425.00
<u>Refund Due Claimant</u>	= \$ 1,200.00

2. Respondent Oppenheimer is solely liable for:

<u>Member Fees</u>	= \$ 3,550.00
<u>Total Fees</u>	= \$ 3,550.00
<u>Less payments</u>	= \$ 3,550.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

3. Respondents are jointly and severally liable for:


<u>Forum Fees</u>	= \$ 3,750.00
<u>Total Fees</u>	= \$ 3,750.00
<u>Less payments</u>	= \$ 0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 3,750.00


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

**ARBITRATION PANEL**

Jeffrey M. Bain, Esq.	-	Public Arbitrator, Presiding Chairperson
Sanford Heiser	-	Public Arbitrator
Howard A. Slater, MBA	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Jeffrey M. Bain, Esq.  
Public Arbitrator, Presiding Chairperson

  
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Signature Date

\_\_\_\_\_  
Sanford Heiser  
Public Arbitrator

\_\_\_\_\_  
Signature Date

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Howard A. Slater, MBA  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

May 8, 2006  
Date of Service (For NASD Dispute Resolution use only)

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Sanford Heiser	-	Public Arbitrator
Howard A. Slater, MBA	-	Non-Public Arbitrator

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