

**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Edward D. Crary, Jr., Claimant v. Donald A. Itzen, Choice Investments, Inc., Vivian D. Jackson, James G. Kaighin, Michael J. Hundley and James G. Kaighin, Jr.,
Respondents

Case Number: 05-02949

Hearing Site: Phoenix, Arizona

Nature of the Dispute: Associated Person v. Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimant:

Kevin B. Harris, Esq.
Kirkpatrick & Harris
Flagstaff, Arizona

For Respondents:

Patrick Lanier, Esq.
Attorney at Law
Austin, Texas

CASE INFORMATION

Statement of Claim filed: June 3, 2005

Claimant's Uniform Submission Agreement signed: June 3, 2005

Joint Statement of Answer filed by Respondents: September 26, 2005

Respondents Choice Investments, Inc. and Donald Itzen's Joint Uniform Submission Agreement signed: December 28, 2005

Uniform Submission Agreement signed by Respondent Vivian D. Jackson:
December 28, 2005

Uniform Submission Agreement signed by Respondent James G. Kaighin: Undated

Uniform Submission Agreement signed by Respondent Michael J. Hundley:
December 28, 2005

Uniform Submission Agreement signed by Respondent James G. Kaighin, Jr.:
December 28, 2005

CASE SUMMARY

The issues of this arbitration arose out of Claimant's relationship as a registered representative associated with Respondent, Choice Investments, Inc., and certain of its principals and employees. Claimant alleged breach of contract, defamation, breach of fiduciary duty and violation of NASD rules and guidelines resulting in permanent damage to his reputation and ability to find employment.

Respondents denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested expungement of the words "lack of production" from his CRD U-5 form, \$157,500.00 in compensatory damages, punitive damages in the sum of \$472,500.00, damages for pain and suffering in the sum of \$100,000.00, costs in the sum of \$1,000.00, forum fees, and 30% contingency attorney's fees.

Respondent requested dismissal of the Claimant's Statement of Claim in its entirety, and costs, including attorney's fees.

FINDINGS AND CONCLUSIONS

1. **Claimant's allegation of violation of NASD Rules and Guidelines By Respondents**

Claimant failed to allege or identify in the hearing any specific NASD Rules or Guidelines violated by any of the Respondents with respect to Claimant's relationship with Respondents. Thus, the Panel finds that this portion of Claimant's claim was not proven and the Panel finds in favor of all of the Respondents on this claim.

2. **Claimant's allegation of Breach of Contract and Breach of Fiduciary Duty**

Claimant alleged he had an oral employment arrangement with Respondent Choice Investments, Inc. ("Choice"), the alleged terms of which were no production quotas required, his client relations would be supervised in a reasonable manner, and, that Choice had a duty to address any trading problems or client relationship issues with his clients. Both Claimant and Respondent Choice admit and agree that the relationship between them was that of Claimant as an independent contractor and not an employee of Choice. The only signed agreement introduced by the Respondents was a signed commission schedule, which could be rescinded upon 30 days notice. The commission schedule provided for payment of commissions and that the Claimant "pays all of his

expenses" and "is liable for AE [Claimant] errors and other charges encountered in pursuit of his business." Respondent Choice alleged that an unsigned Independent Sales Associate Agreement governed the relationship between the parties, but Respondents admitted that Claimant had never signed the agreement despite repeated efforts of Respondents. Claimant denied that the agreement was ever provided to him, or, that it governed the relationship between Respondent Choice and Claimant. Claimant alleged that a website statement that there were no production quotas was part of the oral agreement between the parties that governed their relationship. Claimant alleges that Respondents breached the oral agreement by mishandling a trading dispute with Claimant's most important client and that the Respondents breached an implied promise not to hold Claimant to production quotas.

The Panel believes that even if there was a contract providing that Choice was required to address any alleged trading problems or client relationship issues, the only credible evidence shows that Choice and its principals and employees acted reasonably with respect to the trading dispute involving Claimant's principal client. First, Choice did not execute the trades in dispute; the trades were executed by Southwest Securities ("Southwest"), the clearing firm, and Claimant knew that Choice did not execute trades. Second, Southwest performed a review of the trades in question and addressed the alleged deficiencies in a reasonable manner in a written response provided to Claimant and his client. The uncontested testimony of Respondents expert demonstrated the reasonable nature of the resolution of the trading dispute. There is no evidence of bad faith or breach of any alleged contract by any of the Respondents with respect to the trades at issue. Further, the signed commission schedule provides that in any event Claimant is responsible for any trading errors, not Choice, although any trading error was corrected by Southwest. The weight of the evidence shows that Choice and the other Respondents did not act improperly or unreasonably with respect to Claimant's client.

The Panel believes that even if the statement "no sales quota pressures", which Claimant alleged was posted on Respondent Choice's website during the period of his association with Choice, constituted a contract between Claimant and Respondents, such a contract cannot be reasonably interpreted to provide that Choice is required to continually maintain its independent contractor relationship with Claimant for an indefinite period of time despite the level of commission production. The 30 day term for the rescission of the commission schedule provides a reasonable term for any oral agreement, even if such an agreement existed. Thus, the termination of the commission schedule on September 10, 2003 and the ultimate termination of Claimant by Respondent Choice more than 30 days later did not breach any express or implied contract term.

Thus, the Panel finds no breach of contract or breach of any fiduciary duty by Choice. Further, there is no evidence whatsoever of any express or implied contract with any

individual Respondent and thus there is no breach of contract or breach of any fiduciary duty by any such Respondents.

3. Defamation

Despite repeated requests from the Panel, Claimant failed to provide to the Panel any legal authority on the elements required to establish a claim of defamation under Arizona, Texas or the law of any other jurisdiction. On this basis alone, Claimant's claim could be dismissed. However, the Panel allowed Claimant an opportunity to present such a claim on the basis that such a claim could be established by a statement relating to Claimant's character or reputation in writing that was false, that was made with intent to harm, that was published to a person not authorized to receive the information, and that caused harm as a result of the publication. The basis for the claim was information on Respondents U-5 dated December 19, 2003 "lack of production" which is the only language Claimant testified was defamatory. Respondents presented uncontested authority that the information submitted to the CRD system with respect to Claimant's termination was subject to at least a qualified privilege and that Respondents could have no liability for such statement made through the CRD system. There was no evidence that any Respondent provided a Form U-5 to any person other than Claimant, and thus there is no evidence of publication.

More fundamentally, the overwhelming evidence demonstrated that the term "lack of production" was not false, but in fact accurately reflected the status of Claimant's business at the time of his termination. Claimant indicated that he could not obtain employment with another firm because of the insufficient level of his business and clients. Thus, Claimant actually admitted that he in effect had a "lack of production" which prevented him from obtaining employment, and thus effectively admitted the accuracy of the U-5 statement. Further, Respondents' expert testified that he believed the statement was accurate in light of the level of business Claimant had at the time of his termination. There was no credible evidence of any retaliatory action by any of the Respondents against Claimant. In fact, the overwhelming evidence is that the termination of Claimant was a legitimate business decision without intent to harm Claimant.

The Panel also notes that there is no objective evidence of any relationship between the accurate U-5 and Claimant's alleged inability to find employment. In fact, the evidence shows that other former brokers with Choice who had "lack of production" as the reason for termination were subsequently able to find employment in the industry. Further, Respondents expert testified that lack of production was a common ground for termination in the industry, but was not a violation of NASD rules and not a reportable event that prevented future hiring. Further, Claimant has never lost his ability to work in the industry and in fact has been employed in the industry since his termination by Choice. In addition, the uncontested testimony is that Choice provided more than

sufficient time for Claimant to transfer his business to another broker, or, resign prior to issuing the U-5, which in any event was not false. The request to seek expungement of the term "lack of production" is denied.

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) Claimant's claims are denied in their entirety.
- 2) Claimant's request for the expungement of the words "Lack of Production" from Claimant's U-5 registration records maintained by the NASD Central Registration Depository ("CRD") based on the defamatory nature of the information is denied.
- 3) Claimant is liable to and shall pay Respondents the sum of \$5,000.00 as reimbursement for costs.
- 4) Except as noted above, the parties shall bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	waived
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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, the member firm Choice Investments, Inc., is a party and the following fees are assessed:

Member Surcharge	= \$ 2,250.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 4,000.00
Total Member Fees	= \$ 7,000.00

Forum Fees and Assessments

The Panel 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:

(4) Decisions on discovery-related motions on the papers with (1) one arbitrator @ \$200.00	= \$ 800.00
Claimant submitted (3) discovery-related motions	
Respondents submitted (1) discovery-related motion	

(1) Pre-hearing conference session with the Panel @ \$1,200.00/session	= \$ 1,200.00
Pre-hearing conference: December 2, 2005	1 session

(9) Hearing sessions @ \$1,200.00/session	= \$10,800.00
Hearings:	
June 27, 2006	3 sessions
June 28, 2006	3 sessions
June 29, 2006	3 sessions

Total Forum Fees	= \$12,800.00
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The Panel assessed \$ 12,800.00 of the forum fees to Claimant.

Fee Summary

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

Forum Fees	= \$12,800.00
Balance Due NASD Dispute Resolution	= \$12,800.00

2. Respondent Choice Investments, Inc. is charged with the following fees and costs:

Member Fees	= \$ 7,000.00
Less payments	= \$(7,000.00)
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

Richard M. Weinroth, Esq.	-	Public Arbitrator, Presiding Chair
Paul T. Sachs, JD	-	Public Arbitrator
Suzanne M. Dallimore	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Richard M. Weinroth, Esq.
Chair, Public Arbitrator

July 10, 2006
Signature Date

Paul T. Sachs, JD
Public Arbitrator

Signature Date

Suzanne M. Dallimore
Non-Public Arbitrator

Signature Date

7/10/06
Date of Service

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Public Arbitrator

7/10/06
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Suzanne M. Dallimore
Non-Public Arbitrator

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Signature Date



Date of Service