

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Nicholas P. Zackoff

92-00913

Name of Respondents/Counter-Claimant

Masterson Moreland Sauer Whisman, Inc.;
Thomas W. Masterson

REPRESENTATION

For Claimant/Counter-Respondent: Nicholas P. Zackoff ("Zackoff") was represented by Broadus A. Spivey, Esq. and Thomas P. Prehoditch, Esq. of Spivey, Grigg, Kelly and Knisely, P.C., located in Austin, Texas.

For Respondents/Counter-Claimant: Masterson Moreland Sauer Whisman, Inc. ("Masterson Moreland") and Thomas W. Masterson ("Masterson") were represented by John J. King, Esq. and Stephen G. Hunt, Esq. of Sullivan, King, Henri & Sadberry, P.C., located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: March 16, 1992.

Claimant/Counter-Respondent's Submission Agreement signed on: March 4, 1992.

Joint Statement of Answer filed by Respondents Masterson Moreland and Masterson on: May 7, 1992.

Respondent/Counter-Claimant Masterson Moreland's Counterclaim filed on: May 7, 1992.

Respondent/Counter-Claimant Masterson Moreland's Submission Agreement signed on: May 6, 1992 by Thomas W. Masterson, Chairman, Masterson Moreland Sauer Whisman, Inc.
Respondent Masterson's Submission Agreement signed on: May 6, 1992.

Reply to Counterclaim filed by Claimant/Counter-Respondent Zackoff on: May 22, 1992.

Zackoff's Amended Statement of Claim filed: June 1, 1992.

Zackoff's Second Amended Statement of Claim filed: November 13, 1992.

Respondents First Amended Answer and Masterson Moreland's First Amended Counterclaim filed: December 9, 1992.

Zackoff's Objection to Filing of First Amended Counterclaim filed: December 21, 1992.

Motion for Leave to File First Amended Answer and First Amended Counterclaim filed: December 29, 1993.

Zackoff's Response to Motion for Leave to File First Amended Answer and First Amended Counterclaim filed: January 4, 1993.

Respondents' Reply to Zackoff's Response to Motion for Leave to File First Amended Answer and First Amended Counterclaim: January 13, 1993.

Zackoff's Reply to Respondents' Reply Regarding Respondents' Motion for Leave to File Amended Pleading filed: January 18, 1993.

Respondents' Reply to Zackoff's Opposition to Respondents' Motion for Leave to File Amended Pleading filed: January 19, 1993.

Respondents' Motion to Dismiss and Memorandum of Law in Support Thereof filed: September 28, 1992.

Zackoff's Response and Brief in Opposition to Respondents' Motion to Dismiss filed: November 2, 1993.

Respondents' Reply Brief in Support of Respondents' Motion to Dismiss filed: November 13, 1992.

Zackoff's Supplemental Response in Opposition to Respondents' Motion to Dismiss filed: December 7, 1993.

Respondents' Motion for Reconsideration of Respondents' Motion to Dismiss filed: April 23, 1993.

Zackoff's Response to Respondent's Motion for Reconsideration of Respondents' Motion to Dismiss filed: April 29, 1993.

Respondents' Reply to Zackoff's Opposition to Reconsideration of Respondents' Motion to Dismiss filed: May 3, 1993.

HEARING INFORMATION

Pre-Hearing Conference: January 25, 1993 for One (1) session
before One (1) arbitrator;
May 10, 1993 for One (1) session before
One arbitrator.

Hearing Dates/Sessions: May 17, 1993 for Two (2) sessions;
May 18, 1993 for Two (2) sessions;

May 19, 1993 for Two (2) sessions;
May 20, 1993 for Three (3) sessions;
May 21, 1993 for Two (2) sessions;
August 30, 1993 for Two (2) sessions;
August 31, 1993 for Two (2) sessions;
September 1, 1993 for Two (2) sessions;
September 2, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant/Counter-Respondent Zackoff alleged that Respondent Masterson and Respondent/Counter-Claimant Masterson Moreland libeled him by making false and defamatory statements in a Uniform Termination Notice for Securities Industry Registration, Form U-5 sent to the National Association of Securities Dealers, Inc. and the Securities and Exchange Commission. The following claims were part of the Form U-5:

1. Zackoff opened account and transacted securities trades with customer without knowing customer or obtaining financial statements;
2. Zackoff purchased stock through broker's brother at another firm;
3. Zackoff had warnings of risks of trading penny and low priced stocks; and
4. Suspicious trades with a convicted securities swindler suggest stock manipulation possibilities.

Zackoff denied the above allegations that were part of the Form U-5 and alleged that because of the damage that resulted to his reputation, the Respondents should have conducted a thorough, proper, and complete investigation of the facts and circumstances surrounding the management of the account before the Form U-5 was filed with the NASD.

Based upon the above allegations, Zackoff asserted claims for libel and defamation; injurious falsehood or business disparagement and tortious interference with business relations; intentional and negligent infliction of emotional distress; and negligence. In addition, Zackoff asserted additional causes of action for malicious prosecution and abuse of process because the charges in the Form U-5 initiated an investigative proceeding by the NASD.

Respondents denied the material allegations of the Claim, alleging that:

1. Masterson Moreland's statements in Zackoff's Form U-5 were made in a

NASD Quasi-judicial proceeding and are absolutely privileged communications upon which no liability can be asserted:

2. When Zackoff became an employee of Masterson Moreland, the account of an individual who was convicted of violation of Federal and Florida securities laws and other crimes was transferred with him from his prior brokerage firm. Zackoff failed to secure information regarding the financial ability of the individual or his corporation's ability to meet their financial obligations, their investment objectives or experience was obtained. Zackoff knew nothing about his customer except his phone number, address and a stated bank reference;
3. Between June 12, 1990 and July 10, 1990, Zackoff's customer purchased \$512,558.00 of shares of CIMM, Inc., an obscure over the counter company. Out of the 127,910 shares purchased, buy orders for 103,810 of the shares were accepted Zackoff while the customer was in default of payment on settlement dates for prior CIMM stock purchases. The customer failed to pay on every settlement date for his purchase of CIMM stock and after selling out the customer's account, Masterson Moreland sustained a \$344,850.49 loss;
4. All the purchases of CIMM stock were made through Zackoff's brother, who was a broker at another firm which was a market maker for CIMM securities;
5. On July 11, 1990, trading was suspended and an investigation of Zackoff's trades with this customer was begun. During this investigation, the customer's extensive criminal record was discovered and Zackoff admitted that he never had financial information on the customer. On July 16, 1990, Zackoff's employment was terminated and Masterson Moreland filed Zackoff's Form U-5 with the NASD on July 17, 1990 as required by law; and
6. The loss of \$344,850.49 in the account of Zackoff's customer was caused by Zackoff's violation of Masterson Moreland's policies and procedures; by his failure to obtain financial information on the customer; his failure to end the transactions in CIMM even though there was no reasonable expectation of payment; and by his failure to eliminate or prevent the unsafe transactions in the account.

In addition, Respondents asserted several defenses, including the following:

1. The claims asserted are barred by the applicable statute of limitations, by Zackoff's own contributory negligence, and the doctrines of laches, estoppel and waiver;

2. By executing a Form U-4, Zackoff authorized his former employers to furnish to the NASD information concerning his character, ability, business activities and general reputation, and the reasons for his termination;
3. The statements in the Form U-5 are true and there is no defamation, and were made by the Respondents in good faith; and
4. The information in the Form U-5 was provided solely to the NASD, as required by federal law and under the NASD rules, and was not published to any other third party.

Masterson Moreland asserted a counterclaim for negligence; gross negligence, wanton and reckless misconduct; breach of fiduciary duty; and breach of contract because of Zackoff's alleged misconduct in regard to his handling of the customer account.

Zackoff denied the allegations of the Counterclaim, alleging that another broker who jointly managed the account with him was responsible for the initial purchase and subsequent coordination of the purchases of CIMM, Inc. stock; all relevant information was received from the customer and forwarded to the compliance and operations personnel at Masterson Moreland; he believed that all payments were made for the stock; and he was unaware of the customer's shady reputation until Masterson told him the day of his termination. In addition, Zackoff asserted several affirmative defenses.

RELIEF REQUESTED

Claimant/Counter-Respondent Zackoff requested entry of an award against Respondents for actual damages in the sum of \$1,000,000.00 for damage to his good name, reputation, business and profession; \$1,734,832.00 for lost earnings and \$100,000.00 for other lost benefits; \$5,000,000.00 for exemplary or punitive damages; attorneys' fees and arbitration expenses; pre-judgment and post judgment interest as allowed by law; and all other relief that he showed himself entitled. Furthermore, Zackoff requested that Masterson Moreland take nothing on its counterclaim and that the Panel deny Masterson Moreland's claim for damages.

Respondents requested that Zackoff take nothing on his claim. In addition, Respondent/Counter-Claimant Masterson Moreland requested entry of an award for compensatory damages in the amount of \$344,850.49 and pre-award interest as permitted by law; post judgment interest on all sums awarded as provided by law; punitive damages of \$1,000,000.00 for Zackoff's wanton and reckless misconduct; costs and reasonable attorneys' fees; and such further relief that it was entitled.

OTHER ISSUES CONSIDERED & DECIDED

On February 10, 1993, the Panel, after reviewing the documents filed, determined that Respondents' Motion for Leave to File Respondents' First Amended Answer and Masterson Moreland's First Amended Counterclaim would be granted.

On January 25, 1993, the Panel determined that Respondents' Motion to Dismiss would be denied.

On May 11, 1993, the Panel determined that Respondents' Motion for Reconsideration of Respondents' Motion to Dismiss would be denied and the original decision of the Panel would stand.

At the hearing on May 21, 1993, Respondents' presented an oral motion to dismiss. After hearing argument, the Panel determined that the Motion would be denied.

Prior to the recess of the hearing on May 21, 1993, the Panel allowed Briefs from the parties which were received by the Panel on July 7, 1993. On July 19, 1993, Respondents' Filed a Brief on the Law Regarding Zackoff's Second Amended Statement of Claim. The Claimant objected to the filing of this brief. Upon review of the Motions and responses, on August 30, 1993, the Panel determined that it would not consider the brief for this hearing.

At hearing on August 30, 1993, Respondents' reargued the Motion to Dismiss. The Panel denied the Motion.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing and hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. and Respondent Thomas W. Masterson are jointly and severally liable for and shall pay to Claimant/Counter-Respondent Nicholas P. Zackoff the sum of \$30,000.00 in actual damages;
2. In addition, Respondent/Counter-Claimant Masterson Moreland Sauer

Whisman, Inc. and Respondent Thomas W. Masterson are jointly and severally liable for and shall pay to Claimant/Counter-Respondent Nicholas P. Zackoff the sum of \$56,000.00 as costs;

3. Furthermore. Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. and Respondent Thomas W. Masterson are jointly and severally liable for and shall pay to Claimant/Counter-Respondent Nicholas P. Zackoff the sum of \$50,000.00 as attorneys' fees. In determining to award attorneys' fees, the Panel considered the arguments of the parties, as well as the authorities cited in the Parties hearing briefs, and determined that the authority existed for and award of attorneys' fees to the Claimant/Counter-Respondent, Nicholas P. Zackoff;

4. All Counterclaims asserted against Claimant/Counter-Respondent Nicholas P. Zackoff are hereby dismissed and denied in their entirety;

5. All claims for punitive and/or exemplary damages are hereby dismissed and denied in their entirety;

6. The Panel orders that Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. amend the Form U-5 it has filed by removing the current language of Paragraph 9 of Page 2 and inserting the following language:

"Broker terminated because customer failed to pay for purchases. Investigation did not implicate broker in any criminal wrongdoing"; and

7. All other costs not explicitly awarded herein shall be borne by the party who incurred the cost.

OTHER COSTS

The NASD shall retain the \$1,000.00 postponement fee previously paid by Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. and Respondent Thomas W. Masterson.

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Pre-Hearing conferences with an arbitrator x \$300.00 per conference = \$600.00; Nineteen (19) Hearing sessions x \$1,500.00 per session = \$28,500.00; Total Forum Fees = \$29,100.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and refund the \$1,500.00 hearing session deposit previously deposited by the Claimant/Counter-Respondent, Nicholas P. Zackoff. In addition, the NASD shall retain the \$500.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. Respondent/Counter-Claimant Masterson Moreland Sauer Whisman, Inc. and Respondent Thomas W. Masterson are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$28,350.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Date

William J. Hawkins, Esq.
William J. Hawkins, Esq.
Industry Arbitrator
Chairperson

November 9, 1993

Shirley A. Castle
Shirley A. Castle
Industry Arbitrator

November 9, 1993

Rozanne L. Nelson
Rozanne L. Nelson
Industry Arbitrator

November 9, 1993

Date of Service of Award: 11-9-93