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N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Roger Ulrich

93-00281

Name of Respondent(s)

Wharton P. Whitaker
Eaton Vance Distributors, Inc.

REPRESENTATION

Claimant, Roger Ulrich ("Ulrich") was represented by John R. Kiefner, Jr., Esq. of Riden, Earle & Kiefner, P.A., St. Petersburg, FL.

Respondent, Eaton Vance Distributors, Inc. ("Eaton Vance") was represented by A. Inge Selden III, Esq. of Maynard Cooper & Gale, P.C. of Birmingham, AL.

Respondent, Wharton Whitaker ("Whitaker") was represented by Douglas F. Seaver, Esq. of Warner & Stackpole, Boston, MA.

CASE INFORMATION

Statement of Claim filed: January 25, 1993. Claimant's Submission Agreement signed on: February 24, 1993.

Statement of Answer and Counterclaim filed by Respondents, Eaton Vance and Whitaker on: May 4, 1993. Respondents' Submission Agreement signed on: April 30, 1993 by Whitaker, individually and on behalf of Eaton Vance.

Claimant/Counter Respondent, Ulrich's Answer to Counterclaim filed on: August 24, 1993.

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HEARING INFORMATION

On May 23, 24 and 25, 1994 and October 12 and 13, 1994 in Tampa, Florida, hearings lasting 14 sessions were conducted.

CASE SUMMARY

Claimant alleged that Respondents were liable for: extortion/defamation per se; breach of contract; tortious interference with advantageous business relationships; and, violation of implied covenant of good faith and fair dealing.

Claimant alleged that Respondents defamed him in connection with their filing of a Form U-5 with the NASD. Claimant contends that the Form U-5 was falsified in an attempt to extort Claimant and persuade him to accept a severance package of relatively small value and that such false U-5 essentially "black-balled" Claimant in the industry. Claimant also contends that he was promised certain monetary overrides for a two year period and that such promise was breached. Additionally, Claimant alleged that Respondents violated an implied covenant of good faith and fair dealing and alleged that Respondents' standard of conduct is governed by NASD rules and common law, which Claimant contends were violated.

Respondents alleged that the termination of Claimant's employment with Eaton Vance was entirely justified due to his failure to comply with company policies and his filing of inaccurate call reports. Claimant was an employee-at-will and Respondents had the absolute right to terminate Claimant's employment at any time, with or without cause. Respondents assert that they have fulfilled all contractual obligations they had to the Claimant and deny that they are liable for breach of any alleged contract with him. Respondents deny that they made any defamatory statements concerning Claimant, and maintain that the statements made were truthful in all respects. Respondents further contend that the statements made are subject to an absolute and/or qualified privilege, were not made with malice or ill will, and were not published in a manner necessary to support a claim for defamation. Respondents deny that they have interfered with Claimant's alleged business relationships in any way, and further assert that Claimant's claim for tortious interference is improper because Respondents were parties to contracts from which the relationships allegedly arose. Respondents maintain that they have honored any obligation of good faith and fair dealing they may have owed to Claimant pursuant to the NASD Rules of Fair Practice, and further assert that there is no private right of action for the alleged violation of those rules.

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As additional defenses, Respondents maintain that: Claimant has failed to state a claim upon which relief can be granted; Claimant has breached his obligations under the terms of his alleged contracts with Eaton Vance; the claims are barred by the doctrines of unjust enrichment, unclean hands, corporate privilege, estoppel, and waiver; the claims are barred by the statute of frauds; Respondents acted in good faith and without malice; Claimant has failed to perform under any alleged contract; Whitaker was within his corporate capacity and acted for the sole purpose of protecting the legitimate business interests of Eaton Vance; and, the facts are insufficient to support a claim for punitive damages.

Eaton Vance counterclaimed and alleged that Ulrich breached his fiduciary duties of good faith, undivided loyalty and fair dealing to Eaton Vance by filing false call reports to hide the fact that he was not working full days, and that Ulrich is also liable for breach of contract and misrepresentation.

RELIEF REQUESTED

Claimant amended his Relief Request at the time of the hearing to clarify that he was requesting actual damages of between \$6,255,000.00 and \$6,478,000.00 plus punitive damages of \$10,000,000.00 plus costs and attorney's fees and dismissal of the counterclaim.

Respondents requested dismissal of the claim and counterclaimed for damages in the amount of \$435,000.00.

OTHER ISSUES CONSIDERED & DECIDED

None

AWARD

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

(1) Respondents, Eaton Vance and Whitaker are found liable, jointly and severally, and shall pay to Claimant the amount of six hundred twenty-five thousand dollars (\$625,000.00), inclusive of interest.

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(2) Respondents, Eaton Vance and Whitaker are also found liable, jointly and severally, for attorney's fees. The panel leaves the amount of such attorney's fees to be decided by an appropriate court of competent jurisdiction.

(3) Respondents, Eaton Vance and Whitaker are also found liable, jointly and severally, and shall pay to the Claimant the further amount of one million two hundred fifty thousand dollars (\$1,250,000.00) for punitive damages. The panel bases its authority to award punitive damages on the Federal Arbitration Act and the case law interpreting that Act. The panel finds that punitive damages are appropriate based on the arbitrary enforcement of company policy towards employees which evidenced a blatant disregard of equal treatment in dealing with the Claimant. The panel also believes that the U-5 was improperly used in the termination negotiations in order to manipulate a settlement with Claimant.

(4) Claimant/Counter Respondent, Ulrich, is found not liable and, therefore, all claims against him are hereby dismissed.

OTHER COSTS

(1) Respondents, Eaton Vance and Whitaker are also found liable, jointly and severally, for costs as detailed in the affidavit of costs filed by Claimant and shall pay to Claimant the further amount of thirteen thousand three hundred ten dollars and ninety seven cents (\$13,310.97).

(2) The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$21,000.00 (14 sessions x \$1,500.00 per session).

(1) Respondents, Eaton Vance and Whitaker are hereby assessed \$21,000.00, jointly and severally, \$1,000.00 of which shall be paid directly to the Claimant as a refund of his hearing session deposit and \$19,250.00 of which shall be paid to the National Association of Securities Dealers, Inc.

(2) The NASD shall retain the \$750.00 hearing session deposit previously paid by Respondents in partial satisfaction of such forum fees.

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(3) The NASD shall retain the \$500.00 non-refundable filing fee paid by the Claimant and the \$500.00 non-refundable filing fee paid by the Respondents.

(4) The NASD shall retain the hearing session deposit of \$1,000.00 paid by Claimant.

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

Concurring Arbitrators' Signatures

Public/Industry

/s/
Roderic Johnson

Industry

/s/
Joseph Amonette

Industry

Dissenting Arbitrator Signature

Arbitrator, Beverly Gordon dissents as to the joint and several finding of the award and would only hold Eaton Vance liable. Additionally, Ms. Gordon dissents as to the award of punitive damages in paragraph (3) of the "Award" section above. In all other respects, Ms. Gordon concurs in this decision.

/s/
Beverly Gordon, Esq.

Industry/Chairperson

Date of Decision: January 11, 1995