

N.A.S.D. AMENDED AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Commonwealth Associates, Inc.

93-03290

Name of Respondent

Lew Lieberbaum & Co., Inc.

Name of Third-Party Respondents

Michael Falk
Kerry J. Dukes

REPRESENTATION

For Claimant and Third-Party Respondents: Sandra D. Grannum, Esq. of Tenzer, Greenblatt, Fallon & Kaplan located in New York, New York.

For Respondent: Leonard A. Neuhaus, Chief Operating Officer and Chief Financial Officer of Lew Lieberbaum & Co., Inc. located in Garden City, New York.

CASE INFORMATION

Statement of Claim filed: August 20, 1993.

Claimant's Submission Agreement signed on: August 18, 1993.

Statement of Answer filed by Respondent Lew Lieberbaum & Co., Inc. on: November 10, 1993.

Respondent, Lew Lieberbaum & Co., Inc.'s Submission Agreement signed on: March 18, 1994.

Counterclaim filed by Respondent Lew Lieberbaum & Co., Inc. on: March 18,

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1994.

Response to Counterclaim filed by Claimant, Michael Falk and Kerry Dukes on: April 1, 1994.

Third-Party Respondents Michael Falk and Kerry Dukes did not file submission agreements as required pursuant to Section 25(b)(3) of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Dates / Sessions: July 27, 1994 / One Session
Sept. 29, 1994 / Two Sessions

Hearing Location: National Association of Securities Dealers, Inc. offices located at 33 Whitehall Street in New York City, New York.

CASE SUMMARY

Claimant alleged that on February 16, 1993 Claimant and Respondent entered into and Underwriting Agreement in connection with the initial public offering of JMAR Industries, Inc. ("JMAR"). Claimant further alleged that the Underwriting Agreement provided that Claimant would underwrite 1,176,470 units of JMAR common stock and Respondent would underwrite 1,176,471 units of JMAR common stock. In addition, the Claimant alleged that the Underwriting Agreement provided that each Underwriter would bear its own expense and that legal fees and disbursements incurred as a result of the underwriting would be shared equally among the Underwriters. Claimant alleged that the JMAR public offering went forward on February 16, 1993. Claimant further alleged that it performed its obligations under the Underwriting Agreement and, pursuant to the Underwriting Agreement, Claimant was entitled to its share of the management and underwriting fee which totalled \$60,000. Claimant further alleged that Respondent refused to make such payments.

Respondent denied all liability to Claimant with respect to the alleged money owed and Respondent's refusal to pay.

Respondent filed a counterclaim against Claimant, Michael Falk ("Falk"), President of Claimant, and Kerry Dukes ("Dukes"), Chief Operating Officer of Claimant. Respondent alleged that on June 14, 1992 Claimant and Respondent entered into an Underwriting Agreement in connection with the secondary public

offering of Homecare Management, Inc. ("HMIS"). Respondent alleged that under the HMIS Underwriting Agreement, Falk and Dukes could charge Respondent's account for Respondent's proportionate share of underwriting obligations for ordinary and reasonable expenses incurred by Claimant in connection with the HMIS offering. Respondent alleged that the HMIS offering went forward on or about June 4, 1992 and Respondent performed all its obligations under the HMIS Underwriting Agreement. Respondent further alleged that it made repeated requests of Falk and Dukes for an accounting of all funds allocated to and/or from the account exclusively maintained by Claimant for Respondent's behalf. Respondent alleged that Falk and Dukes refused to provide an accounting of the underwriting expenses. Respondent alleged that as a result of the actions of Falk and Dukes, Respondent believed that Claimant had perpetrated "financial fraud."

Respondent alleged that Falk agreed to issue to Respondent 5,000 Underwriters Warrants to purchase Providence Health Care, Inc. ("Providence") in recognition of Respondent's support of Providence's common stock subsequent to its public offering as managed by Claimant in February 1992. Respondent further alleged that despite requests to Falk and Dukes to honor the obligation, the Warrants were never received.

Respondent alleged that, with respect to the JMAR offering, that it was understood between the parties that Respondent would be the managing underwriter. Respondent further alleged that several days before the JMAR offering's effectiveness, Respondent was informed by members of Claimant's Corporate Finance Department of a private prior buy out agreement between Falk and several former partners of Claimant. Respondent alleged that said agreement prevented the co-underwriters from receiving their final compensation pursuant to the underwriting and that Respondent reluctantly agreed to reduce its compensation in order for the offering to be declared effective. Furthermore, Respondent alleged that as a result of the material omission by Claimant of its prior private agreement, Respondent was prevented from receiving its full compensation. Respondent also alleged that, subsequent to the JMAR offering on or about February 16, 1993, Claimant proceeded to sell back to Respondent the majority of its position received as part of the underwriting, and thereby, decreased the value of the JMAR units and damaged Respondent's clientele. Respondent further alleged that, as a result of the actions of Falk and Dukes, Respondent believed that Claimant had a predetermined plan to fraudulently misrepresent its interest in the JMAR public offering.

Claimant moved to dismiss Respondent's counterclaim pursuant to Section 39(b) of the Code of Arbitration Procedure because Respondent's counterclaims were made after the appointment of the panel. Claimant maintained that Respondent

failed to state a claim for which relief could be granted. Claimant further maintained that Respondent did not provide justification for personally naming Falk and Dukes and moved for dismissal of Respondent's claims as against Falk and Dukes.

Claimant maintained that, with respect to the HMIS offering, Respondent never requested from Claimant an accounting. Claimant further maintained that Respondent failed to provide specificity, as required by Section 25(a) of the Code, for the claim of financial fraud and, therefore, the claim should be dismissed. Claimant maintained that Respondent did not have a contract for Providence Warrants, and if a unilateral promise was made it was freely revocable as it was not supported by consideration. Claimant further maintained that the Providence Warrants had no value. Claimant maintained that Respondent conceded in its counterclaim that Respondent was informed of the buy out agreement between Falk and several former partners of commonwealth prior to JMAR's offering taking effect. Claimant further maintained that, as Respondent was jointly responsible for doing a due diligence in the JMAR underwriting, Respondent was fully aware of any and all contracts prior to the underwriting becoming effective. Claimant maintained that Respondent conceded that it "agreed to reduce its compensation" and, therefore Respondent's allegation that it did not receive full compensation is baseless.

Claimant maintained several affirmative defenses: Respondent failed to abide by Section 39(b) of the Code; Respondent failed to state a claim for which relief may be granted; and, Respondent failed to satisfy the specificity requirement of Section 25(a) of the Code.

Claimant moved for sanctions against respondents alleging that Respondent's counterclaim had no basis in fact and that Respondent had no basis for naming Falk and Dukes. In addition Claimant alleged that Respondent violated Sections 39(b) and 25(a) of the NASD Code of Arbitration Procedure. Claimant also alleged that Respondent intentionally and in bad faith cast a shadow on the reputations of Claimant, Falk and Dukes and that Respondent's sole motivation in bringing its counterclaim was to force Claimant to withdraw its contract claim, and moved for sanctions against Respondent.

RELIEF REQUESTED

Claimant requested:

1. An award against Respondent for \$60,000.
2. Pre-award interest.

3. Attorney's fees, costs and such other relief as the panel deems proper and just.

Claimant, Falk and Dukes requested:

1. Respondent's counterclaim be dismissed with prejudice.
2. Damages in the amount of \$50,000.
3. Costs, expenses, attorney's fees and such other relief as the panel deems proper and just.

Respondent, in its answer requested:

1. Claimant's claim be summarily dismissed against Respondent.
2. All costs be assessed against Claimant.

Respondent, in its counterclaim requested:

1. An award jointly and severally liable against Falk, Dukes and Commonwealth for the sum of \$1,056,000.
2. Pre-award interest, attorney's fees, costs and such other relief as the panel deems proper and just.

OTHER ISSUES CONSIDERED & DECIDED

At the hearing Respondent withdrew, with full prejudice, its counterclaim against Claimant Falk and Dukes but only as the counterclaim pertained to allegations concerning Homecare and Providence securities. As a result, the only security at issue in Respondent's counterclaim was JMAR.

AWARD

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

1. Respondent is liable and shall pay to Claimant the sum of \$47,929.41 in compensatory damages.

2. Respondent is liable to Claimant for interest at the rate of 6% per annum if not paid 30 days from the date of the award.
3. Respondents counterclaim against Claimant, Falk and Dukes is dismissed.
4. Each party shall bear its respective attorneys' fees and costs.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

3 sessions X \$1,000 = \$3,000 minus hearing session deposit of \$600 paid by Claimant minus \$1,000 hearing session deposit paid by Respondent = net \$1,400 due.

Forum fees Assessed Against:

1. Respondent is assessed \$1,400 which represents the balance of the forum fee due. Respondent is liable and shall pay to the NASD the sum of \$1,400.

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


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Concurring Arbitrators' Signatures

Name

Industry Chairperson


Barbara J. Gleams, Esq.

11/7/94

Name

Industry Panelist

Kevin C. Ahearn

Name

Industry Panelist

Alvin Meentemeier

Date of Decision: NOVEMBER 22, 1994

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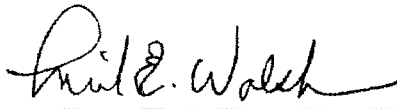
NASD Award #93-03290

STATE OF: *New York*

SS:

COUNTY OF: *New York*

On this 7th day of *NOVEMBER*, 1994, before me personally appeared **Barbara J. Glenns, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.



NEIL E. WALSH
Notary Public, State of New York
No. 31-4849267
Qualified in New York County
Commission Expires Jan. 27, 1996

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Kevin C. Ahearn** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Alvin Meentemeier** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.