

**NATIONAL ASSOCIATION OF SECURITIES DEALERS
AWARD**

In the Matter of the Arbitration Between

SCOTT LOWRY and MORTON KIRSCHENBAUM,

Claimants,

v.

NASD No. 93-4256

EXPANSION CAPITAL SECURITIES and
MICHAEL MEYER,

Respondents.

Representation

For Claimants: Kenneth Nemzer, Esq., Tiburon, California

For Respondents: Edward King, Esq. and Susan Stark, Esq. of the Law Offices of Edward King, San Francisco, California

Case Information

Statement of Claim filed: October 13, 1993, First Amendment to Claim for Damages filed on October 10, 1994

Claimants' Submission Agreement signed: October 8, 1993

Statement of Answer filed on: February 7, 1993, Amended Answer filed on November 4, 1994

Respondents' Submission Agreement signed on: February 2, 1994

Hearing Information

Prehearing Conference Date(s)/Sessions: November 3/one, 4/one, 11/one, 14/one, 1994

Hearing Date/Sessions: November 15/two, 16/two, 1994, December 1/two, 2/two, 1994

Hearing Location: San Francisco, California

Case Summary

Claimants alleged:

Defamation, malicious prosecution, abuse of process and breach of contract. Respondents published an April 22, 1992 letter accusing Claimants of attempted illicit trading practices and unprofessionalism, of walking away from personal liabilities and other misdeeds, and that they should be permanently barred from the securities industry. Claimants were licensed securities brokers and enjoyed good reputations generally and in their occupations.

Respondents caused the April 22, 1992 letter to be read by National Association of Securities Dealers (NASD) officials and to be put in Claimants' files with the NASD. Respondents made slanderous remarks and accusations by imputing lack of qualifications and dishonest and unethical behavior with reference to their professions. Respondents also filed a claim in NASD arbitration against Claimants alleging misrepresentation in a securities transaction, which was ended favorably to Claimants. Claimant Kirschenbaum was accused, falsely, on form U-5 filed with the NASD, that he did not pay for a loss in his account that he caused.

Respondents denied all allegations of wrongdoing in the Statement of Claim and alleged:

The purported defamatory statements complained of in the Statement of Claim were true and judicially privileged in that said statements were made in the course of anticipated proceedings before the NASD. The purported defamatory statements were made by Respondents without any feelings of hatred or ill will for Claimants and made in good faith, honestly and without malice. Furthermore, the publication was made in the course of anticipated proceedings before the NASD and thus was privileged.

Relief Requested

Claimants requested:

1. General damages for defamation to each Claimant;
2. Special damages for malicious prosecution and abuse of process (abuse of process subsequently withdrawn) to each Claimant;
3. Special damages for breach of contract to Claimant Kirschenbaum;
4. Punitive damages to each Claimant;
5. Costs of arbitration;

6. Such further relief as the panel deems proper.

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

At the arbitration hearing, Respondents requested a ruling from the panel that statements made in the letter of April 22, 1992 to the NASD and the U-5 form for Morton Kirschenbaum were absolutely privileged and/or subject to a qualified privilege. The panel asked for and received legal briefs on the issue, and after full consideration, denied the request regarding the absolute privilege. The panel subsequently ruled that the statements are not subject to a qualified privilege.

Also at the arbitration hearing, the panel ruled, after legal briefs were requested and received from the parties, that the defamation claims in this action stem from the transactions described in the first paragraph of the letter of April 22, 1992. Consequently, all requests for discovery relating to additional transactions were denied.

At the conclusion of Claimants' case-in-chief, Respondents made a Motion to Dismiss all claims. The panel granted the motion with respect to Claimant Morton Kirschenbaum's claim for breach of contract. The motion was denied as to the remaining claims.

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. Claimant Morton Kirschenbaum has established that the statements in the April 22, 1992 letter by Michael Meyer to the NASD are defamatory. Respondents Expansion Capital and Michael Meyer are jointly and severally liable for and shall pay Claimant Morton Kirschenbaum the sum of \$30,000;
2. Claimant Morton Morton Kirschenbaum failed to establish his malicious prosecution claim which is dismissed;
3. Claimant Scott Lowry has established that the statements in the April 22, 1992 letter by Michael Meyer to the NASD are defamatory. Claimant Scott Lowry has also established his malicious prosecution claim. Respondents Expansion Capital and Michael Meyer are jointly and severally liable for and shall pay Claimant Scott Lowry the sum of \$30,000 for these two claims;
4. Each and every other claim, including the claims for punitive damages, are dismissed;
5. The parties shall each bear their respective attorney's fees;
6. The parties shall each bear their respective costs.

Other Costs

None.

Forum Fees

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc., shall refund the \$600 hearing session deposit previously paid by the claimant. Forum fees are assessed against:

Respondents, jointly and severally, for \$3,600,

calculated as follows: four prehearing sessions at \$300/prehearing session, plus four hearing sessions at \$600/hearing session, equals \$3,600.

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

Arbitration Panel

<i>Name</i>	<i>Public/Industry</i>
Bette Roth	Public
Donald Green	Public
George Guth	Industry

Concurring Arbitrators' Signatures



Bette Roth

Donald Green

George Guth

Date of Decision:

Date Served: 12/29/94

Other Costs

None.

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Donald Green	Public
George Guth	Industry

Concurring Arbitrators' Signatures

Bette Roth

Donald Green

George Guth

Date of Decision:

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Other Costs

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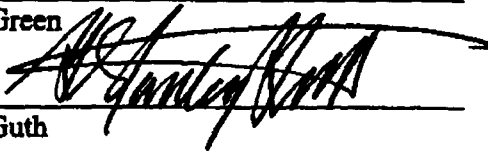
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