

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

The Principal/Eppler, Guerin & Turner

93-05070

Name of Respondent/Counter-Claimant

Wayne A. McIntosh

REPRESENTATION

Claimant Principal/Eppler, Guerin & Turner ("P/EGT" or "Claimant") was represented by Joel P. Hoxie, Esq. and Brian J. Campbell, Esq., of Snell & Wilmer, Phoenix, Arizona.

Respondent Wayne A. McIntosh ("McIntosh" or "Respondent") was represented by Thomas R. Canham, Esq. and James J. Pisanelli, esq. of Schreck, Jones, Bernhard, Woloson & Godfrey, CHTD., Las Vegas, Nevada.

CASE INFORMATION

Statement of Claim filed: December 8, 1993.

Claimant's Submission Agreement signed on: December 6, 1993 by Brian J. Hurst, Senior Vice President of The Principal/Eppler, Guerin & Turner.

Statement of Answer and Counterclaim filed by Respondent, Wayne A. McIntosh on: April 8, 1994.

Respondent, Wayne A. McIntosh's, Submission Agreement signed on: April 8, 1994.

Claimant's Answer to Respondent's Counterclaim filed on: May 3, 1994.

HEARING INFORMATION

Hearing Dates/Sessions: October 12, 1994 for Two (2) Sessions; and
October 13, 1994 for Two (2) Sessions.

Hearing Location: Phoenix, Arizona.

CASE SUMMARY

P/EGT alleged that Respondent McIntosh had failed to pay the sums due on a promissory note executed as part of his employment with P/EGT. P/EGT specifically alleged that:

1. On or about November 2, 1992, in connection with McIntosh's employment, P/EGT advanced McIntosh the sum of \$200,000.00 and McIntosh signed a promissory note to P/EGT in that amount. P/EGT agreed that on November 2, 1993, if McIntosh was still in its employ, it would forgive one-third of the principal amount of said note; likewise, on November 2, 1994 and November 2, 1995, if McIntosh was employed by P/EGT on such dates, it would forgive another one-third of the principal of said note so that at the end of three years McIntosh would owe no sums whatsoever;
2. One-third of the Note had been forgiven when McIntosh resigned from P/EGT in November 1993, leaving an unpaid balance of \$133,333.00;
3. Respondent has informed P/EGT in writing that he will not repay the balance of the Note.

Respondent denied owing any sums to P/EGT, alleging that:

1. McIntosh is not obligated under the law to repay P/EGT any amounts allegedly due and owing under the Note.

Respondent asserted the following affirmative defenses:

1. The Statement of Claims fails to state a claim against McIntosh upon which relief can be granted;
2. Claimant's claims are barred by waiver and estoppel;
3. Claimant's claims are barred by certain setoffs;
4. Respondent alleges breach of contract, accord and satisfaction, breach of condition precedent, and unclean hands.

Respondent counterclaimed:

- 1. P/EGT breached its contract and promises it made to McIntosh at the beginning of his employment. Specifically, P/EGT damaged McIntosh's ability to maintain his high-yield bond practice; P/EGT failed to support McIntosh's commercial paper transactions; P/EGT failed to transfer McIntosh's commodities license to P/EGT;**
- 2. P/EGT made intentional misrepresentations to McIntosh in order to induce him to accept employment at P/EGT; P/EGT breached an implied covenant of good faith and fair dealing; P/EGT interfered with the contractual and business relationships and prospective economic advantage of McIntosh.**

Claimant denied any misrepresentations or breaches of any promises were made to Claimant, alleging that:

- 1. During Respondent's interviews with P/EGT, no promises were made regarding his commercial paper business or his commodities license;**
- 2. P/EGT, in order to satisfy their responsibilities for supervision and suitability under the rules of the NASD and NYSE, sent risk acknowledgment letters to McIntosh's junk bond customers; McIntosh agreed to and participated in the drafting of these letters;**
- 3. To P/EGT's knowledge, none of McIntosh's customers closed or transferred their accounts in response to these letters.**

RELIEF REQUESTED

In its Statement of Claim, Claimant requested an entry of award against the Respondent in the amount of \$133,333.00 plus interest at the rate of 10% per annum; and attorney's fees, costs, and expenses.

In response to the Statement of Claim, McIntosh requested that the Statement of Claim be dismissed in its entirety and that he be awarded all costs and attorney's fees incurred in this matter.

In its Counter-claim, McIntosh requested an entry of award against P/EGT in the amount of \$2,700,000.00 and reasonable attorney's fees, costs, and expenses incurred in this matter.

In response to the Counter-claim, P/EGT requested that the counterclaim be dismissed in its entirety and that they be awarded all costs and attorney's fees incurred in this matter.

OTHER ISSUES CONSIDERED & 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 original remain on file with the NASD.

AWARD

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

1. Respondent Wayne A. McIntosh is liable for and shall pay to Claimant nothing (\$0) on the Claim by Claimant The Principal/Eppler, Guerin & Turner.
2. Claimant The Principal/Eppler, Guerin & Turner, Inc. is liable for and shall pay to the Respondent nothing (\$0) on the Counterclaim by the Respondent Wayne A. McIntosh.
3. Any relief not specifically granted is hereby denied.

OTHER COSTS

The parties shall bear their own costs of arbitration, including attorney's fees, except for those specifically enumerated herein.

Respondent Wayne McIntosh is liable for and shall pay to Claimant the sum of \$1,500.00 as reimbursement of one-half of the forum fees incurred in this arbitration.

FORUM FEES

Pursuant to Section 44(c) of the NASD Code of Arbitration Procedure (the "Code"), the following Forum Fee(s) are assessed: Four (4) Hearing Sessions x \$750.00 per session = \$3,000.00; Total Forum Fees = \$3,000.00.

Pursuant to Section 44(c) of the Code, the NASD shall retain the \$500.00 filing fee and the \$750.00 hearing session deposit previously deposited by Claimant.

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the NASD shall retain the Counterclaim filing fee in the amount of \$500.00, and shall REFUND the Counterclaim hearing session deposit in the amount of \$1,000.00 previously deposited by McIntosh.

Claimant is liable for and shall pay to the NASD additional forum fees of \$2,250.00.

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

Concurring Arbitrators' Signatures

Name

Date

Mark Leibsohn /s/
Mark Leibsohn, Esq.
Industry Arbitrator
Chairperson

November 20, 1994

F. James Clough/s/
F. James Clough
Industry Arbitrator

November 11, 1994

Arnold J. Weinberg /s/
Arnold J. Weinberg, Esq.
Industry Arbitrator

November 11, 1994

Date of Service:

11/23/94