

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Ira Bernard Newman

95-04652

Name of Respondents

Duke & Co. Inc.

Victor Wang

Gregg Thaler

REPRESENTATION

For Claimant Ira Bernard Newman ("claimant") appeared Brian S. Fraser, Esq., of the law firm Richards, Spears, Kibbe & Orbe located in New York, New York.

For Respondents Duke & Co., Inc. ("Duke"), Victor Wang ("Wang") and Gregg Thaler ("Thaler") appeared Charles J. Hecht, Esq., of the law firm Hecht & Steckman, P.C. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on October 2, 1995. Claimant's Submission Agreement was signed on September 21, 1995.

Respondents Joint Statement of Answer and Counterclaim was filed on December 4, 1995. Respondent Duke's Submission Agreement was signed on November 28, 1995. Respondent Wang's Submission Agreement was signed on November 29, 1995. Respondent Thaler's Submission Agreement was signed on November 28, 1995.

HEARING INFORMATION

Pre-Hearing Conference:	August 29, 1996	-	1 Session
Hearing Dates/Sessions:	September 19, 1996	-	2 Sessions
	September 20, 1996	-	2 Sessions
	November 7, 1996	-	2 Sessions
	November 8, 1996	-	2 Sessions
	December 12, 1996	-	2 Sessions
	December 13, 1996	-	2 Sessions

The hearings were held at the offices of NASD Regulation, Inc.

CASE SUMMARY

Claimant alleged that he was wrongfully terminated by respondents in March 1995. Claimant further alleged that respondents falsely and maliciously stated on his Form U-5, and to his new employer, that he negligently failed to draw down all available Duke funds held at Duke's clearing firm Adler Coleman Clearing Corporation ("Adler Coleman"). Claimant also alleged that in or around February 1995, rumors were circulating regarding the financial health of Adler Coleman and that in response to these rumors, he began to draw down excess funds from Duke's proprietary trading accounts at Adler Coleman, despite Wang's statements that he should not take action with respect to the rumors. Claimant asserted that he also inquired and learned that Duke proprietary funds held at Adler Coleman would not be covered by the Securities Investor Protection Corporation ("SIPC") if Adler Coleman were to become insolvent.

Claimant argued that after learning of the absence of the SIPC protection, Wang instructed him on or about February 22, 1995 to withdraw as much of Duke's proprietary money as possible from Adler Coleman. Claimant contended that he spoke with Charles Sanacore ("Sanacore"), Adler Coleman's director of Correspondent Services, who told him that he could not reduce Duke's deposit account because it was at a level then required by Adler Coleman, and was unwilling to lower the required level at that point. According to claimant, he asked Sanacore if Duke could receive any of the money in its commission account and was told that Duke would not be able to retrieve any money from its commission account until after the settlement date of the monthly period. Claimant contended that he was fired on March 9, 1995, citing the fact the Duke had not received any money from its commission account prior to Adler Coleman's bankruptcy on February 27. Claimant further alleged that he was subject to harassment and psychological abuse at the hands of respondents.

Respondents Duke, Wang, and Thaler (collectively referred to as "respondents") maintained that under claimants Employment Agreement, Duke was free to fire him for any lawful reason or for no reason at all. Respondents further maintained that the loss occurred because claimant unnecessarily segregated the commission account from Duke's proprietary trading accounts. Respondents also maintained that claimant knew or should have known the commission funds were immediately retrievable from Adler Coleman. Respondents contended that under New York law the statements set forth in claimant's Form U-5 are absolutely privileged information and may not be subject to a defamation claim. Respondents further contended that no defamatory remarks were made about claimant, however, even if they were made, they are protected as a qualified privileged communication under New York law.

Respondents in their counterclaim against claimant alleged that weeks before Adler Coleman filed for bankruptcy, rumors had been circulating as to Adler's failing financial strength. Respondents further alleged that as soon as Wang learned of these rumors, he initiated a multi-faceted plan by which Duke would ascertain its protection under SIPC and withdraw all permissible monies from Adler Coleman. Respondents also alleged that much of Wang's plan centered on claimant's performance as the firm's chief financial officer. Respondents asserted that claimant unnecessarily segregated Duke's commission account, failed to apprise Wang of the existence of the commission account, and negligently failed to retrieve \$1.2 million in the commission account.

Claimant in his reply to the counterclaim maintained that he did not fail to withdraw the \$1.2 million from Duke's accounts at Adler Coleman in the weeks before Adler's bankruptcy. Claimant further maintained that he dutifully attempted to, and in fact did, draw as much of Duke's proprietary money as possible from Adler Coleman. Claimant also maintained that he did not unnecessarily segregate Duke's commission account at Adler Coleman, rather the trading and commissions accounts were dictated by Adler Coleman in accordance with its standard practice for brokerage firms. Claimant contended that he informed Wang of the commission account on several occasions, both before and after the Adler

Coleman's bankruptcy. Claimant further contended that he was not an employee at will under the Employment Agreement.

RELIEF REQUESTED

Claimants requested (1) payment of salary due for the period from March 1 through March 9, 1995, plus 25% penalty under New York State law for wrongful withholding of salary due; (2) reimbursement of business expenses incurred in February 1995; (3) severance payments of one year's salary \$110,000.00; (4) costs of one year's health insurance coverage for him and his family; (5) \$30,000.00 for bonus due to him for work performed in 1994 or, in the alternative, payment of 5% of Duke's pre-tax income for the most recently completed fiscal year; (6) payment reflecting salary for claimant accrued, unused vacation time for 1994, 1994, 1995; (7) interest on these amounts from the dates the payments were due; (8) a revised Form U-5; (9) damages for defamation in the amount of 1 million; (10) \$500,000.00 for emotional distress; (11) \$5,000,000.00 in punitive damages; (12) claimants reasonable costs and attorneys' fees.

Respondents in their counterclaim requested \$1.2 million, plus attorneys' fees and costs of this arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Respondents' motion to dismiss punitive damages claim was filed on December 4, 1995. The arbitrators considered respondents' motion to dismiss claimant's punitive damages claim and determined to deny it.

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 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:

Claimant is awarded against Respondent Duke & Co., Inc. ("Duke") \$110,000.00 for severance pay, \$22,500.00 for unpaid bonus (\$30,000.00 less \$7,500.00 for withholding the computer password), plus \$7,800.00, at 6.4 % simple interest for 11 months, for interest to date of award, for a total of \$140,300.00.

In addition, Claimant is awarded against Respondent Duke \$20,000.00, without interest, as reimbursement for legal fees for, among other items, responding to voluminous unnecessary and, in some instances, misleading legal memoranda submitted by Respondent. CS First Boston Corp. v. Schuman, (Sup. Ct. N.Y. No. 1996), Omansky, J.S.C., NYLJ 2/10/97, p.28, col.5.

Claimant is also awarded against Respondent Duke \$12,500.00, without interest, for defamation by Respondents Duke and Gregg Thaler. Duke is ordered to file, within 30 days of the date of this award, a termination notice, Form U-5, for Claimant, amending the previously filed Form U-5 dated April 10, 1995 and July 13, 1995, eliminating from

both reports the entry in item 12 following "Provide an Explanation"; change the "Yes" to "No" in item 15 on the July 13, 1995 report; eliminating from the Disclosure Reporting Page dated July 13, 1995 the responses to items 3,4,5,6,7 and 9, substituting the phrase "Termination without cause" for "Termination with cause" in item 8(c), and deleting the entry in item 9 and inserting the following in place thereof: "The parties submitted their dispute to arbitration before a panel of NASD arbitrators and the dispute was resolved in favor of Ira Bernard Newman." Further, Respondent Duke shall, within 30 days of the date of this award, furnish a copy of the amended Form U-5 to Claimant, and take steps to cause the Central Registration Depository to classify the two previously filed Form U-5 as non-reviewable.

All other claims and counterclaims for relief, including punitive damages, are denied.

FORUM FEES

Pursuant to Section 10205 of the Code of Arbitration Procedure, the arbitrators have determined that the NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fees previously deposited by claimant and respondents and the arbitrators have assessed the following Forum Fees.

1 Pre-Hearing conference X \$300.00	=	\$300.00
12 Hearing Sessions X \$1,500.00	=	\$18,000.00
minus hearing deposits 2 X \$1,500.00	=	<u>\$3,000.00</u>
Total outstanding	=	\$15,300.00

The arbitrators have determined to assess the entire cost of the arbitration against Duke & Co., Inc.

Therefore Duke be and hereby is liable and shall pay to NASD Regulation, Inc. the sum of \$15,300.00. Respondent Duke shall reimburse claimant in the sum of \$1,500.00 which represents the hearing session deposit previously submitted by claimant.

ARBITRATORS' SIGNATURES



James Dolan, Esq.
Public Chairman

Robert Bartkus, Esq.
Public Panelist

Herbert Geiger, Esq.
Industry Panelist

I, James Dolan, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



James Dolan, Esq.

I, Robert Bartkus, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Robert Bartkus, Esq.

I, Herbert Geiger, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Herbert Geiger, Esq.

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Public Chairman




Robert Bartkus, Esq.
Public Panelist

Herbert Geiger, Esq.
Industry Panelist

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James Dolan, Esq.

I, Robert Bartkus, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



Robert Bartkus, Esq.

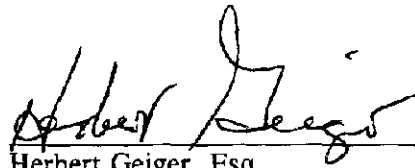
I, Herbert Geiger, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Herbert Geiger, Esq.

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Public Chairman

Robert Bartkus, Esq.
Public Panelist



Herbert Geiger, Esq.
Industry Panelist

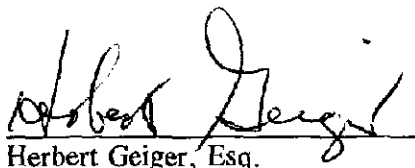
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James Dolan, Esq.

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Robert Bartkus, Esq.

I, Herbert Geiger, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.



Herbert Geiger, Esq.