

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

John McKittrick,

Claimant and Counter-Respondent,

and

No. 95-05274

H.J. Meyers & Co., Inc.,

Respondent and Counter-Claimant.

REPRESENTATION OF PARTIES

Claimant, John McKittrick, was represented by Bruce M. Daniel, Esquire of Daniel & Daniel, located in Houston, Texas.

Respondent, H.J. Meyers & Co., Inc., was represented by Stephen C. Voris, Esquire of Burke, Warren & MacKay, located in Chicago, Illinois.

CASE INFORMATION

John McKittrick's Statement of Claim was filed on or about November 6, 1995.

John McKittrick's Submission Agreement was signed on October 16, 1995.

H.J. Meyers & Co., Inc.'s Statement of Answer and Counterclaim was filed on or about April 8, 1996.

H.J. Meyers & Co., Inc.'s Submission Agreement was signed on December 4, 1995 by Michael F. Brown, General Counsel of H.J. Meyers & Co., Inc.

HEARING INFORMATION

The hearing was held on April 28, 1997 for two (2) sessions and on April 29, 1997 for three (3) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

Claimant, John McKittrick, ("Claimant") brought this action to recover losses allegedly resulting from the common law fraud and deceit and breach of contract committed by Respondent, H.J. Meyers & Co., Inc. ("Respondent").

Claimant alleged that Respondent solicited him away from his previous employer, Howard, Weil, Labouisse, Friedrichs, Inc., where he was a bond trader, in order to fulfill Respondent's desire to enter the fixed income market. According to Claimant, on approximately September 1, 1994 he entered into an employment agreement with Respondent whereby he was to receive a fixed monthly salary of \$5,000 and a quarterly bonus at a rate of \$5,000 or 20% of his gross commissions, which ever was greater, for a term of one year. Claimant then began working for Respondent's Houston office in its new division called Pinnacle Capital Markets Group ("Pinnacle"). Claimant asserted that on approximately January 19, 1995, despite his protest, his annual salary was cut and he never received another paycheck. Claimant argued that in addition to Respondent's breach of their employment agreement, Respondent also failed to fulfill its representations upon which Claimant relied by not allowing its traders access to retail brokers, by not finding qualified personnel for the Pinnacle office, by not allowing the Pinnacle office to use Respondent's other offices to conduct business, and by not devoting substantial funds to the Pinnacle office. According to the Claimant, Respondent refused his demands to honor the terms of the agreement and insisted that Claimant agree to modify his compensation package. Despite the lack of compensation, Claimant allegedly stayed with Respondent attempting to resolve the matter. Finally, on March 23, 1995, when Respondent allegedly delivered an ultimatum to all senior Pinnacle traders to either modify the agreement and accept a positions as commission employees or leave, all five senior traders left the employ of the Respondent.

Respondent denied the allegations set forth in the Statement of Claim as they related to any wrongdoing on its part. Respondent conceded that it entered into an employment relationship with Claimant. However, Respondent contended, Claimant's contract was not guaranteed. According to Respondent, Claimant's employment was always based upon his performing his obligations under the contract. Respondent asserted that by failing to perform as he had represented, Claimant himself breached the contract thereby relieving Respondent of its obligations. Moreover, Respondent argued, the contract was void from the outset because Claimant knowingly and fraudulently induced Respondent to enter into the employment contract based upon false and misleading representations as to the amount of business he assured Respondent he would generate for the Pinnacle operation.

Respondent brought its counterclaim to recover amounts allegedly lost in the Pinnacle operation as a result of Claimant's negligent misrepresentation and breach of contract.

According to Respondent, Claimant breached his employment agreement by failing to generate the revenues which he represented would be achieved. Respondent asserted that, as a result of Claimant's negligent misrepresentations, it suffered damages in salary paid to unqualified employees and other expenses incurred in connection with the failure of Pinnacle. Respondent further asserted that, as a result of Claimant's breach of the employment agreement, it suffered damages and was entitled to the entire amount it lost in the Pinnacle operation.

RELIEF REQUESTED

Claimant, John McKittrick, requested an award for: actual damages for salary in the amount of \$36,309.20; actual damages for bonus in the amount of \$150,000; actual damages for expenses not reimbursed in the amount of \$914.56; consequential damages in the amount of \$10,000; punitive and exemplary damages in the amount of \$591,671.28; interest; costs; and attorney's fees.

Respondent, H.J. Meyers & Co., Inc., requested an award for: salary paid to John McKittrick in the amount of \$35,000; costs; and attorneys' fees incurred in this arbitration.

OTHER ISSUES CONSIDERED AND DECIDED

Prior to the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to consolidate this case with NASD Arbitration Case Numbers 95-04458 and 95-05198. After reviewing the submissions of all parties, and in accordance with § 10314(d)(3) of the NASD Code of Arbitration Procedure, the Director of Arbitration preliminarily determined that the motion was denied and that these matters were to proceed separately.

Respondent, H.J. Meyers & Co., also filed claims against Third-Party Respondents, James E. Winchester and Clifford D. Bequette, in this matter. Third-Party Respondent, James E. Winchester, filed a Counter-Claim against H.J. Meyers & Co. Pursuant to H.J. Meyers & Co.'s letter dated April 24, 1997, Clifford D. Bequette's letter dated April 25, 1997 and James E. Winchester's letter dated April 30, 1997, said parties agreed to voluntarily dismiss their claims against one another with prejudice.

On or about April 15, 1997, Respondent, H.J. Meyers & Co., Inc., moved to dismiss the proceeding or in the alternative to exclude documents and evidence. On or about April 24, 1997, the undersigned arbitrators considered the motion as well as the related submissions and decided to deny the motion.

After the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to bar John McKittrick from disseminating the transcripts, moved to strike all references to illegally taped conversations and moved for sanctions. On or about May 16, 1997, the undersigned panel of arbitrators denied these motions.

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(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

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. That H.J. Meyers & Co. is liable for and shall pay to John McKittrick the sum of \$106,000 in actual damages;
2. That H. J. Meyers & Co., Inc.'s Counterclaim is hereby denied in its entirety and dismissed with prejudice;
3. That the parties shall bear their own costs including attorneys' fees except for forum fees, which are addressed below; and
4. All other claims and requests for relief not specifically awarded here are, and each of them, hereby denied in their entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There were five (5) hearing sessions x \$1,000 = \$5,000 in total forum fees. Pursuant to § 10205(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to § 10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by John McKittrick.

Pursuant to § 10333 of the Code, H.J. Meyers, & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$500.

Pursuant to § 10205(c) of the Code, H.J. Meyers & Co., Inc. is liable for and shall pay to the NASD

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Regulation, Inc. Office of Dispute Resolution the non-refundable filing fees in the amount of \$1,000.

Pursuant to § 10205(c) of the Code, H.J. Meyers & Co., Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$4,000.

Pursuant to § 10205(c) of the Code, H.J. Meyers & Co. is liable for and shall pay to John McKittrick the sum of \$1,000 as reimbursement of the hearing session deposit.

James E. Winchester is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution, pursuant to § 10205(c) of the Code, the non-refundable filing fees in the amount of \$500.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

William J. Hawkins, Esquire
William J. Hawkins, Esquire
Chairperson
Industry Arbitrator

June 30, 1997
Dated: *h.*

James M. Alexander
James M. Alexander
Panelist
Industry Arbitrator

June 30, 1997
Dated:

Larry J. Sklar
Larry J. Sklar
Panelist
Industry Arbitrator

June 18, 1997
Dated:

For NASD use only:

Date Award was served on the parties: July 1, 1997