

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Principal Financial Securities.

Claimant,

and

No. 96-01184

David A. Ross,

Respondent,

REPRESENTATION OF PARTIES

Claimant Principal Financial Securities was represented by Terrence J. Fleming, Esquire, and Kim Ruckdaschel-Haley, Esquire, of Lindquist & Vennum P.L.L.P., located in Minneapolis, Minnesota.

Respondent David A. Ross was represented by Cortney S. LeNeave, Esquire, and Steven M. Hunegs, Esquire, of Hunegs, Stone, Koenig & LeNeave, P.A., located in Minneapolis, Minnesota.

CASE INFORMATION

Claimant Principal Financial Securities' Statement of Claim was filed on or about March 18, 1996.
Claimant Principal Financial Securities' Reply to Counterclaim was filed on or about June 24, 1996.
Claimant Principal Financial Securities' Submission Agreement was signed on March 15, 1996 by
Mike D. Krmpotich, Assistant Branch Manager of Principal Financial Securities, Inc.

Respondent David A. Ross' Statement of Answer and Counterclaim was filed on or about May 20, 1996. Respondent David A. Ross' Submission Agreement was signed on May 14, 1996.

HEARING INFORMATION

No pre-hearing conferences were held.

[illegible]

The hearing was held in Minneapolis, Minnesota.

CASE SUMMARY

Claimant Principal Financial Securities ("Claimant") alleged that respondent David A. Ross ("Respondent") is liable for payments due on two promissory notes, plus interest, attorney fees, and costs. Claimant stated that on or about January 13, 1994, Hamilton Investments, Inc. ("Hamilton") hired Respondent as a registered representative in its Minneapolis, Minnesota office and loaned him \$20,000 pursuant to a promissory note executed on or about January 13, 1994 in favor of Hamilton, payable on or before December 15, 1997. Claimant asserted that this promissory note contained the following terms: Respondent's indebtedness would be forgiven in four annual installments, if he maintained continuous employment; if Respondent resigned or was terminated prior to the December 15, 1997 due date, the entire unforgiven balance was payable on demand; and Respondent was required to pay interest at the rate of 5.37% per year. According to Claimant, on or about September 1, 1994, Claimant acquired Hamilton, through which Claimant was assigned this promissory note as well as all rights thereunder, and Respondent became employed with Claimant as a registered representative in its Minneapolis, Minnesota office. Claimant further stated that on or about August 15, 1994, Claimant loaned Respondent \$9,500 pursuant to a promissory note with the following terms: payable on or before August 15, 1997; interest at the applicable percentage rate published by the Internal Revenue Service (the "Stated Rate") during the period of Respondent's employment; Respondent's indebtedness to be forgiven in three annual installments provided that certain conditions were met and Respondent remained employed with Claimant; if Respondent resigns or is terminated, the entire unforgiven principal amount and accrued interest is immediately due and payable; upon default, Respondent was required to pay interest from the date payment was due until paid at an interest rate per year equal to the Stated Rate plus two percent; and Respondent was to pay claimant's reasonable attorney fees and costs incurred to collect under this promissory note. Claimant asserted that on or about January 15, 1996, Respondent's employment with Claimant was terminated, which created a debt due by Respondent to Claimant in the amount of \$16,333.33 plus interest, which Respondent has failed to pay.

Respondent admitted entering into and signing the promissory notes at issue. Respondent asserted, however, that the promissory notes were presented to him with certain representations, promises and guarantees by Claimant and Hamilton, which were not fulfilled. According to Respondent, Claimant breached its contractual promises and representations, which nullifies the agreement and constituted a waiver of the terms of the promissory notes. Respondent also asserted that Claimant is estopped from enforcing the terms of the promissory notes due to its own wrongful conduct. Finally, according to Respondent, Claimant's damages, if any, are offset by the damage to Respondent and by Claimant's unjust enrichment through its retention of Respondent's clients and the respective commissions earned, which were stated at approximately \$80,000.00.

Respondent alleged that contrary to Claimant's representations and promises, and in breach thereof, Claimant: failed to provide professional office support and management; failed to refer clients to him in a fair and equitable manner; wrongfully, prematurely, and without just cause terminated him; failed to conduct his termination in a professional and good faith manner; refused to transfer him; and filed a false and defamatory U-5 termination form. According to Respondent, Claimant also promised that he would be employed for the duration of the promissory notes and that he would be given every opportunity to repay the notes in the manner they prescribed. Respondent made the following legal claims: (1) breach of contract; (2) wrongful and unjustifiable termination; (3) defamation; (4) tortious interference with prospective business relations; and (5) punitive damages.

Claimant denied the allegations made in the Counterclaim. Claimant stated that Respondent was terminated due to his behavior and conduct to other employees of his branch office and his clients, which was hostile and disruptive and which adversely affected Claimant's work environment and its relationship with its clients. Claimant made the following affirmative defenses: (1) Respondent was an at-will employee of Claimant and could therefore be dismissed for any or no reason; (2) Claimant had cause to terminate Respondent because of his hostile and abusive behavior; (3) Respondent's claim for breach of contract fails because Claimant has fulfilled any and all contractual obligations owed to Respondent; (4) Respondent's claim for breach of the covenant of good faith and fair dealing fails because Minnesota law does not recognize an implied covenant of good faith and fair dealing in employment contracts; (5) Respondent's claim for defamation is barred because Claimant's U-5 filings are protected by an absolute or qualified privilege; (6) Respondent's defamation claim fails because Claimant made no false representations and it is required to accurately disclose the reasons for its discharge of a registered representative pursuant to the NASD Bylaws and Rules of Fair Practice; (7) Respondent cannot recover under his defamation claim because Claimant did not maliciously or recklessly injure him; (8) Respondent's claim for tortious interference is barred since any actions taken by Claimant were appropriate, necessary, and justified in order to deal with his wrongful conduct; (9) Respondent's claim for punitive damages fails because Claimant did not act with willful indifference to his rights; (10) Respondent's claims are frivolous and are brought in bad faith; (11) Respondent's claims are estopped by his own conduct; (12) Respondent has failed to mitigate his damages, if any; and (13) Respondent's claims fail to state a claim upon which relief can be granted.

RELIEF REQUESTED

Claimant Principal Financial Securities requested an award for: \$10,000.00 for the principal owed on the January 13, 1994 promissory note, plus interest at the rate of 5.37% per year; \$6,333.33 for the principal owed on the August 15, 1994 promissory note, plus interest; and attorney fees and costs incurred in bringing its claims. Claimant Principal Financial Securities also requested that the Counterclaim be dismissed and that the requested relief contained therein be denied.

Respondent David A. Ross requested that the claims asserted against him be denied. Respondent David A. Ross also requested an award for: damages resulting from the wrongful termination in an

amount of \$300,000.00; damages resulting from the false and defamatory U-5 and wrongful interference with his business relations in an amount of \$300,000.00; and punitive damages in an amount of at least \$600,000.00. Finally, Respondent David A. Ross requested an award and order requiring that claimant Principal Financial Securities amend the U-5 form to state the truthful and actual reason for termination as "Other" with an explanation that "Principal [Financial Securities] involuntarily terminated [David A.] Ross due 1.) to a personality conflict with the manager; 2.) to obtain acceleration of certain promissory notes, and 3.) to obtain an unfair business advantage over [David A.] Ross in the pursuit of [David A.] Ross' clients and commissions."

OTHER ISSUES CONSIDERED & DECIDED

At the hearing in this matter, claimant Principal Financial Securities submitted a written amendment to the pleadings consisting of an affidavit of attorney fees and expenses. Also at the hearing in this matter, respondent David A. Ross submitted a written amendment to the pleadings consisting of a legal brief.

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 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 respondent David A. Ross is liable for and shall pay claimant Principal Financial Securities compensatory damages in the amount of \$16,333.33, plus interest thereon in the amount of \$857.00, which accrued from March 1, 1996 to December 30, 1996;
2. That respondent David A. Ross is liable for and shall pay claimant Principal Financial Securities for attorney fees in the amount of \$14,936.11 pursuant to the loan agreement and promissory note;
3. That respondent David A. Ross is liable for and shall pay claimant Principal Financial Securities for costs in the amount of \$3,069.15; and
4. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied 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 no pre-hearing conferences and there were five (5) hearing sessions x \$1,000 = \$5,000 in 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, 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 \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Principal Financial Securities.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$100 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Principal Financial Securities.

Pursuant to §10205(c) of the Code, 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 NASD Regulation, Inc. Office of Dispute Resolution by respondent David A. Ross.

Respondent David A. Ross is liable for and shall pay forum fees in the amount of \$3,700 (= \$5,000 total forum fees - \$1,000 hearing session deposit by respondent David A. Ross - \$300 hearing session deposit by claimant Principal Financial Securities).

Respondent David A. Ross is liable for and shall reimburse claimant Principal Financial Securities for its hearing session deposit in the amount of \$300.

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

Dated:

/s/ Edward C. Oliver

Edward C. Oliver
Industry Arbitrator, Presiding Chair

February 12, 1997

/s/ John S. Hoyt, Jr., Ph.D.

John S. Hoyt, Jr., Ph.D.
Public Arbitrator

February 3, 1997

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/s/ Robert E. Robertson
Robert E. Robertson
Industry Arbitrator

February 5, 1997