

NASD Regulation, Inc. AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant(s)

Michael D. Horvitz
James R. Pezzimenti

96-01264

Name of Respondent(s)

D. Blech & Co. Inc.
David Blech

REPRESENTATION

For Claimants Michael D. Horvitz ("Horvitz") and James R. Pezzimenti ("Pezzimenti"): Ronald Shindler, Esq. of Fowler White Burnett Hurley Banick & Strickroot, P.A., Miami, Florida.

For Respondents D. Blech & Co. Inc. ("Blech & Co.") and David Blech ("Blech"): L. Van Stillman, Esq. of the Law Offices of L. Van Stillman, Boca Raton, Florida.

CASE INFORMATION

Statement of Claim filed on: March 18, 1996. Claimants' Submission Agreements signed on: March 18, 1996 by Horvitz and on March 20, 1996 by Pezzimenti.

Statement of Answer filed by Respondents on: December 10, 1996. Respondent Blech & Co.'s Submission Agreement signed on: May 2, 1996. Respondent Blech failed to file a Submission Agreement as required by Rules 10201 and 10314 of the NASD Code of Arbitration Procedure ("the Code") (see "Other Issues").

HEARING INFORMATION

On March 26 and 27, 1997 in Ft. Lauderdale, Florida, hearings lasting four sessions were conducted.

CASE SUMMARY

Claimants alleged that Respondents were liable for breach of contract and constructive termination. Claimants alleged that Blech induced Claimants to leave their positions with Prudential Securities and PaineWebber, Inc. by providing them with employment contracts that

were personally guaranteed by Blech. Claimants maintained that Blech promised them that they would receive warrants earned on public offerings that they sold to their clients and would be provided with two "cold callers" each to further increase their business. Claimants next maintained that Blech represented that he was signing the employment contracts, not only as an officer of Blech & Co., but in his individual capacity as well and that the minimum draw was guaranteed both by Blech individually and by Blech & Co.. Claimants next maintained that Blech represented that Blech & Co.'s new office would offer a full range of investment products and that Claimants would not be required to sell Blech biotech stock. Claimants further alleged that Blech represented that Claimants would receive the maximum health benefits provided for by the Chubb Insurance Company and, in particular, that Pezzimenti's family would be covered regardless of any pre-existing health conditions. Claimants alleged that, after they began their employment with Blech & Co., they learned that the representations made by Blech were false. Claimants maintained that Blech & Co.'s management discouraged, dissuaded or refused to accept sell orders on Blech biotech stocks and that Claimants were otherwise hampered in their ability to sell their clients certain other products. Claimants alleged that Respondents unilaterally reduced their pay and refused to pay them on other occasions and constructively terminated Claimants by their actions. Pezzimenti further alleged that Respondents were also liable for unreimbursed medical expenses.

Respondents denied all allegations of wrongdoing and asserted various affirmative defenses including unclean hands, the Economic Loss Rule, Claimants voluntarily terminated their employment, Claimants fraudulently misrepresented their books of business and that Claimants were employees at will. Respondents further alleged that the Statement of Claim fails to state a claim, the claims were barred by the doctrine of impossibility of performance since the firm ceased operations, and that the memoranda of March 31, 1994 and March 18, 1994 are not binding contracts due to the lack of mutuality of obligation.

RELIEF REQUESTED

Claimant Horvitz requested damages in excess of \$288,000.00. Claimant Pezzimenti requested damages in excess of \$260,000.00 and both Claimants also requested interest, costs, attorney's fees and punitive damages.

Respondents requested dismissal of the claim plus costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

Pursuant to Rule 10101 of the Code the arbitration panel found subject matter jurisdiction over this controversy. The arbitration panel further found that Respondent Blech was a person associated with a member of the NASD at the time the controversy arose. Consequently, the arbitration panel found personal jurisdiction over Respondent Blech pursuant to Rule 10301 of the Code.

In view of the above, the arbitration panel found that Respondent Blech was required to file with the NASD a properly executed Submission Agreement pursuant to Rule 10314(b) of the Code. In this regard the arbitration panel found that the Statement of Claim was properly served upon the Respondent Blech pursuant to Rule 10314(a) of the Code.

Respondent Blech appeared via telephone.

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.

AWARD

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

1. Respondents Blech and Blech & Co. are found liable, jointly and severally, and shall pay to Claimant Pezzimenti the amount of \$50,900.00 inclusive of interest.
2. Respondents Blech and Blech & Co. are also found liable, jointly and severally, and shall pay to Claimant Pezzimenti the further amount of \$8,400.00. The panel notes that Respondent Blech & Co. stipulated that it owed this amount to Pezzimenti. Nevertheless, the panel finds both Respondents jointly and severally liable for this amount.
3. Respondents Blech and Blech & Co. are also found liable, jointly and severally, and shall pay to Claimant Horvitz the amount of \$41,500.00 inclusive of interest.
4. Respondent Blech & Co. is also found liable and shall pay to Claimant Horvitz the further amount of \$3,000.00.
5. Respondents Blech and Blech & Co. are also found liable, jointly and severally, to Horvitz and Pezzimenti for attorney's fees. The panel leaves the amount of such fees to be determined by a court of competent jurisdiction.
6. Respondents Blech and Blech & Co. are also found liable, jointly and severally, and shall pay to Claimants the further amount of \$1,000.00 as a reimbursement of the hearing session deposit previously paid by Claimants to NASD Regulation, Inc..
7. Respondents Blech and Blech & Co. are also found liable, jointly and severally, and shall pay to Claimants the further amount of \$500.00 as a reimbursement of the claim filing fee previously paid by Claimants to NASD Regulation, Inc.

8. Claimants' request for punitive damages is denied.

OTHER COSTS

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$4,000.00 (4 sessions x \$1,000.00 per session).

1. Respondents Blech and Blech & Co. are hereby assessed, jointly and severally, \$4,000.00 for which NASD Regulation, Inc. shall retain the \$1,000.00 previously paid by Claimants in partial satisfaction thereof, leaving a balance due to NASD Regulation, Inc. in the amount of \$3,000.00.
2. Respondent Blech & Co. is also assessed the \$300.00 member surcharge pursuant to Rule 10333 of the Code of Arbitration Procedure.
3. NASD Regulation, Inc. shall retain the \$500.00 claim filing fee previously paid by Claimants to NASD Regulation, Inc.

Fees are payable to the NASD Regulation, Inc.

Concurring Arbitrators' Signatures
Name

Public/Industry

/s/
John Darling

Industry/ Chairman

/s/
James South

Industry

/s/
Howard Ralby

Industry

Date of Decision: 5-5-97