

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Leonard Nelson Alsfeld,

Claimant,

and

No. 96-01627

Dickinson & Co.,
T. Marshall Swartwood,
Thomas M. Swartwood,
Elizabeth R. Ring, and
Bradford J. Titus,

Respondents.

REPRESENTATION OF PARTIES

Claimant Leonard Nelson Alsfeld was represented by Russell C. Burk, Esquire of Denver, Colorado.

Respondents Dickinson & Co., T. Marshall Swartwood, Thomas M. Swartwood, Elizabeth R. Ring, and Bradford J. Titus were represented by Barbara Bennett, Esquire of Dickinson & Co. located in Des Moines, Iowa.

CASE INFORMATION

Claimant Leonard Nelson Alsfeld's Statement of Claim was filed on or about April 15, 1996.

Claimant Leonard Nelson Alsfeld's Submission Agreement was signed on April 25, 1996.

Respondents' Joint Statement of Answer and Counterclaims was filed on or about July 15, 1996.

Claimant Leonard Nelson Alsfeld's Response and Defenses to Counterclaim was filed on or about September 13, 1996.

Respondent Dickinson & Co.'s Submission Agreement was signed on July 10, 1996 by Barbara Bennett, Vice President of Dickinson & Co.

Respondent Elizabeth R. Ring's Submission Agreement was signed on July 10, 1996.

Respondent Bradford J. Titus' Submission Agreement was signed on July 10, 1996.

NASD Regulation, Inc. Office of Dispute Resolution has no record of submission agreements submitted by Respondents T. Marshall Swartwood and Thomas M. Swartwood.

HEARING INFORMATION

There was a pre-hearing conference held on January 20, 1997 for one (1) session.

The hearing was held on: February 5, 1997 for two (2) sessions; and
February 6, 1997 for two (2) sessions.

The hearing was held in New Orleans, Louisiana.

CASE SUMMARY

Claimant Leonard Nelson Alsfeld ("Claimant") alleged that Respondent Dickinson & Co., through its Chairman of the Board, T. Marshall Swartwood, its President and Chief Executive Officer, Thomas M. Swartwood, its Chief Financial Officer, Elizabeth R. Ring, and its Director of Compliance, Bradford J. Titus, (hereinafter collectively referred to as "Respondents") defamed him by filing a false Form U-5 with the NASD and are liable for compensation due him pursuant to the terms of a compensation agreement set forth in a letter by Respondent T. Marshall Swartwood dated August 26, 1994 (the "Agreement"). Claimant asserted that the Agreement contained the following terms: a \$10,000.00 per month salary; a 5% over-ride on the gross sales production in the Metairie, Louisiana office of Dickinson & Co. ("Dickinson") for six months and thereafter compensation in accordance with Dickinson's manager's grid; a 50% pay-out on personal sales production for the first six months of employment with Dickinson, and thereafter compensation pursuant to Dickinson's broker's grid; a 2% over-ride on the gross sales production at Dickinson's Charlotte and LaJolla offices; and an 8% sales allowance on new mutual fund business incremental to existing mutual fund production of \$1,200,000.00 annually. Claimant contended that Respondents were liable for the following breaches of the Agreement: failure to pay Claimant his monthly salary beginning in May 1995 until March 1996, thereby failing to pay him \$39,700.00 in base salary; failure to pay him any of the 8% sales allowance on new mutual fund business, which totaled \$64,783.00; cancellation of the 2% over-ride on the gross sales production of the Charlotte, North Carolina office of Dickinson, resulting in an unpaid amount of \$22,243.00; and withholding of \$13,420.00 in mutual fund trailers from 1995. Claimant asserted that Dickinson owes him at least \$140,146.00. Claimant made the following claims, including: (1) breach of contract; (2) tortious interference with contractual relations; (3) breach of covenant of good faith and fair dealing; (4) unjust enrichment; (5) promissory estoppel; (6) negligent misrepresentation; (7) common law fraud; (8) outrageous conduct; (9) intentional interference with prospective business advantage; (10) disparagement; (11) civil conspiracy; (12) reformation of Form U-5; and (13) referral to the NASD for disciplinary action.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that at all times while Claimant was employed by Dickinson, he was an employee-at-will and that the terms of his employment were subject to change at any time. Respondents made the following affirmative defenses: (1) the Statement of Claim fails to state a claim upon which relief can be granted; (2) Claimant's claims are barred by the doctrine of waiver; (3) Claimant's claims are barred by the doctrine of estoppel; and (4) Claimant has not suffered damages as a result of any alleged wrongful action or inaction on the part of Respondents. In addition, Respondents alleged that Claimant breached his duty of loyalty to Dickinson, interfered with business, made misrepresentations, and converted Dickinson property, which resulted in losses from unusable leases due to closed offices in an amount of at least \$493,285.00, and costs incurred in closing those offices as well as unauthorized use of overnight delivery service, phones and equipment in an amount in excess of \$50,000.00.

In response to Respondents' counterclaims, Claimant made the following affirmative defenses: (1) Respondents have failed to state a counterclaim upon which relief can be granted; (2) Respondents' counterclaims are barred by the doctrines of waiver, estoppel, and laches; (3) Respondents have failed to mitigate their damages, if any; and (4) Respondents would be unjustly enriched to the extent any award is given to them pursuant to their counterclaims.

RELIEF REQUESTED

Claimant Leonard Nelson Alsfeld requested an award for: actual damages in the amount of \$140,146.00; punitive damages in the amount of \$140,146.00; special damages; pre-judgment and post-judgment interest; and for all fees and costs associated with this arbitration.

Respondents Dickinson & Co., T. Marshall Swartwood, Thomas M. Swartwood, Elizabeth R. Ring, and Bradford J. Titus requested that the claims asserted against them be dismissed in their entirety and that they be awarded their counterclaims, costs, and attorney fees incurred in this arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Respondents T. Marshall Swartwood and Thomas M. Swartwood did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted.

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 Dickinson & Co. is liable for and shall pay Claimant Leonard Nelson Alsfeld compensatory damages in the amount of Ten Thousand Dollars and No Cents (\$10,000.00), plus interest at the rate of 9.25%, which shall begin to accrue on February 20, 1996 and shall continue to accrue until the date this award is paid in full;
2. That all claims against Respondents T. Marshall Swartwood, Thomas M. Swartwood, Elizabeth R. Ring, and Bradford J. Titus are hereby dismissed in their entirety with prejudice;
3. That the Counterclaim is hereby dismissed in its entirety with prejudice; 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 \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference session x \$300 = \$300, and there were four (4) hearing sessions x \$750 = \$3,000. Total forum fees are \$3,300. 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 \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Leonard Nelson Alsfeld.

Pursuant to §10205(c) of the Code, Claimant Leonard Nelson Alsfeld is liable for and shall pay forum fees in the amount of \$75.

Pursuant to §10205(c) of the Code, Respondent Dickinson & Co. is liable for and shall pay forum fees in the amount of \$2,475.

Pursuant to §10333 of the Code, Respondent Dickinson & Co. is liable for and shall pay the member surcharge in the amount of \$350.

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Pursuant to §10205(c) of the Code, Respondent Dickinson & Co. is liable for and shall pay the non-refundable filing fee associated with the filing of Respondents' counterclaim in the amount of \$500.

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

Concurring Arbitrators' Signatures

\s\ William T. D'Zurilla
William T. D'Zurilla, Esquire
Public Arbitrator
Presiding Chair

March 18, 1997

Dated:

\s\ Louis M. Jones
Louis M. Jones, Esquire
Public Arbitrator
Panelist

March 21, 1997

Dated:

\s\ Frederick H. Bruce
Frederick H. Bruce
Industry Arbitrator
Panelist

March 22, 1997

Dated:

For NASD Regulation Use Only:

Date Award Served on the Parties: March 24, 1997