

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of Arbitration Between

Ronald V. Johnston,

Claimant and Counter-Respondent,

and

No. 96-03025

W.B. McKee Securities, Inc.,

Respondent and Counter-Claimant,

and

McKee & Company, and William B. McKee,

Respondents.

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## **REPRESENTATION OF PARTIES**

Claimant, Ronald V. Johnston, was represented by Peter Shenass, Esquire of The Law Office of Peter Shenass, located in San Diego, California.

Respondents, W.B. McKee Securities, Inc., McKee & Company, and William B. McKee were represented by Paul J. Roshka, Jr., Esquire of Roshka, Heyman & DeWulf, located in Phoenix, Arizona.

## **CASE INFORMATION**

Ronald V. Johnston's Statement of Claim was filed on or about July 15, 1996.

Ronald V. Johnston's Answer to the Counterclaim was filed on or about September 24, 1996.

Ronald V. Johnston's Submission Agreement was signed on July 9, 1996.

W.B. McKee Securities, Inc., McKee & Company, and William B. McKee's Statement of Answer and W.B. McKee Securities, Inc.'s Counterclaim was filed on or about September 12, 1996.

W.B. McKee Securities, Inc.'s Submission Agreement was signed on December 5, 1996 by Gary J. Sherman, President of W.B. McKee Securities, Inc.

William B. McKee's Submission Agreement was signed on December 5, 1996.

### HEARING INFORMATION

The hearing was held on: June 11, 1997 for two (2) sessions; and June 12, 1997 for three (3) sessions.

The hearing was held in Phoenix, Arizona.

### CASE SUMMARY

Claimant, Ronald V. Johnston ("Claimant" or "Counter-Respondent"), brought this action to recover consideration allegedly owed to him by William B. McKee ("Mr. McKee"), an officer of W.B. McKee Securities, Inc. ("W.B. McKee" or "Counter-Claimant") and McKee & Company, pursuant to an employment agreement Claimant entered into with Mr. McKee.

According to Claimant, about the last week of April 1994, Mr. McKee agreed, on behalf of W.B. McKee and McKee & Company, to an employment contract (the "contract") with Claimant. Claimant contended that on or about April 20, 1994 he entered upon his duties pursuant to the contract and over the one year term of the contract performed all of the duties, on his part, that were required to be performed. Claimant alleged that Mr. McKee, W.B. McKee, and McKee & Company (hereinafter collectively referred to as "Respondents") failed to make the \$10,000 forgivable loan pursuant to the contract. Claimant further alleged that, during the course of his contract period, warrants were issued to Respondents from Deihl and Knickerbocker, which were offerings Claimant participated in, but Respondents failed and refused to transfer the 5% of the warrants to Claimant as agreed upon. Claimant asserted that it was not until about the first week in May 1996, that he discovered from Mr. McKee that Claimant's stock options had a three year vesting period. Claimant also argued that Respondents failed to open a San Diego Branch office as was agreed upon. Claimant made the following legal claims: breach of contract; fraud; violation of 18 U.S.C. §§ 1961-1968, the Racketeer Influenced Corrupt Organizations Act; and a request for punitive damages.

Respondents denied the allegations set forth in the Statement of Claim as they relate to any liability on its part. Respondents specifically denied that there was ever an enforceable agreement to provide Claimant with a forgivable loan. Respondents further denied that there was ever an agreement or obligation to transfer any compensation from the warrants to Claimant. Respondents contended that Claimant's stock options had the standard three-year vesting period and that because Claimant resigned, he was informed that he had no rights under the program. Respondents' affirmative defenses included the following: (1) Claimant has failed to state any claims upon which relief can be granted or an award issued; (2) the claims are barred by the doctrine of assumption of the risk; (3) the claims are barred by the doctrine of laches; (4) the claims are barred by the failure of consideration; (5) Claimant has failed, and continues to fail, to mitigate any damages he allegedly

suffered; (6) none of the acts of conduct attributed to Respondents, as a matter of law, may be regarded as the actual or proximate cause of any alleged damages; and (7) the losses, if any, sustained by Claimant were proximately caused and contributed to by his negligence, improper conduct or intervening acts of the Claimant.

Counter-Claimant brought action for relief from Counter-Respondent's alleged breach of the contract due to his failure to disclose at the time he was hired that he was subject to a regulatory investigation and because he inadequately supervised a number of transactions.

Counter-Respondent denied the allegations set forth in the Counterclaim as they relate to any liability on his part.

#### **RELIEF REQUESTED**

Claimant, Ronald V. Johnston, requested an award for: compensatory damages in the amount of \$200,000; punitive damages; treble damages; costs and expenses, including attorney's fees, associated with this arbitration proceeding; and pre-judgment interest. Ronald V. Johnston, as Counter-Respondent, requested that Counter-Claimant, W.B. McKee Securities, Inc., take nothing by its Counterclaim.

Respondents, W.B. McKee Securities, Inc., McKee & Company, and William B. McKee, requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees. Counter-Claimant, W.B. McKee Securities, Inc., requested an award for damages in an amount of at least \$250,000, plus interest, its costs, and attorneys' fees.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

At the beginning of the hearing, Claimant withdrew his claim for RICO damages. Further, prior to the hearing, McKee & Co. and William McKee moved to dismiss all counts. In response, Claimant agreed the McKee & Company should be dismissed, and dismissed also agreed to dismiss the claim for breach of contract as to William McKee.

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. Ronald V. Johnston's claims made against W.B. McKee Securities, Inc., McKee & Company, and William B. McKee are, and each of them, denied with prejudice.
2. W.B. McKee Securities, Inc.'s, McKee & Company's, and William B. McKee's claims against Ronald V. Johnston are, and each of them, denied with prejudice.
3. 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 five (5) hearing sessions x \$750 = \$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, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Ronald V. Johnston.

Pursuant to § 10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable Counterclaim filing fee in the amount of \$500 and retain the Counterclaim hearing session deposit in the amount of \$750 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by W.B. McKee Securities, Inc., McKee & Company, and William B. McKee.

Pursuant to § 10333 of the Code, W.B. McKee Securities, 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 § 10319 of the Code, Ronald V. Johnston is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution postponement fees in the amount of \$250.

Pursuant to § 10319 of the Code, W.B. McKee Securities, Inc., McKee & Company, and William B. McKee are liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution postponement fees in the amount of \$250.

Additional forum fees in the amount of \$2,500 are assessed by the arbitrators against Ronald V. Johnston.

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Additional forum fees in the amount of \$2,500 are assessed by the arbitrators against W.B. McKee Securities, Inc., McKee & Company, and William B. McKee.

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

Concurring Arbitrators' Signatures

Matthew R. Gould  
Matthew R. Gould  
Chairperson  
Public Arbitrator

/s/

July 25, 1997  
Dated:

Richard I. Topus  
Richard I. Topus  
Panelist  
Public Arbitrator

/s/

July 10, 1997  
Dated:

July 10, 1997  
Leon G. Mackey  
Panelist  
Industry Arbitrator

/s/

July 10, 1997  
Dated: