

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Oppenheimer & Co., Inc.

96-03083

Name of Respondent

Jay Gibson Rogers

REPRESENTATION

For Claimant: Lorraine M. Ferrigno, Esq. of the Law Offices of Mark J. Alonso, P.C., New York, New York.

For Respondent: Gerald B. Kline, Esq. of the law firm of Sims Moss Kline & Davis LLP, Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed: July 16, 1996.

Claimant's Submission Agreement signed on: June 17, 1996.

Reply to Respondent's Answer and Counterclaim filed: November 6, 1996.

Answer and Counterclaim filed by Respondent on: September 20, 1996.

Respondent's Submission Agreement signed on: September 19, 1996.

HEARING INFORMATION

The evidentiary hearing which lasted five sessions was conducted in Atlanta, Georgia on March 15, 16 and 17, 1999.

CASE SUMMARY

Claimant alleged the following: The claim was commenced by Oppenheimer & Co. Inc. ("Oppenheimer") against Jay Gibson Rogers ("Rogers"), a former Oppenheimer broker. The claim, for breach of contract, is based on an Employment Agreement and Promissory Note (the

"Note") for \$40,000.00, signed by Mr. Rogers when he began his employment at Oppenheimer. Mr. Rogers was offered a forgivable loan of \$40,000.00 as an incentive to join the Atlanta Branch of the company. The terms of the forgivable loan were clearly set forth in the Employment Agreement and the Promissory Note. More specifically, the \$40,000.00 was to be forgiven at a rate of 33% per year over a three-year term of employment. Mr. Rogers was permitted to resign from Oppenheimer in June of 1994, nine months after his employment began, and according to the express terms of the agreement, the full amount of the \$40,000.00 forgivable loan became due and owing. The monies were not paid to Oppenheimer, despite due demand.

Mr. Rogers denied liability under the Note, contending specifically that (i) during recruitment dealings, Oppenheimer promised him an up-front bonus to assist him in his transition from Merrill Lynch to Oppenheimer but never mentioned that the bonus would be in the form of a Note; (ii) Oppenheimer had engaged in a collusive, constructive termination of his employment; and (iii) the only applicable termination event which could trigger the Note's maturity was a written voluntary resignation, which had not occurred. In his affirmative defenses, Mr. Rogers further claimed that Oppenheimer, through its conduct, had waived and was estopped from asserting maturity of the Note and had materially breached the parties' Employment Agreement, thereby excusing any further performance by Mr. Rogers. Therefore, Mr. Rogers contended that he was entitled to a set off or recoupment of all damages he himself had suffered, against any sums allegedly due to Oppenheimer. Further, Mr. Rogers contended that no attorney's fees should be awarded to Oppenheimer under the Note, as Oppenheimer failed to provide him with the statutory attorneys' fees notice required under O.C.G.A. Section 13-1-11.

Mr. Rogers asserted a counterclaim that alleged that in its recruitment efforts, Oppenheimer promised Mr. Rogers access to certain branch resources, experienced sales assistants, business development programs and freedom from having to actively solicit purchases of Oppenheimer's proprietary securities offerings. Mr. Rogers asserted that Oppenheimer did not have the present intent to fulfill these promises and, following his registration, failed to perform the promises and otherwise breached its implied duty of good faith contract dealings necessary to support and enhance the development of Mr. Rogers' securities business.

By further counterclaim, Mr. Rogers asserted that Oppenheimer had tortiously interfered with his business relationships and had filed a false and malicious Form U-5 which was inaccurate and untruthful in material respects, stemming from a customer communication which Oppenheimer contrived into a sales practice complaint. Thereafter, Mr. Rogers contended Oppenheimer forced his termination by "permitting" him to resign.

In response to the counterclaims, Claimant asserted the following defenses: consideration existed in the form of the forgivable loan given by Oppenheimer to its detriment; good faith exhibited by Oppenheimer in the form of performance of the employment agreement; qualified privilege; truth; the obligation to fill out a Form U-5; and, lack of exhibited damages to Mr. Rogers as he quickly found other employment and continues in the securities industry to date and has suffered no damages in relation to the required Form U-5.

RELIEF REQUESTED

Claimant requested the balance of the \$40,000.00 forgivable loan plus interest at the New York

Judgement Rate of nine (9) percent, and attorney's fees, as required by the Employment Agreement and Promissory Note. Claimant further requested a dismissal of all counterclaims in their entirety.

Respondent requested that the Panel enter an award that the Note had been satisfied and paid in full. In the event that the Panel considered him to be liable under the Note, Mr. Rogers alternatively prayed that the Panel credit him for commissions and taxes held by Oppenheimer along with a prorated forgiveness of twenty-two percent of the Note liability. Respondent further requested a dismissal of Claimant's request for attorneys' fees.

Under the counterclaim, Mr. Rogers sought the following relief: damages for defamation and tortious interference with his business and livelihood; the recovery of withheld commissions and other sums plus interest thereon; expungement of inaccurate and untruthful information placed on his Form U-5 and the accompanying Disclosure Reporting Page and a reclassification of his termination as "voluntary"; and awards of attorneys fees, expenses of arbitration, filing and session fees and exemplary damages against Oppenheimer.

OTHER ISSUES CONSIDERED & DECIDED

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.

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:

Respondent is liable and shall pay to Claimant the sum of \$16,596.41, pre-judgment interest specifically excluded.

Claimant's request for attorneys' fees is denied.

The counterclaims of Respondent are dismissed in their entirety. However, Claimant is liable and shall pay to Respondent attorneys' fees in the sum of \$1,596.00 pursuant to O.C.G.A. Section 13-6-11 because of the repeated failure of Claimant to comply with discovery orders in a timely manner.

FORUM FEES

Pursuant to Rule 10205c of the Code of Arbitration Procedure, forum fees in the sum of \$3,000.00 (five sessions x \$600.00) are assessed as follows:

Claimant is assessed the sum of \$1,500.00 for which NASD Regulation, Inc. shall retain the \$600.00 previously deposited in partial satisfaction thereof, leaving a balance due in the sum of \$900.00.

Respondent is assessed the sum of \$1,500.00 for which NASD Regulation, Inc. shall retain the \$300.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$1,200.00.

OTHER FEES

Pursuant to Rule 10205 of the Code of Arbitration Procedure, Claimant and Respondent have paid to NASD Regulation, Inc. the \$500.00 claim filing fee for the claim and counterclaim, respectively.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Claimant has paid to NASD Regulation, Inc. the \$200.00 member surcharge.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

/s/
Christopher J. Moran, Jr., Esq.

Public

/s/
George H. Loughery

Public

/s/
Thomas C. Moxley

Industry

Date of Decision: March 30, 1999

Respondent is assessed the sum of \$1,500.00 for which NASD Regulation, Inc. shall retain the \$300.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$1,200.00.

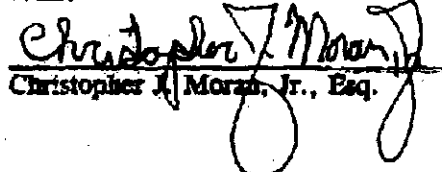
OTHER FEES

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

Concurring Arbitrators' Signatures
Name


Christopher J. Moran, Jr., Esq.

Public/Industry

Public

Public

George H. Loughery

Industry

Thomas C. Moxley

Date of Decision: 3/22/99

Respondent is assessed the sum of \$1,500.00 for which NASD Regulation, Inc. shall retain the \$300.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$1,200.00.

OTHER FEES.

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Concurring Arbitrators' Signatures
Name

Public/Industry

Public

Christopher J. Moran, Jr., Esq.

George H. Loughery
George H. Loughery

Public

Industry

Thomas C. Moxley

Date of Decision: March 26, 1999

Respondent is assessed the sum of \$1,500.00 for which NASD Regulation, Inc. shall retain the \$300.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$1,200.00.

OTHER FEES

Pursuant to Rule 10205 of the Code of Arbitration Procedure, Claimant and Respondent have paid to NASD Regulation, Inc. the \$500.00 claim filing fee for the claim and counterclaim, respectively.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Claimant has paid to NASD Regulation, Inc. the \$200.00 member surcharge.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

Public

Christopher J. Moran, Jr., Esq.

Public

George H. Loughery

Industry

Thomas C. Moxley

Date of Decision:

17 March 1999