

**Award**  
NASD Dispute Resolution, Inc.

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In the Matter of the Arbitration Between:

Steven E. Leatherman, Brian Williams, et. al. (Claimants) vs. Walter Imhoff, Gary J. Wilson, Richard T. Huebner et. al. (Respondents).

Case Number: 99-03239

Hearing Site: Denver, Colorado

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**REPRESENTATION OF PARTIES**

Claimants, Steven E. Leatherman, Jeffrey Wall, Pamela Higgins, Pamela McCuskey ("Leatherman Claimants"): Margaret E. Pepper, Esq. and Gary J. Ceriani, Esq. : Davis & Ceriani, P. C., located in Denver, Colorado.

Claimants, Russell Jansky and Gene Andrist ("Jansky Claimants"): Robert F. Hill, Esq., John F. Walsh, Esq., and Jennifer Hunt, Esq. : Hill & Robbins, P.C., located in Denver, Colorado.

Claimants, Brian Williams and Bruce Brauer ("Williams Claimants"): Gary C. Davenport, Esq. and Krista Tushar, Esq.: McGloin Davenport Severson and Snow located in Denver, Colorado.

Respondents, Walter F. Imhoff, Gary J. Wilson, Richard Huebner, George A. Johnson, ("Respondents"): Daniel Hoffman, Esq. , Barbara Z. Blumenthal, Esq. : and Tobin D. Kern, Esq. : Hoffman, Reilly, Pozner & Williamson, LLP, located in Denver, Colorado. Respondents were also represented by Chris J. Trebatosky, Esq. and John E. Flanagan, Esq, of Michael, Best and Frederick, LLP, located in Milwaukee, Wisconsin.

**CASE INFORMATION**

Statement of Consolidated Claim filed by Claimants, Steven E. Leatherman, Jeffrey Wall, Pamela Higgins, Pamela McCuskey , Russell Jansky, Gene Andrist, Brian Williams, and Bruce Brauer on or about: April 15, 1999.

The NASD has no record of Claimant, Steven E. Leatherman's, signed Uniform Submission Agreement.

The NASD has no record of Claimant, Jeffrey Wall's, signed Uniform

**Submission Agreement.**

The NASD has no record of Claimant, Pamela Higgins', signed Uniform Submission Agreement.

The NASD has no record of Claimant, Pamela McCuskey's , signed Uniform Submission Agreement:

The NASD has no record of Claimant, Russell Jansky's, signed Uniform Submission Agreement.

The NASD has no record of Claimant, Gene Andrist's, signed Uniform Submission Agreement:

The NASD has no record of Claimant, Brian Williams', signed Uniform Submission Agreement.

The NASD has no record of Claimant, Bruce Brauer's, signed Uniform Submission Agreement:

Joint Statement of Answer filed by Walter F. Imhoff, Gary J. Wilson, Richard Huebner, George A. Johnson on or about: May 22, 2000.

Respondent, Walter F. Imhoff, signed the Uniform Submission Agreement: July 12, 1999.

Respondent, Gary J. Wilson, signed the Uniform Submission Agreement: July 14, 1999.

Respondent, Richard T. Huebner, signed the Uniform Submission Agreement: July 9, 1999.

Respondent, George A. Johnson, signed the Uniform Submission Agreement: July 9, 1999.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duty, civil conspiracy and breach of fiduciary duty by trust fiduciaries under ERISA. Claimants further alleged that Respondents' conduct was attended by circumstances of fraud, malice, and willful and wanton conduct. The causes of action arise from the Claimants' employment with Respondents.

Unless specifically admitted in their Answer, Respondents, Walter Imhoff, Gary Wilson, Richard Huebner, George Johnson, denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' allegations fail

to state any claims upon which relief can be granted; Claimants' claims are barred insofar as any alleged damages or equitable relief they have requested relates to Qualified Employer Securities because Claimants have failed to exhaust their administrative remedies as required by the documents and instruments governing the ERISA plan, Claimants' claims are barred by the doctrine of waiver; Claimants' claims are barred by the doctrine of estoppel; Claimants' claims are barred by the law of discharge of employees at will; Leatherman's damages, if any, were proximately caused by his own conduct, e.g. unsatisfactory job performance, and not by the conduct of any third parties; Claimants' allegations contain misrepresentations of fact; Claimants' claims are barred by the applicable statutes of limitations; Claimants cannot obtain punitive damages related to their ERISA claims; Claimants do not have standing to bring claims on behalf of the ERISA Plan; The NASD does not have jurisdiction over the claims of any individuals or entities other than the Claimants themselves and therefore lacks jurisdiction to award relief pursuant to the ERISA Plan; To the extent Claimants' claims relate to the Plan or Qualifying Employer Securities such claims are preempted by ERISA; Respondents acted at all times in the sole interest of the ERISA Plan participants, with the care, skill, prudence and diligence of prudent men in like capacity in the circumstances then prevailing, and in accordance with the documents and instruments governing the ERISA Plan. Respondents did not breach any fiduciary duty claim owed to Claimants, and therefore Claimants, and therefore Claimants' ERISA breach of fiduciary duty claim must be dismissed.

#### RELIEF REQUESTED

Claimants requested:

Compensatory Damages	unspecified
Punitive Damages	unspecified
Interest	unspecified
Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief:	unspecified

Respondents requested:

Interest	unspecified
Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief:	unspecified

### OTHER ISSUES CONSIDERED AND DECIDED

In this award, parties Steven E. Leatherman, Jeffrey Wall, Pamela Higgins, Pamela McCuskey, Russell Jansky, Gene Andrist, Brian Williams and Bruce Brauer are referred to as Claimants and Walter F. Imhoff, Gary J. Wilson, Richard Huebner, George A. Johnson are referred to as Respondents as the result of various Motions made by the parties to consolidate and/or sever and various Court proceedings. In addition, the parties entered into a stipulation, received by the NASD March 10, 2000, in which the parties agreed to realign the parties in this manner.

At the end of Claimants' case, the following motions were made by Respondents:

1. For a directed verdict as to whether the Claimants could have kept their stock following their termination. Denied.
2. For reconsideration of the Panel's ruling to the effect that the Respondents had orally stipulated to the Panel in a pre-hearing telephone conference prior to the hearing that Respondents would not rely on a defense of "advice of counsel" as a complete bar to liability on the part of the Respondents, and that therefore the Panel would consider only the reasonableness of Respondents' reliance on advice of counsel in determining liability. Denied.
3. For dismissal of Claimants' case because Claimants failed to provide expert testimony on the value of Claimants' shares in Hanifen Imhoff Holdings, Inc. at the time of Claimants' termination. Denied.
4. For dismissal of Claimants' case because Claimants failed to prove that they mitigated damages following their termination and payment for their shares in Hanifen Imhoff Holdings, Inc. Denied.
5. Following testimony and cross-examination of Respondent Richard T. Huebner, Respondent moved for the dismissal of Mr. Huebner from the case on the basis that he had not been an officer, director or a "core" decision maker of Hanifen, Imhoff Holdings, Inc. during relevant times, did not hold a controlling interest of the shares of Holdings, and had not been a member of the Committee nor a Trustee of the Hanifen Imhoff Inc. Pension and Profit Sharing Plan during times relevant to this proceeding. Granted.
6. Following the testimony and cross-examination of Respondent George A. Johnson, Respondent moved for the dismissal of Mr. Johnson from the case on grounds similar to those asserted in the motion for dismissal of Mr. Huebner. Denied.

Following the close of the Respondents' case and prior to closing arguments, the Respondent made the following Motions:

1. For dismissal of the Claimants' claims relating to their Hanifen Imhoff Pension and Profit Sharing Plan because Claimants lacked standing under ERISA to recover damages with respect thereto. Denied.
2. For dismissal of Claimants' case because Claimants failed to provide expert testimony on the fair market value of Claimants' stock (both as to Plan and Non-Plan stock) in Hanifen Imhoff Holdings, Inc. Denied.
3. For dismissal of Claimants' claims related to their Non-Plan stock in Hanifen Imhoff Holdings, Inc. because their February 1996 offer from Fiserve Inc. expired on April 30, 1996 and, accordingly, the Respondents could not have violated a fiduciary duty to Claimants with respect to this offer when they terminated Claimants on May 1, 2000. Denied.

Claimants Steven Leatherman, Brian Williams, Bruce Brauer, Russell Jansky, Jeffrey Wall, Pamela Higgins, Pamela McCuskey and Gene Andrist did not file with the NASD Dispute Resolution, Inc. a properly executed submission to arbitration but are required to submit to arbitration pursuant to the Code 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.

#### AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and post hearing submission the Arbitration Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. That Walter F. Imhoff and Gary J. Wilson are hereby jointly and severally liable for and shall pay Steven Leatherman \$340,110 (three hundred and forty thousand, one hundred and ten dollars); Jeffrey Wall \$140,788 (one hundred forty thousand, seven hundred and eighty eight dollars); Pamela Higgins \$68,865 (sixty eight thousand, eight hundred sixty five dollars); Pamela McCuskey \$47,144 (forty seven thousand, one hundred forty four dollars); Russell Jansky \$153,500 (one hundred fifty three thousand, five hundred dollars); Gene Andrist \$155,672 (one hundred fifty five thousand, six hundred seventy two dollars); Brian Williams \$442,478 (four hundred forty two thousand, four hundred seventy eight dollars) and Bruce Brauer, \$487,209 (four hundred eighty seven thousand, two hundred and nine dollars) in compensatory damages relating to the ERISA Plan shares of the Claimants;
2. That Walter F. Imhoff, Gary J. Wilson, and George A. Johnson are hereby

jointly and severally liable for and shall pay Steven Leatherman \$1,141, 873 (one million one hundred and forty one thousand, eight hundred seventy three dollars); Jeffrey Wall \$77, 433 (seventy seven thousand, four hundred thirty three dollars); Pamela Higgins \$51, 740 (fifty one thousand, seven hundred forty dollars); Pamela McCuskey \$21, 471 (twenty one thousand, four hundred seventy one dollars); Russell Jansky \$1, 841, 516 (one million eight hundred forty one thousand, five hundred and sixteen dollars); Gene Andrist \$499,095 (four hundred ninety nine thousand, and ninety five dollars); Brian Williams \$492, 760 (four hundred ninety two thousand, seven hundred sixty dollars); and Bruce Brauer \$59, 835 (fifty nine thousand, eight hundred thirty five dollars) in compensatory damages relating to the Non-Plan Shares of the Claimants;

3. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Steven Leatherman, Jeffrey Wall, Pamela Higgins, Pamela McCuskey, Russell Jansky, Gene Andrist, Brian Williams, and Bruce Brauer \$142, 489 (one hundred forty two thousand dollars and four hundred eighty nine dollars) in costs;
4. That Walter F. Imhoff, Gary J. Wilson, George A. Johnson are hereby jointly and severally liable for and shall pay Steven Leatherman \$370, 496 (three hundred thousand seventy dollars four hundred ninety six dollars) in attorneys' fees;
5. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Brian Williams \$233, 810 (two hundred thirty three thousand eight hundred and ten dollars) in attorneys fees;
6. That Walter F. Imhoff, Gary J. Wilson, George A. Johnson are hereby jointly and severally liable for and shall pay Bruce Brauer \$136,761 (one hundred thirty six thousand seven hundred sixty one dollars) in attorneys' fees;
7. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Russell Jansky \$498, 754 (four hundred ninety eight thousand, seven hundred and fifty four dollars) in attorneys' fees;
8. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Jeffrey Wall \$54,555 (fifty four thousand five hundred fifty five dollars) in attorneys' fees;
9. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Pamela Higgins \$30, 151 (thirty thousand one hundred fifty one dollars) in attorneys' fees;
10. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Pamela McCusky \$17, 154 (seventeen thousand one hundred fifty four dollars) in attorneys' fees;
11. That Walter F. Imhoff, Gary J. Wilson and George A. Johnson are hereby jointly and severally liable for and shall pay Gene Andrist \$163, 692 (one hundred sixty three thousand and six hundred ninety two dollars) in attorneys' fees;
12. That in making this award of attorneys' fees, the panel considered all written

documents, pleading, oral arguments, motions and case and statutory law submitted by the parties including but not limited to ERISA Section 502 (g)(1)(29) U.S.C. Section 1132 (g)(1), Bernhard v. Farmers Insurance Exchange, 915 P.2d 1289 (Colo. 1996) and Buder v. Sartore, 774 P.2d 1383 (Colo. 1989) and find authority exists for this award;

13. That any and all requests for relief not specifically addressed herein, including punitive damages, are hereby dismissed and denied in their entirety.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$250.00
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#### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firm is the Claimant's former firm.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$600.00
Hearing process fee	= \$2,000.00

#### Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$450.00  
Pre-hearing conference: October 9, 2000 1 session

Six (6) Pre-hearing sessions with Panel x \$1,000.00 = \$6,000.00  
Pre-hearing conferences: January 19, 2000 1 session  
March 13, 2000 1 session  
March 24, 2000 1 session  
April 25, 2000 1 session  
October 24, 2000 1 session  
November 1, 2000 1 session

Twenty nine (29) Hearing sessions x \$1,000.00 = \$29,000.00  
Hearing Dates: November 6, 2000 3 sessions

November 7, 2000	3 sessions
November 8, 2000	3 sessions
November 9, 2000	3 sessions
November 10, 2000	3 sessions
November 11, 2000	2 sessions
November 13, 2000	3 sessions
November 14, 2000	3 sessions
November 15, 2000	3 sessions
November 16, 2000	3 sessions

Total Forum Fees	= \$35,450.00
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1. The Arbitration Panel has assessed \$34,450.00 of the forum fees jointly and severally to Respondents Walter Imhoff, Gary Wilson, and George Johnson.
2. The Arbitration Panel has assessed \$1000.00 of the forum fees jointly and severally to Claimants Steven Leatherman, Brian Williams, Bruce Brauer, Russell Jansky, Jeffrey Wall, Pamela Higgins, Pamela McCuskey and Gene Andrist.

#### Fee Summary

1. Respondents, Walter F. Imhoff, Gary J. Wilson and George A. Johnson, Inc., be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$250.00
Forum Fees	= \$34,450.00
Administrative Costs	= \$0
Total Fees	= \$35,700.00
Less payments	= \$1,400.00
Balance Due NASD Dispute Resolution, Inc.	= \$33,300.00

2. Claimants, Steven Leatherman, Brian Williams, Bruce Brauer, Russell Jansky, Jeffrey Wall, Pamela Higgins, Pamela McCuskey and Gene Andrist, be and hereby are jointly and severally liable for:

Filing Fee	= \$250.00
Forum Fees	= \$1000.00
Administrative Costs	= \$0
Total Fees	= \$1,250.00
Less payments	= \$0
Balance Due NASD Dispute Resolution, Inc.	= \$1,250.00



All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signature

/s/ Nyle Barnes

February 1, 2001

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Nyle Barnes  
Public Arbitrator, Presiding Chair

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Signature Date

/s/ Lynn Chapman Greene

February 5, 2001

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Lynn Chapman Greene  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

/s/ Robert F. Saint-Aubin

February 1, 2001

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Robert Saint-Aubin  
Public Arbitrator

\_\_\_\_\_  
Signature Date

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signature



Nyle Barnes  
Public Arbitrator, Presiding Chair

2.1.2001  
Signature Date

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Lynn Chapman Greene  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

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Robert Saint-Aubin  
Public Arbitrator

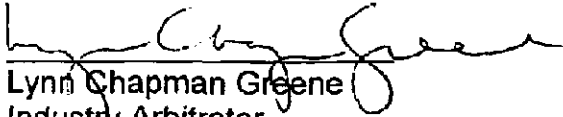
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All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signature

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Nyle Barnes  
Public Arbitrator, Presiding Chair

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Signature Date

  
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Lynn Chapman Greene  
Industry Arbitrator

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Signature Date

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Robert Saint-Aubin  
Public Arbitrator

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Signature Date

All balances are due to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signature

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Nyle Barnes  
Public Arbitrator, Presiding Chair

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Signature Date

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Lynn Chapman Greene  
Industry Arbitrator

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Signature Date

  
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Robert Saint-Aubin  
Public Arbitrator

2-1-2001  
Signature Date