

**Award**  
**NASD Dispute Resolution**

---

In the Matter of the Arbitration Between:

American Express Financial Advisors, Inc. (Claimant) vs. Frank P. Marzano (Respondent)

Case Number: 04-02723

Hearing Site: New York City, New York

---

Nature of the Dispute: Member vs. Associated Person

**REPRESENTATION OF PARTIES**

Claimant American Express Financial Advisors, Inc., hereinafter referred to as "Claimant":  
Michael A. Zaretsky, Esq., Chorpenning, Good & Pandora Co., LPA, Columbus, OH

Respondent Frank P. Marzano hereinafter referred to as "Respondent": Thomas M. Campbell,  
Esq., Smith Campbell, LLP, New York, NY. Previously represented by Richard B. Feldman,  
Todtman, Nachamie, Spizz & Johns, P.C., New York, NY. Previously represented by Martin H.  
Kaplan, Esq., Gusrae, Kaplan & Bruno, PLLC, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: April 9, 2004.

Reply to Counterclaim filed on or about: October 15, 2004.

Claimant signed the Uniform Submission Agreement: April 9, 2004.

Statement of Answer and Counterclaim filed by Respondent on or about: May 4, 2004.

Respondent signed the Uniform Submission Agreement: May 3, 2004.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of Independent Financial Planner Business Franchise Agreement and misappropriation of trade secrets.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Respondent asserted the following causes of action in his Counterclaim: breach of contract, defamation, wrongful filing of U-5, wrongfully soliciting clients, and egregious conduct.

Unless specifically admitted in its reply to the Counterclaim, Claimant denied the allegations and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested that Respondent and all those acting in concert with him be and hereby are restrained and enjoined from: *directly, or indirectly, representing to the public or to hold himself out as a present or former franchisee of AEFA; using without limitation, all signs, advertising materials, displays, stationary, forms, products, and any other articles, which display the Proprietary mark of AEFA; failing to comply with his contractual duty to make such modifications or alterations to his business premises; using certain telephone numbers; using the confidential methods, procedures, techniques, symbols or devices; using any computer software developed for Claimant's system; requiring Respondent to deliver the originals of all client records and files; delivering manuals and all other original records, including most recent financial plans and recommendations, computer databases and files, correspondence and instructions containing confidential information relating to Claimant's system; and such further equitable and legal relief as the Panel deems just and proper to award.*

Respondent requested that the Panel issue an Award granting Respondent damages in an amount to be determined at the hearing, punitive damages in an amount to be determined at the hearing, injunctive relief, costs and disbursements of this action, reasonable attorneys' fees, and for such other and further relief as the Panel deems just and proper.

In his Counterclaim, Respondent requested unspecified damages, punitive damages, injunctive relief and expungement of CRD records.

Claimant requested that the Counterclaim be denied and grant it all relief sought including costs, attorneys' fees and filing fees. Claimant also requests a permanent injunction to enjoin Marzano from breaching the Franchise Agreement.

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

At the commencement of the hearing, Claimant withdrew its Statement of Claim and request for permanent injunctive relief. The hearing then proceeded on Respondent's Counterclaim, but only for the sole purpose of determining whether the Respondent would be entitled to copies of a list of his clients while at American Express Financial Advisors, Inc., copies of Respondent's files for these clients and an inventory of the contents of the files. Subsequent hearings were scheduled and held on the question of damages not addressed in the expedited hearing.

At the conclusion of the expedited hearing and after deliberation, the Panel issued an Order dated November 10, 2004 setting forth the following:

- 1) The Statement of Claim has been withdrawn and is therefore, dismissed.
- 2) Respondent's request for relief has been granted as follows: the Claimant will turn over to the Respondent a list of clients. This list is to include those clients that were first clients of Respondent prior to his joining Claimant, clients brought into Claimant by Respondent and clients inherited or assigned to Respondent while at Claimant; the files maintained by Respondent for those clients will be copied at the expense of Claimant and forwarded to the Respondent; and no inventory of these files will be required.

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 the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant is liable for and shall pay Respondent compensatory damages in the amount of \$230,000.00, plus interest at the New York State statutory rate of 9% per annum, commencing thirty days from the service of this Award until the date of payment.
2. The Panel recommends that the language contained in Part 1, item 3 of the Internal Review DRPs submitted to Central Registration Depository ("CRD") as part of the amended Forms U5 filed, on behalf of Respondent Frank P. Marzano with CRD by Claimant American Express Financial Advisers, Inc., on July 27, 2004 and November 10, 2004 be expunged. Replacement language for Part 1, Item 3 of the Internal Review DRPs is as follows: "The firm conducted a multi-broker review that focused on industry and company policy violations. The firm's review concluded that the registered representative violated AEFA company policy by facilitating personal transactions on behalf of clients." The expungement recommendation is being made to clarify that the firm's review was a "multi-broker" review.

The Panel makes the recommendation above with the understanding that Respondent Frank P. Marzano must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

3. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 500.00
Counterclaim filing fee	= \$ 250.00

#### 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. Accordingly, American Express Financial Advisers, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

May 12-13, 17, 18, 2005 adjournment by Claimant = \$ 1,000.00

**Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Five (5) Pre-hearing sessions with Panel @ \$1,000.00 = \$ 5,000.00

Pre-hearing conferences:	September 20, 2004	1 session
	October 1, 2004	1 session
	November 5, 2004	1 session
	May 17, 2005	1 session
	September 15, 2005	1 session

Twenty-eight (28) Hearing sessions @ \$1,000.00 = \$28,000.00

Hearing Dates:	November 3, 2004	2 sessions
	November 4, 2004	2 sessions
	November 9, 2004	2 sessions
	September 13, 2005	2 sessions
	September 14, 2005	2 sessions
	September 20, 2005	2 sessions
	September 21, 2005	2 sessions
	October 26, 2005	2 sessions
	October 27, 2005	2 sessions
	October 28, 2005	2 sessions
	November 22, 2005	2 sessions
	November 28, 2005	2 sessions
	November 30, 2005	2 sessions
	December 5, 2005	2 sessions

---

Total Forum Fees = \$33,000.00

1. The Panel has assessed \$26,400.00 of the forum fees to Claimant.
2. The Panel has assessed \$6,600.00 of the forum fees to Respondent.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant requested copies of tapes for the November 3-4, 9, 2004 hearings = \$ 330.00
2. Respondent requested copies of tapes for the November 3-4, 2004 hearings = \$ 285.00

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 4,450.00
Forum Fees	= \$26,400.00
Adjournment Fee	= \$ 1,000.00
<u>Administrative Costs</u>	<u>= \$ 330.00</u>
Total Fees	= \$32,680.00
<u>Less payments</u>	<u>= \$ 7,280.00</u>
Balance Due NASD Dispute Resolution	= \$25,400.00

2. Respondent is solely liable for:

Filing Fee	= \$ 250.00
Forum Fees	= \$ 6,600.00
<u>Administrative Costs</u>	<u>= \$ 285.00</u>
Total Fees	= \$ 7,135.00
<u>Less payments</u>	<u>= \$ 1,535.00</u>
Balance Due NASD Dispute Resolution	= \$ 5,600.00

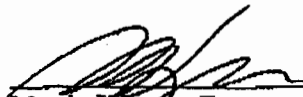
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Martin Hunger, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Robert A. Cohen	-	Non-Public Arbitrator
Steven J. Petrie	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this, which is my award.

  
\_\_\_\_\_  
Martin Hunger, Esq.  
Non-Public Arbitrator

Jan 12, 2006  
Signature Date

\_\_\_\_\_  
Robert A. Cohen  
Non-Public Arbitrator

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

\_\_\_\_\_  
Steven J. Petrie  
Non-Public Arbitrator

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

JANUARY 13, 2006  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

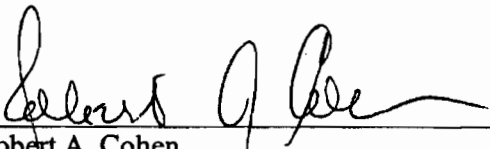
Martin Hunger, Esq. - Non-Public Arbitrator, Presiding Chairperson  
Robert A. Cohen - Non-Public Arbitrator  
Steven J. Petrie - Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this, which is my award.

\_\_\_\_\_  
Martin Hunger, Esq.  
Non-Public Arbitrator

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

  
\_\_\_\_\_  
Robert A. Cohen  
Non-Public Arbitrator

31 December 2005  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Steven J. Petrie  
Non-Public Arbitrator

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

JANUARY 13, 2006  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Martin Hunger, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Robert A. Cohen	-	Non-Public Arbitrator
Steven J. Petrie	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this, which is my award.

\_\_\_\_\_  
Martin Hunger, Esq.  
Non-Public Arbitrator

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

\_\_\_\_\_  
Robert A. Cohen  
Non-Public Arbitrator

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

  
\_\_\_\_\_  
Steven J. Petrie  
Non-Public Arbitrator

1/13/06  
\_\_\_\_\_  
Signature Date

JANUARY 13, 2006  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)