

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant

Case Number: 03-00558

American Express Financial Advisors, Inc.

Names of the Respondents/Third-Party Claimants

Hearing Site: Charlotte, North Carolina

Charles M. Pitts

Lisbeth L. Cherrington

Names of the Third-Party Respondents

Daniel Richardson

Kevin F. Crowe

William Karl Eychaner

Nature of the Dispute: Member vs. Associated Persons

REPRESENTATION OF PARTIES

Claimant, American Express Financial Advisors, Inc. ("AEFA"), hereinafter referred to as "Claimant", was represented by Edward Magarian, Esq. and Todd Schnell, Esq., Dorsey & Whitney LLP, Minneapolis, Minnesota.

Respondent/Third-Party Claimant, Charles M. Pitts ("Pitts"), was represented by William Bowen, Esq., Law Office of William Bowen, Hilton Head Island, South Carolina.

→ Respondent/Third-Party Claimant, Lisbeth L. Cherrington ("Cherrington") was represented by Thomas M. Campell, Esq., Smith Campbell, LLP, New York, New York.

Third-Party Respondents, Daniel Richardson ("Richardson"), Kevin F. Crowe ("Crowe"), and William Karl Eychaner ("Eychaner"), hereinafter collectively referred to as "Third-Party Respondents", were represented by Edward Magarian, Esq. and Todd Schnell, Esq., Dorsey & Whitney LLP, Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed on January 22, 2003.

Amended Statement of Claim filed on January 31, 2003.

C. David Flower executed the Uniform Submission Agreement on behalf of Claimant on December 31, 2002.

Statement of Answer, Counterclaim and Third-Party Claim filed by Respondent Cherrington on February 6, 2003.

Respondent Cherrington signed the Uniform Submission Agreement on February 5, 2003. Statement of Answer, Counterclaim and Third-Party Claim filed by Respondent Pitts on February 7, 2003.

Respondent Pitts signed the Uniform Submission Agreement on February 5, 2003. Third-Party Respondents did not file Uniform Submission Agreements with NASD Dispute Resolution.

Claimant and Third-Party Respondents filed their response to the Counterclaim and Third-Party Claim of Respondent Cherrington on February 18, 2003.

Claimant and Third-Party Respondents filed their response to the Counterclaim and Third-Party Claim of Respondent Pitts on February 18, 2003.

Respondent Cherrington's Post-Hearing Submission was filed on March 10, 2003.

Respondent Pitts's Post-Hearing Submission was filed on March 11, 2003.

Claimant's Memorandum in Support of its Motion for Preliminary Injunction was filed on March 11, 2003.

Claimant and Third-Party Respondents' Motion to Dismiss was filed on June 16, 2003.

Respondent Pitts and Cherrington's Opposition to the Motion to Dismiss was filed on July 2, 2003.

Claimant and Third-Party Respondents' Reply to Respondents Pitts and Cherrington's Opposition to the Motion to Dismiss was filed on July 7, 2003.

Claimant and Third-Party Respondents' Memorandum in Support of Motion to Dismiss Respondent's Fourth Claim for Relief-Defamation was filed on November 17, 2003.

Respondent Cherrington Opposition to Motion to Dismiss Respondent's Fourth Claim for Relief-Defamation was filed on December 4, 2003.

Claimant and Third-Party Respondents' Reply to Respondent Cherrington's Opposition to the Motion to Dismiss was filed on December 9, 2003.

Respondent Cherrington's Motion for Judgment was filed on November 12, 2003.

Respondent Pitts's Motion for Judgment was filed on November 13, 2003.

Claimant and Third-Party Respondents' Consolidated Response to Respondents Pitts and Cherrington's Motions for Judgment was filed on December 4, 2003.

CASE SUMMARY

Claimant asserted the following causes of action, among others: breach of contract, misappropriation of trade secrets, breach of fiduciary duty, unfair competition, fraud, and violation of Section 43(a) of the Lanham Act. The causes of action relate to Respondents Pitts and Cherrington's alleged breach of their Franchise Agreement with AEFA and their actions before and after terminating their relationship with AEFA.

Unless specifically admitted in his Answer, Respondent Pitts denied the allegations made in the Amended Statement of Claim.

Unless specifically admitted in her Answer, Respondent Cherrington denied the allegations made in the Amended Statement of Claim.

Respondent Pitts asserted the following causes of action, among others: discrimination under M.S.A. Section 363.01 et. sq., tortious interference with prospective business advantage, tortious interference with contract, defamation, deceptive trade practices under M.S.A. Section 325D.44 et seq., breach of contract, breach of implied covenant of fair dealing and good faith, and unjust enrichment.

Unless specifically admitted in his Answer, Claimant and Third-Party Respondents denied the allegations made in the Respondent Pitts's Counterclaim and Third-Party Claim and asserted the following defenses, among others: failure to state a claim upon which relief may be granted, failure to exhaust administrative remedies, all actions taken against Respondent were reasonable and based on other factors other than age, Claimant and Third-Party Respondents exercised reasonable care, any statements made were privileged and therefore not actionable, any statements were truthful, statute of limitations, and any alleged actionable conduct occurred outside the scope of Third-Party Respondents' employment.

Respondent Cherrington asserted the following causes of action, among others: discrimination under M.S.A. Section 363.01 et. sq., tortious interference with prospective business advantage, tortious interference with contract, defamation, deceptive trade practices under M.S.A. Section 325D.44 et seq., breach of contract, breach of implied covenant of fair dealing and good faith, and unjust enrichment.

Unless specifically admitted in their Answer, Claimant and Third-Party Respondents denied the allegations made in the Respondent Cherrington's Counterclaim and Third-Party Claim and asserted the following defenses, among others: failure to state a claim upon which relief may be granted, failure to exhaust administrative remedies, all actions taken against Respondent were reasonable and based on other factors other than sex, Claimant and Third-Party Respondents exercised reasonable care, any statements made were privileged and therefore not actionable, any statements were truthful, statute of limitations, and any alleged actionable conduct occurred outside the scope of Third-Party Respondents' employment.

RELIEF REQUESTED

Claimant in its Amended Statement of Claim requested injunctive relief, compensatory damages in excess of \$75,000.00, punitive damages, attorneys' fees, costs and such other relief as is deemed appropriate.

Respondent Pitts in his Counterclaim and Third-Party Claim requested compensatory damages of no less than \$750,000.00, punitive damages of \$5,000,000.00, injunctive relief, attorneys' fees,

expenses, and costs.

Respondent Cherrington in her Counterclaim and Third-Party claim requested compensatory damages of no less than \$750,000.00, punitive damages of \$5,000,000.00, injunctive relief, attorneys' fees, expenses, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

Third-Party Respondents did not file with NASD Dispute Resolution, properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The Panel denied Claimant's request for permanent injunction.

During the January 9, 2004 hearing, Respondent Pitts agreed to dismiss his claims for defamation, discrimination under the Minnesota Human Rights Act, Minn. Stat., sec. 363.01 and deceptive trade practices under Minn. Stat., sec 363.02 et seq. By Order dated January 16, 2004, the Panel dismissed the above-referenced claims.

By Order dated January 29, 2004, the Panel dismissed Respondent Cherrington's claims for defamation, discrimination under the Minnesota Human Rights Act, Minn. Stat., sec. 363.01, deceptive trade practices under Minn. Stat., sec 363.02 et seq, and any claims arising from conduct predating March 8, 2002.

By the same Order dated January 29, 2004, the Panel denied Claimant and Third-Party Respondents' Motion to dismiss Respondent Cherrington's defamation claim.

By way of letter dated March 8, 2004, Respondent Cherrington voluntarily dismissed her defamation claim.

AWARD

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

1. Claimant is liable to and shall pay to Respondent Pitts compensatory damages in the amount of \$620,000.00;
2. Claimant is liable to and shall pay to Respondent Cherrington compensatory damages in the amount of \$500,000.00. This amount is inclusive of any entitlement existing under her buy/sell agreement with Respondent Pitts;

3. Claimant is liable to and shall pay to Respondent Pitts attorney's fees in the amount of \$130,000.00, pursuant to the franchise documents and applicable law;
4. Claimant is liable to and shall pay to Respondent Cherrington attorney's fees in the amount of \$300,000.00, pursuant to the franchise documents and applicable law;
5. All claims against Respondents Pitts and Cherrington are denied in their entirety;
6. All claims against Third-Party Respondents are denied in their entirety;
7. The parties shall bear their respective costs, except as Fees are specifically addressed below; and,
8. Any and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.

Arbitrator Feldman concurs in part and dissents in part with the Panel's Award. Attached, as "Exhibit A", is Arbitrator Feldman's Dissenting Opinion.

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
Respondent Pitts' Counterclaim/Third-Party Claim filing fee	= \$ 600.00
Respondent Cherrington's Counterclaim/Third-Party Claim filing fee	= \$ 600.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person(s) at the time of the events giving rise to the dispute. Accordingly, Claimant AEFA is a party.

Member surcharge	= \$ 1,500.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 5,500.00</u>
Total Member Fees	= \$ 7,750.00

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

Member firm AEFA is assessed:

Injunctive relief surcharge	= \$ 2,500.00
Additional arbitrator honoraria	= \$ 2,600.00
Arbitrator travel expenses and costs	= \$ 1,597.44

Forum Fees and Assessments

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: February 24, 2003 1 session	
Three (3) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 3,600.00
Pre-hearing conferences: March 21, 2003 1 session	
June 25, 2003 1 session	
January 16, 2004 1 session	
Twenty-seven (27) Hearing sessions @ \$1,200.00	= \$32,400.00
Hearing Dates: February 20, 2003 3 sessions	
February 21, 2003 3 sessions	
February 22, 2003 1 session	
July 14, 2003 2 sessions	
July 15, 2003 2 sessions	
July 16, 2003 2 sessions	
July 17, 2003 2 sessions	
July 18, 2003 2 sessions	
December 11, 2003 2 sessions	
December 12, 2003 2 sessions	
January 9, 2004 2 sessions	
March 10, 2004 2 sessions	
March 11, 2004 2 sessions	
<hr/> Total Forum Fees	<hr/> = \$36,450.00

1. The Panel has assessed \$36,450.00 of the forum fees to Claimant.

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 | = \$ 645.00 |
| 2. Respondent Pitts requested copies of tapes | = \$ 495.00 |
| 3. Respondent Cherrington requested photo copies and administrative support at hearing location | = \$ 49.55 |

SEE SUMMARY

- | | |
|---|----------------------|
| 1. Claimant is assessed and shall pay the following fees: | |
| Initial Filing Fee | = \$ 500.00 |
| Member Fees | = \$ 7,750.00 |
| Injunctive Relief Fees | = \$ 6,697.44 |
| Forum Fees | = \$36,450.00 |
| <u>Administrative Costs</u> | <u>= \$ 645.00</u> |
| Total Fees | = \$52,042.44 |
| <u>Less payments</u> | <u>= \$11,957.90</u> |
| Balance Due NASD Dispute Resolution | = \$40,084.54 |
| 2. Respondent Pitts is assessed and shall pay the following fees: | |
| Filing Fee | = \$ 600.00 |
| <u>Administrative Costs</u> | <u>= \$ 495.00</u> |
| Total Fees | = \$ 1,095.00 |
| <u>Less payments</u> | <u>= \$ 2,994.58</u> |
| Refund Owed Respondent | = \$ 1,899.58 |
| 3. Respondent Cherrington is assessed and shall pay the following fees: | |
| Filing Fee | = \$ 600.00 |
| <u>Administrative Costs</u> | <u>= \$ 49.55</u> |
| Total Fees | = \$ 649.55 |
| <u>Less payments</u> | <u>= \$ 2,450.00</u> |
| Refund Owed Respondent | = \$ 1,800.45 |

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


ARBITRATION PANEL

David L. Gittleman, Esq.	-	Public Arbitrator, Presiding Chairperson
Larry A. Feldman	-	Public Arbitrator, Panelist
John A. Baynes, III	-	Public Arbitrator, Panelist

Concurring Arbitrators' Signatures

David L. Gittleman, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date


John A. Baynes, III
Public Arbitrator, Panelist

3/3/04
Signature Date

Concurring in Part and Dissenting in Part Arbitrator's Signature

Larry A. Feldman
Public Arbitrator, Panelist

Signature Date

April 2 2004
Date of Service (For NASD Dispute Resolution office use only)

Concurring Arbitrators' Signatures

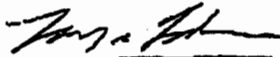
David L. Gittleman, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

John A. Baynes, III
Public Arbitrator, Panelist

Signature Date

Concurring in Part and Dissenting in Part Arbitrator's Signature



Larry A. Feldman
Public Arbitrator, Panelist

03-30-04
Signature Date

April 2, 2004
Date of Service (For NASD Dispute Resolution office use only)

Exhibit A

Dissenting Opinion

Arbitrator Feldman concurs in part and dissents in part.

With regard to the findings of the panel concerning the case brought by American Express Financial Services, Inc. against Ms. Cherrington and Mr. Pitts as well as the counter-claims filed by Ms. Cherrington and Mr. Pitts, Arbitrator Feldman concurs with the panel's findings in dismissing all claims against Ms. Cherrington and Mr. Pitts.

Mr. Feldman dissents from the panel decision in the amount of the award to Ms. Cherrington and Mr. Pitts and would have awarded compensatory damages in the amount of not less than \$750,000.00 to both.

Mr. Feldman would also award to Mr. Pitts punitive damages in an amount not less than \$750,000.00

