Award
FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
Leerink Swann LLC

Case Number: 13-01897

vs.

Respondent
Scott Edward Price

Hearing Site: Boston, Massachusetts

Nature of the Dispute: Member vs. Associated Person

REPRESENTATION OF PARTIES

For Claimant Leerink Swann LLC: Peter A. Brown, Esq., D'Ambrosio Brown LLP, Boston, Massachusetts.

For Respondent Scott Edward Price: Peter R. Pendergast, Esq., Prince Lobel Tye LLP, Boston, Massachusetts.

CASE INFORMATION

Statement of Claim filed on or about: June 27, 2013.
Answer to Counterclaim filed on or about: September 20, 2013
Claimant signed the Submission Agreement: June 27, 2013.

Statement of Answer and Counterclaim filed by Respondent on or about: August 20, 2013.
Respondent signed the Submission Agreement: September 8, 2013.

CASE SUMMARY

Claimant asserted the following causes of action: breach promissory note, breach of employment contract, breach of implied covenant of good faith and fair dealing, and unjust enrichment.

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

In his Counterclaim, Respondent asserted the following causes of action: breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, equitable estoppel, fraud and deceit, negligence, and breach of duty of care.

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

RELIEF REQUESTED

In the Statement of Claim, Claimant requested compensatory damages in the amount of $135,000.00, interest, attorneys' fees, costs, and such other and further relief as the Arbitrator deems just and proper.

In his Answer and Counterclaim, Respondent requested dismissal of Claimant's claims, unspecified compensatory damages, rescind the promissory note and grant Respondent equitable relief discharging any and all obligations of payment under the note.

In his counterclaim, Respondent never specified a dollar amount for damages he allegedly sustained. In his prehearing Brief, Respondent asserted that he had sustained damages in the amount $720,000.00 that represents lost commissions from three of his largest clients from Credit Suisse who refused to transfer their accounts to Leerink Swann when Respondent first became employed. Respondent subsequently filed an Amended Prehearing Brief wherein he revised the amount of his alleged damages to $219,685.00.

In its Answer to the Counterclaim, Claimant requested dismissal of the Counterclaim, costs, attorneys' fees, and such other and further relief as the Arbitrator deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

Both Claimant and Respondent filed Motions to Compel; each party filed an opposition. The Claimant's motion was granted in part and denied in part. The Respondent's motion was allowed in part and denied in part. At the hearing, the Respondent made a Motion to Compel the Appearance of Jeffrey Leerink, CEO of Leerink Swann and the Claimant filed an opposition thereto. Respondent had included Mr. Leerink on his witness list. Respondent's Motion to Compel the Appearance of Mr. Leerink was granted. Respondent however, never called Mr. Leerink to testify. At the hearing, Claimant made a Motion for leave to file Affidavit of Legal Fees and Costs Incurred after The close of the hearing and before the close of the record. Claimant's motion was allowed. At the hearing, Claimant made a Motion to Dismiss Count V (Fraud & Deceit) of Respondent's Counterclaim. The motion was moot as Respondent voluntarily withdrew this Count from his counterclaim at the start of the hearing. At the hearing, Claimant made a Motion In Limine to Exclude Testimonial Evidence of Damages in Support of Respondent's Counterclaims. In the interest of allowing Respondent a full and fair opportunity to be heard on all issues present and, Claimant's motion was denied.

As noted above, Respondent failed to specify any dollar amount of damages in his Counterclaim. Additionally, in response to Claimant's discovery requests concerning his claimed damages, Respondent failed to produce any documentation that would support his procedurally inappropriate and untimely damages claim. During the hearing on Claimant's Motion to Compel, Respondent stated that documentary evidence would be produced in support of his counterclaim damages on or before the deadline for the Prehearing Brief. The Respondent submitted no such documentation. In the interest of allowing Respondent a full and fair opportunity to be heard on all issues, the Arbitrator denied Claimant's Motion in limine To Exclude Testimonial Evidence of Damages in Support of Respondent's Counterclaims. However, in addition to the procedurally inappropriate manner in which it was raised for the first time in his Prehearing Brief, the Arbitrator finds that the Respondent's oral testimony in support of his counterclaim damages was wildly speculative, unsupported or uncorroborated by any documentation, inconsistent with his own testimony and accordingly, was impossible to ascertain with any certainty.

At the conclusion of the hearing, the record remained open so that the Claimant, through counsel, could submit his Affidavit and documentation in support of attorneys' fees. The Claimant filed his Affidavit on April 10, 2015 and seeks $105,970.00 in attorneys' fees, $7,325.00 in costs as well as $12,312.00 in e-discovery vendor expenses which it has incurred. The parties both filed Post-Hearing Briefs. On April 23, 2015 a telephonic hearing was held on Claimant's request for attorneys' fees. Both parties participated in the hearing.

ARBITRATOR'S REPORT

Respondent seeks to circumvent the unambiguous terms and conditions of the promissory note and written employment contract he executed by arguing that these two documents did not constitute his "Agreement" with Leerink Swann, but rather were supplemented during the interview process by representations and promises made to him about certain unspecified resources that would allegedly be made available to him in connection with building his wealth management practice. Through his counterclaim, Respondent argues that the legal doctrine of promissory estoppel operates to void his obligations under the Note because, but for the alleged misrepresentations made to induce him to leave Credit Suisse on which he relied, he never would have joined Leerink Swann's Wealth Management group.

In order to prevail on a claim of promissory estoppel, a plaintiff must show that the defendant made a material misrepresentation or promise on which he reasonably relied to his detriment. *Barcelona v. Deutsche Bank Nat. Trust Co.,* 8 Mass. App. Ct. 1102 (2014). Additionally, a mere promise made by the defendant is insufficient, the promise must be enforceable sufficient with which to support a contractual obligation. See, *Rhode Island Hospital Trust National Bank vs. Paul N. Varadian,* 419 Mass. 841, 850; 647 N.E.2d 1174 (1995). Respondent's attempt to modify, alter or supplant the clear and express terms of his written employment agreement and promissory note must fail because there was insufficient evidence in the record that would support a finding the Claimant made a material misrepresentation to Respondent on which he reasonably relied to his detriment.

Respondent alleges that during the recruitment process, he met with several of Leerink's executives who made certain representations concerning the firm's plans to build its Wealth Management group into a model that would try to replicate the Hambrecht & Quist/Montgomery Securities model of investment banking client referrals to the firm's retail financial advisors. Respondent contends that he was shown a marketing document, dated December 9, 2009, by Leerink Swann's recruiter at the early stages of the hiring process, which he characterizes as a "Pitch Book". Respondent further asserts that this document contained a number of representations concerning the extent of resources (specifically investment banking client referrals and referrals from MEDACorp, Leerink's network of physicians and expert health care consultants) that Leerink Swann promised they would provide him in order to build a wealth management business. Respondent claims that other executives, with whom he met during the interview process, expanded upon the representations contained in the "Pitch Book".

Despite the importance Respondent ascribes to the Pitch Book in support of his promissory estoppel claim, the document itself is nothing more than a printed copy of a PowerPoint presentation. The single most defining characteristic or attribute of such documents is their lack of specificity. The information conveyed in such documents is presented in a rudimentary or conceptually broad-based outline form. The wording or concepts presented in the "Pitch Book", on which Respondent places great reliance, is similarly vague and untethered to any specific representations that would support an enforceable contractual promise. See, *Rhode Island Hospital Trust, supra, (detrimental reliance is equivalent to a contract action, and the party bringing such an action must prove all the necessary elements of a contract other than consideration). Compare, John M. Rooney vs. Paul D. Osborne Desk Company, Inc.,* 38 Mass. App. Ct. 82 (1995) (oral promise to issue shares of the defendant's capital stock to plaintiff as consideration for his future services in lieu of his normal salary was enforceable as evidenced by the written minutes of a meeting of the board of directors). Thus, Respondent's testimony that he believed, based on the Pitch Book, that he was being given a "winning lottery ticket," is not credible because that document is devoid of any phrases or words that could be construed as a guarantee or promise on the part of Leerink Swann that Respondent would be given a specified number of investment banking clients or MEDACorp referrals.

Respondent's testimony that he was not provided with the promised infrastructure, platform or resources sufficient for him to receive referrals was vague, internally inconsistent, implausible and unsupported by any credible evidence. Furthermore, Respondent's position on several crucial issues vacillated and evolved from the filing of the counterclaim, through discovery and up to and including his testimony throughout the hearing. In his counterclaim, Respondent placed great emphasis on the alleged representation that he would receive referrals from MEDACorp, Leerink Swann's expert physician/consultant network. Respondent claimed that the existence of MEDACorp and the promise/potential for referrals was integral to his decision to leave Credit Suisse and join Leerink Swann. Eight of sixteen of his requests for production of documents made specific reference to MEDACorp. Yet, at the hearing, the importance and significance of MEDACorp for Respondent waned considerably. Respondent testified that the predominant lure was the potential for investment banking client referrals and the representations concerning MEDACorp was merely "icing on the cake".

Additionally, it is inexplicable how Respondent could admit that he knew his term of employment was for no fixed term, but then argue, in the same breath, that he was harmed by Leerink's decision to shut down the Wealth Management group. Respondent's acknowledgment that he was an at-will employee and that he understood the meaning of the term is wholly inconsistent with the allegations of his counterclaim that Leerink Swann duped him into working for it on the basis that they were obligated to hand-deliver to him countless number of referrals, but then intentionally failed to do so.

More significantly, there was credible testimony from witnesses at the hearing that the Respondent knew that the Wealth Management group was in the process of development and the Respondent was hired to help facilitate its growth. Respondent's supervisor credibly testified that he explained to Respondent what resources were in place; that the Wealth Management group was inchoate and a work in progress, and further, that he made no guarantees to Respondent in terms of how many investment banking client referrals he would receive, nor did he make any representations that contradicted the unequivocal terms of his written employment agreement. Respondent's own witness, who was his friend and was hired by Leerink upon his recommendation and was shown the "Pitch Book", testified that he understood that Leerink Swann was working on "building a Wealth Management business" and furthermore, he was, "not naive" and knew that he was being provided an opportunity to help build something and was not merely being handed a "winning lottery" ticket. In short, Respondent's entire counterclaim is premised on an interpretation of the Pitch Book that is inconsonant with that of every other witness who either received and/or who prepared the document and testified at the hearing.

The most glaring defect in Respondent's counterclaim is the fact that he sustained no damages or suffered no detriment as a result of working for Leerink Swann. It is undisputed that Respondent earned $81,000 his final year at Credit Suisse in 2009 and then earned $229,000 and $187,000 in 2010 and 2011 respectively at Leerink Swann. A question thus inexorably arises: how can Respondent claim he was harmed by working for Leerink Swann? *See, Hall v Horizon House Microwave Inc.*, 24 Mass.App.Ct. 84, 94 (1987) (no evidence of detriment for promissory estoppel claim where plaintiff's compensation increased).

Furthermore, Respondent's own testimony undermines his claim that his reliance on the alleged misrepresentations was reasonable. Respondent testified that Leerink Swann's retail brokerage group had a less than stellar reputation among Boston's brokerage community. Respondent further stated that he was told by Leerink Swann's recruiter that the firm was planning on "cleaning house" in order to bring in more seasoned and reputable retail brokers. As one of the first hires in the Wealth Management unit with almost thirty years of experience in the investment brokerage business in Boston, it was clearly unreasonable for Respondent to expect that the reputation and caliber of the retail unit at Lerrink, that in his own words was previously held in low regard, would become transformed overnight into a group of seasoned and respected financial advisors whose esteem would have sufficient appeal to the investment banking group at Leerink Swann so they would feel more comfortable referring the firm's investment banking clients to the retail brokers in the revitalized Wealth Management group.

Additionally, the contention of Respondent that his reliance on the alleged misrepresentations of Leerink Swann was reasonable or justifiable falters completely because he testified that he performed not a modicum of due diligence on the viability of the new Wealth Management group or platform prior to accepting Leerink Swann's offer of employment. Respondent could have easily called or emailed the Investment Banking group at Leerink to assess or ascertain the prospect for referrals given the status or infrastructure of the Wealth Management group as it existed when he was planning on joining the firm. He chose not to do so. See, *Collins v. Huculak,* 57 Mass.App.Ct. 387,392 (2003) (no justifiable reliance where plaintiff blindly relies upon a misrepresentation the falsity of which would be patent to him if he utilized his opportunity to make a cursory examination or investigation).

Finally, there is credible evidence in the record that belies Respondent's assertion that but for the alleged representation about the status of the Wealth Management group, he would have never left Credit Suisse. A cotemporaneous email dated at around the time Respondent was interviewing with Leerink indicates that he was also conducting an interview with Oppenheimer & Co. Respondent's explanation that the only reason he was interviewing was because his neighbor worked at Oppenheimer strains credulity.

During the telephonic hearing on Claimant's request for attorney's fees, Respondent argued that since this was a simple promissory note case, the attorney's fees Claimant is seeking are excessive and disproportionate to the amount of recoverable damages. The claims adduced here by the Respondent are disingenuous and wholly without merit. Were this the simple and uncomplicated promissory note case that Respondent contends, why the doggedness of his defense? Why the filing of a five-count counterclaim? Why the insistence on burdensome, time-consuming and costly responses to discovery requests when the production by the Claimant did not enhance or advance Respondent's counterclaim in any appreciable or legally significant manner? Respondent insisted on full and complete discovery that required Claimant to produce some 54,000 pages of emails. Yet, only a handful of these documents were offered and admitted into evidence.

The unyielding litigation stance adopted by the Respondent wholly undermines his claim that the instant arbitration was a simple garden-variety promissory note case. The manner in which the Respondent chose to litigate this matter was the primary reason for the protracted nature of the proceedings. Respondent will not presently be heard to complain about the amount of attorney's fees incurred by Claimant when the defense tactics he so willingly employed were responsible for a substantial amount of those same fees now assessed against him.

Examples of the consumption of time and expense the Claimant was unnecessarily required to expend due to the litigation tactics of the Respondent include the following: failing to comply with the FINRA Code of Arbitration procedure that mandates a party to first attempt to resolve discovery disputes with the opposing party prior to filing a motion to compel; providing an extensive list of witnesses to require Claimant to prepare for cross-examination then releasing those witnesses the Friday before the scheduled Monday hearing; threatening to file motions to dismiss and motions for sanctions in an attempt to gain litigation leverage necessitating unnecessary responses by Claimant; noncompliance with the discovery Orders issued by the Arbitrator; and, arguing the

significance of the MEDACorp network as a basis for document requests knowing that the type of document review and production would be onerous and burdensome and insisting on a full and complete production on an issue that was then later depicted at the hearing as a rather insignificant part of the case.

From the time Respondent defaulted on the promissory note, Claimant made a number of attempts to resolve the matter in an amicable, expeditious and fair manner. These settlement efforts included an offer to reduce the outstanding balance due on the forgivable loan by 25%. Respondent rebuffed these repeated good-faith attempts, made no payments on the balance due and instead, responded by filing a baseless, and as noted above, legally deficient counterclaim, that unnecessarily prolonged the arbitration and forced the Claimant to incur substantial costs, fees and expenses in its attempt to collect on the loan. The attorney's fees provision in the promissory note exists to dissuade such obdurate behavior.

Respondent acknowledged that he signed the promissory note and accepted the money from Leerink Swann. He understood that he was an at-will employee and could be terminated for any reason. Respondent further testified that he knew that upon his separation from Leerink, he would be liable for the balance due as well as attorney's fees incurred in collecting the default balance. He executed the promissory note, he took the money, he used the money at a low interest rate (2.45%) and when Leerink Swann closed down the Wealth Management Group, he took another up front bonus/forgivable loan shortly thereafter from First Republic, yet, despite having no legitimate defense to repayment, he has refused to tender the loan balance due and owing to Leerink Swann.

Though the Respondent's disproportionality argument in connection with Claimant attorneys' fees request, as noted above, is unpersuasive, I have made adjustments, where warranted, due to instances where the level of billing or time spent on certain matters or issues was incommensurate with that which was reasonably necessary for the specified task to be completed in a competent and proficient manner in accordance with the provisions of the FINRA Code of Arbitration Procedure. The arbitrator based these adjustments on my experience awarding attorney's fees in other cases as well as my knowledge of the issues presented for resolution in the instant arbitration.

AWARD

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

1. Respondent is liable for and shall pay to Claimant compensatory damages in the amount of $135,000.00 plus interest at the rate of 2.45% per annum from January 1, 2012 until the date of the Award.

2. Respondent is liable for and shall pay to Claimant attorneys' fees in the amount of $80,600.00. The Arbitrator awarded attorneys' fees pursuant to the terms of the promissory note.

3. Respondent is liable for and shall pay to Claimant $7,325.00 in costs.

4. Respondent is liable for and shall pay to Claimant $12,312.00 in e-discovery vendor costs.

5. Respondent's Counterclaim is denied in its entirety.

6. Any and all relief not specifically addressed herein is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees
FINRA Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee	= $ 2,125.00
Counterclaim Filing Fee	= $ 1,250.00

**The filing fee is made up of a non-refundable and a refundable portion.*

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, as a party, Leerink Swann, LLC is assessed the following:

Member Surcharge	= $ 1,700.00
Pre-Hearing Processing Fee	= $ 750.00
Hearing Processing Fee	= $ 2,750.00

Adjournment Fees
Adjournments granted during these proceedings for which fees were assessed:

June 20 and 23, 2014 adjournment by the parties	= $ 450.00
September 26 and 29, 2014 adjournment by Claimant	= $ 450.00
March 19, 2015 adjournment by Claimant	= $ 450.00
Total Adjournment Fees	= $1,350.00

1. The Arbitrator has assessed $675.00 of the adjournment fees to Claimant.
2. The Arbitrator has assessed $675.00 of the adjournment fees to Respondent.

Three-Day Cancellation Fees
Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

March 19, 2015 adjournment by Claimant	= $ 100.00

Hearing Session Fees and Assessments

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

Three Pre-hearing sessions with a single arbitrator @ $450.00/session			= $1,350.00
Pre-hearing conferences:	November 6, 2013	1 session	
	May 5, 2014	1 session	
	May 9, 2014	1 session	
Seven (7) Hearing sessions @ $450.00/session			= $3,150.00
Hearing Dates:	February 23, 2015	2 sessions	
	February 24, 2015	2 sessions	
	March 26, 2015	2 sessions	
	April 23, 2015	1 session	
Total Hearing Session Fees			= $4,500.00

1. The Arbitrator has assessed $2,250.00 of the hearing session fees to Claimant.
2. The Arbitrator has assessed $2,250.00 of the hearing session fees to Respondent.

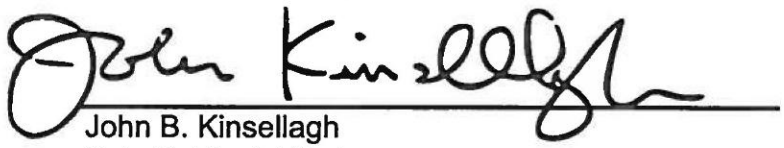
All balances are payable to FINRA Dispute Resolution and are due upon receipt.

ARBITRATOR

John B. Kinsellagh - Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature



John B. Kinsellagh
Sole Public Arbitrator

May 29, 2015
Signature Date

June 1, 2015
Date of Service (For FINRA Dispute Resolution office use only)