

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

ONB Investment Services, Inc.

Case No. 00-05150

Name of Respondents/Counterclaimants

Mark R. Edwards;  
Lisa L. Thomas; and  
Jill M. White

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**REPRESENTATION OF PARTIES**

Claimant/Counter-Respondent ONB Investment Services, Inc. ("ONB") was represented by Mark J. R. Merkle, Esq., of Krieg Devault Alexander & Capeheart, LLP, located in Indianapolis, Indiana.

Respondents/Counterclaimants Mark R. Edwards ("Edwards"), Lisa L. Thomas ("Thomas") and Jill M. White ("White") (the "Respondents") were represented by B. Keith Shake, Esq., of Henderson Daily Withrow & DeVoe, located in Indianapolis, Indiana.

**CASE INFORMATION**

Statement of Claim filed on or about: November 20, 2000.

ONB signed the Uniform Submission Agreement: November 15, 2000.

ONB's Prehearing Brief in Support of Injunctive and Other Relief filed on: November 29, 2000.

Statement of Answer filed by Respondents Edwards, Thomas and White on or about: December 19, 2000.

Edwards signed the Uniform Submission Agreement: January 4, 2001.

Thomas signed the Uniform Submission Agreement: January 3, 2001.

White signed the Uniform Submission Agreement: January 3, 2001

Respondents' Memorandum on Custom and Practice and the Balance of the Relative Hardships filed on: November 28, 2000.

Respondents' Memorandum of Law on Irreparable Harm and the Public Interest filed on:

November 28, 2000.

Respondents' Memorandum on Likelihood of Success on the Merits filed on: November 28, 2000.

Respondents' Request to Reconsider filed on: December 18, 2000.

ONB's Response to the Request to Reconsider filed on: December 27, 2000.

Respondents Edwards, Thomas and White's Statement of Counterclaim filed on: December 20, 2000.

ONB's Response to Counterclaim filed on: December 29, 2000.

ONB's Arbitration Proceeding Brief in Support of Injunctive and Other Relief filed : February 26, 2001.

Respondents' Memorandum in Opposition to Request for an Injunctive and Other Relief filed on: February 26, 2001.

### **CASE SUMMARY**

Claimant alleged that Respondents Edwards, Thomas and White violated the employment agreement they executed with ONB by removing confidential customer information from the office before their resignation from ONB. Immediately upon their resignation, their new employer, PaineWebber Incorporated, used this information to solicit the transfer of ONB customer accounts to PaineWebber. ONB asserted claims for (1) violation of Indiana's Uniform Trade Secrets Act; (2) breaches of fiduciary duty and duty of loyalty; (3) tortious interference with contractual relationships; and (4) criminal trespass and criminal conversion.

Unless specifically admitted in its Answer, Respondents denied the allegations made in the Statement of Claim. Respondents asserted a counterclaim, alleging that ONB had no right to prohibit Edwards, Thomas and White from earning a livelihood by prohibiting them from maintaining their longstanding relationship with their clients, especially in the absence of any non-competition or other restrictive covenant. In addition, Edwards alleged that since ONB hired him in 1989, he had developed clients through his own efforts and networking, and often at his own expense. Edwards further alleged that not only was there no covenants or expectations that the customer information would remain confidential, but also he acted in a manner consistent with industry custom and practice. Based upon these allegations, the Respondents asserted claims for violating Rule 10335 because ONB initially filed in state court without filing in arbitration and for the improvidently granted Immediate Injunctive order.

Unless specifically admitted, ONB denied the allegations of the Counterclaim.

### **RELIEF REQUESTED**

Claimant requested an interim injunction enjoining Respondents from further violating

the confidentiality provisions of the agreements and from other prohibited conduct. In addition, ONB requested compensatory damages for the accounts lost to PaineWebber, as well as other damages to be proved at hearing.

Respondent Edwards, Thomas and White requested:

1. The panel rescind the existing preliminary injunctive order entered on behalf of ONB;
2. The panel grant the Respondents damages for all their costs, expenses and attorneys fees required in defending the wrongfully filed state court proceeding;
3. The panel grant them damages to compensate for the harm caused by Immediate Injunctive Order, including any compensation Edwards lost due to the Order;
4. A declaration that Respondents are free to provide investment services to any and all persons, including former customers of ONB;
5. Attorneys' fees;
6. Such other relief as the panel deemed proper.

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

An interim injunctive hearing was heard before a single arbitrator on November 29, 2000. On December 3, 2000, Arbitrator Jerome O. Pitt entered an order enjoining Respondents from any professional involvement with the account of any former ONB customer who transferred to PaineWebber after September 22, 2000 and ordering the return to ONB of any confidential customer information.

On December 27, 2000, Arbitrator Jerome O. Pitt entered an order denying the Respondents' Request to Reconsider the order entered December 3, 2000.

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

1. The Panel vacates the injunction entered on December 3, 2000, against Respondents Mark R. Edwards, Lisa L. Thomas, and Jill M. White, (collectively, the "Respondents"), which enjoined them from handling or having any other professional involvement with the account of any former customer of ONB Investment Services, Inc., ("ONB"), that was transferred from ONB to Paine Webber after September 22, 2000. However, the

Respondents continue to be prohibited from receiving any commissions, fees, or compensation of any kind for any activity or service related to any such account during the period the injunction was in effect.

2. Respondent/Counterclaimant Mark R. Edwards is liable for and shall pay to Claimant/Counter-respondent ONB Investment Services, Inc. compensatory damages in the sum of \$150,000.00;
3. In addition, Respondent/Counterclaimant Mark R. Edwards is liable for and shall pay to Claimant/Counter-Respondent ONB Investment Services, Inc. attorney fees in the sum of \$42,000.00. In deciding to award attorneys' fees, the panel considered the arguments of the parties, as well as the pleading filed in this matter, and determined that authority existed for an award of attorneys' fees to the Claimant/Counter-Respondent ONB Investment Services, Inc.;
4. The counterclaim filed by Respondent/Counterclaimants Mark R. Edwards, Lisa L. Thomas and Jill M. White is dismissed and denied in its entirety;
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein;
6. Any relief not specifically awarded is hereby denied; and
7. The following information shall be deemed confidential and shall remain sealed: any exhibit, tape recording, transcription, or other record of the proceedings, or any portion thereof, that contains the name, address, social security number, account number, account balance, or other identifying information about any past or present customer of ONB.

#### **FEES**

Pursuant to the Code, the following fees are assessed:

##### **Filing Fees**

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

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

##### **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 persons at the time of the events giving rise to the dispute. In this matter, ONB Investment Services, Inc. is a party and PaineWebber Incorporated is the Respondents' firm.

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

**Adjournment Fees**

Adjournments requested during these proceedings: None.

**Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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 x \$ 450.00	= \$ 450.00
Pre-hearing conference: November 29, 2000 1 session	
One (1) Pre-hearing session with Panel x \$ 1,000.00	= \$ 1,000.00
Pre-hearing conference: February 8, 2001 1 session	
Six (6) Hearing sessions x \$ 1,000.00	= <u>\$ 6,000.00</u>
Hearing Dates: March 5, 2001 2 sessions	
March 6, 2001 2 sessions	
March 7, 2001 2 sessions	
Total Forum Fees	= \$ 7,450.00

The Panel has assessed \$ 3,725.00 of the forum fees to Claimant/Counter-Respondent ONB Investment Services, Inc. In addition, the Panel has assessed \$ 3,725.00 of the forum fees jointly and severally to Respondent/Counterclaimants Mark R. Edwards, Lisa L. Thomas and Jill M. White.

**Fee Summary**

Claimant/Counter-Respondent ONB Investment Services, Inc. is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 3,800.00
Injunctive Relief Fee	= \$ 2,500.00
<u>Forum Fees</u>	= <u>\$ 3,725.00</u>
Total Fees	= \$10,525.00
<u>Less payments</u>	= <u>\$ 7,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 2,725.00

PaineWebber Incorporated is solely liable for:

<u>Member Fees</u>	= <u>\$ 3,800.00</u>
Total Fees	= \$ 3,800.00
<u>Less payments</u>	= <u>\$ 3,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 0

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Respondent/Counterclaimants Mark R. Edwards, Lisa L. Thomas and Jill M. White.  
are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 250.00
<u>Forum Fees</u>	= \$ 3,725.00
Total Fees	= \$ 3,975.00
<u>Less payments</u>	= \$ 1,250.00

Balance Due NASD Dispute Resolution, Inc. = \$ 2,725.00

All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

  
Jerome O. Pitt  
Public Arbitrator, Presiding Chair

4/27/01  
Signature Date

F. Wesley Bowers, JD  
Public Arbitrator

Signature Date

Charles W. Turner  
Industry Arbitrator

Signature Date

Date of Service (For NASD-DR office use only)

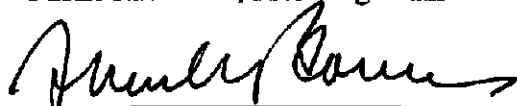
Respondent/Counterclaimants Mark R. Edwards, Lisa L. Thomas and Jill M. White.  
are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 250.00
<u>Forum Fees</u>	<u>= \$ 3,725.00</u>
Total Fees	= \$ 3,975.00
<u>Less payments</u>	<u>= \$ 1,250.00</u>
 Balance Due NASD Dispute Resolution, Inc.	 = \$ 2,725.00

All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

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Jerome O. Pitt  
Public Arbitrator, Presiding Chair



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Respondent/Counterclaimants Mark R. Edwards, Lisa L. Thomas and Jill M. White.  
are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 250.00
<u>Forum Fees</u>	<u>= \$ 3,725.00</u>
Total Fees	= \$ 3,975.00
<u>Less payments</u>	<u>= \$ 1,250.00</u>

Balance Due NASD Dispute Resolution, Inc. = \$ 2,725.00

All balances are due and payable to NASD Dispute Resolution, Inc.


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Public Arbitrator, Presiding Chair

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4/10/01  
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