

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

ROBERTA M. NELSON, Individually and as Trustee of the Roberta M. Nelson Revocable Trust, RAY BARNETT and His Wife ADELLE E. BARNETT, JAMES LINDSEY, and his wife MARY LOU LINDSEY, ALEXANDER A LOBATO, and CLIFFORD M. SIMS, JR. and His Wife, SIGNY-SIMS; Individually, and as Trustees of the Clifford M. Sims, Jr. Revocable Living Trust

## ARBITRATION

**NASD CLAIM NO. 01-0400**

## Claimants

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**EDGAR L. MCLEAN**  
and  
**FFP SECURITIES, INC.**

**MOTION TO DISMISS, OR,  
IN THE ALTERNATIVE,  
FOR CHANGE OF VENUE  
AND OTHER RELIEF**

### DECISION AND ORDER

## Respondents

**Appearances** Joel A. Goodman, Esq. for the Claimants  
Carlos B. Castillo, Esq. for the Respondents

**Arbitrators:** Nickolas F. Monteforte, Arbitrator, Chairman  
Thomas Mc Avoy, Arbitrator  
George K. Beardsley, Arbitrator.

In this matter, the Respondents, FFP Securities, and Edgar Mc Lean, filed a motion for Dismissal or in the alternative, for transfer of venue to Missouri. In addition, the Respondents sought an Order requiring that the arbitration be conducted in accordance with the law of the State of Missouri. The underlying basis for the motion was a provision in Respondent, FFP's new account form that required the arbitration to take place in the County of St. Louis, Missouri, with Missouri Law governing the proceedings.

~~Claimants replied, opposing Respondent's motion on the grounds that contract clauses governing venue were prohibited by NASD rules; that only two of the claimants had signed such~~

Agreements; that in this case, the choice of law provisions were, or may be found contrary to Florida Securities law and were or would be unenforceable; that the NASD director of Arbitration had already determined the venue to be in Florida, and given that all claimants lived in the Jacksonville area, that respondent, McLean lived and worked in FFP's Jacksonville, Florida Office, and that the transactions took place in Florida, was sufficient reason to retain venue in Florida. Claimants crossmoved for sanctions, including, inter alia, costs and attorneys fees.

As part of the pre-hearing scheduling order, the parties were directed to file briefs on all issues. Thereafter, and pursuant to that order, extensive briefs, case law, NASD rules, and NASD member directives and newsletters, all in support of the respective parties positions, were submitted to the arbitrators for consideration. Given the complexities of the motion and cross motion, and the extensive submission by each party, the arbitrators determined that the matter should be scheduled for a telephonic pre-hearing conference at which time the parties would be given the opportunity to heard and present oral arguments in support of their positions. The telephonic conference took place on Monday, September 24, 2001, commencing at 2:30 PM.

At the start of the telephonic conference, Respondent withdrew that aspect of its motion seeking to dismiss and/or alternatively to change venue to the State of Missouri, based on its customer agreements. Respondent proceeded on the venue issue solely on the basis of "*forum non conveniens*." Respondent, however, maintained its position regarding its motion to apply Missouri law, and so argued.

In response, Claimant opposed Respondent's "*forum non conveniens*" argument; stressed its contention that the choice of law provisions in FFP's customer agreements were unenforceable under both Florida law and NASD rules; pointed out that even if the choice of law issue were decided against Claimants, it would only apply to Claimants Roberta Nelson and James and Mary

Lou Lindsey, thus, requiring application of differed law to different parties. Since Claimants argument, that the choice of law clause in FFP's contract was unenforceable, turned, inter alia, on alleged violations of Florida Securities law that were ultimately to be proven at the hearing, ~~Claimants contended that, at a minimum, the motion the apply Missouri Law to the claims of~~ Rebecca Nelson and the Lindsay's should be held in abeyance, until completion of discovery at the earliest, or preferably to the end of the submission of evidence at the hearing. Finally, Claimants argued their cross motion for sanctions, costs and attorney's fees.

Upon completion of Oral argument, the attorneys for the parties exited the conference call, and the arbitrators remained in executive session. During the executive session, the arbitrators discussed and considered the moving papers and the oral arguments presented by counsel for the respective parties. As a result, the arbitrators have unanimously agreed as follows.

1. The Respondent, FFP's, motion for change of venue based on the provisions in its customer service agreement having been withdrawn is no longer an issue for consideration by the arbitrators.
  2. Respondent's motion for change of venue based on the doctrine of "*forum non conveniens*" is denied. The sole contact with Missouri is the fact that FFP's home office is located there. All of the eight claimants live in the Jacksonville area, as does Respondent, McLean. Respondent, FFP maintains a branch office in Jacksonville Florida, and Respondent McLean works in FFP's Jacksonville Office. All of the transactions that give rise to the claims presented in this action took place in FFP's Jacksonville, Florida, Office. The ties to Florida are overwhelming. Further, by choosing to open and maintain a Florida office, Respondent clearly took upon itself the obligation to present itself in Florida when arbitration proceedings, such as herein, occurred. Respondent has not carried its burden, and venue will remain in Florida.
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3. Respondent's motion to apply the Law of the State of Missouri is stayed, and may be revived by Respondents, based on the briefs submitted herein and without the need to re-file, at any time subsequent to completion of discovery and up to the close of the receipt of evidence at the hearings. ~~In any event, if revived, the motion shall apply only to Claimants, Roberta Nelson, and James and Mary Lou Lindsey, and should a ruling be issued at that time, only these claimants will fall within the scope of that ruling.~~

4. Claimant's motion for sanctions is granted as follows: Respondents FFP, and only respondent FFP, shall be liable for all forum costs associated with the filing of this motion, and, in addition, for counsel fees incurred by the plaintiffs in the defense of that aspect of the motion that, as filed, was based on the clause in FFP's customer agreement that required that venue be solely in the County of St. Louis, Missouri.

It is clear from the factual and legal documentation produced in support of the various positions asserted in this motion, that FFP, as a member of NASD, was notified as early as October of 1995 that members were not to include, nor seek to enforce provisions in customer agreements that restrict or limit, contrary to NASD's rules, the ability of customers to arbitrate disputes or the authority of the arbitrators to make an award, including an award of punitive damages. Stated otherwise, customer agreements cannot be used to curtail rights that a party otherwise may have had in a judicial forum. Specifically, a member firm may not designate a hearing location for self-regulatory organization (SRO) arbitration. See, NASD notice to Members, October 16, 1995. There can be no doubt that a clause restricting the venue of an NASD arbitration proceeding is exactly the type of clause prohibited by the NASD rules referenced in the October 16, 1995 Notice.

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The law is also clear that once an organization becomes a member of an SRO, such as NASD, it agrees to be bound by its rules. The Courts have uniformly upheld the principle that

SRO arbitration rules control the conduct of its members, and, where appropriate, the SRO rules take precedence over clauses to the contrary that may appear in member customer agreements. See: Thomas James Associates, Inc. et al v. Harry Jameson 102 F. 3d 60 U.S.C.A., 2<sup>nd</sup> Circuit (1996), where the court held that a securities firm that was a member of the National Association of securities Dealers was required by the NASD code to arbitrate a former Employee's employment dispute, and that a clause in the employment contract waiving arbitration was, therefore, invalid. In The Matter Of The Application Of McLaughlin, Piven, Vogel Securities \*\*\* For Review Of Disciplinary Action Taken By The New York Stock Exchange, 1996 W.L. 734269; Release No. 34-38076, 63 S.E.C. Docket 1210, wherein the S.E.C. held that when a firm became a member of the NYSE, it agreed to be bound by its rules, and that the firm's use of a contract for trainees that purported to waive the employee's right to arbitrate, violated that rule. Not only was the McLaughlin's waiver provision found to be inconsistent with the rules, but because Mc Laughlin had repeatedly ignored the exchange's directive to remove the waiver provision, disciplinary sanctions in the amount of \$15,000 imposed by the NYSE were upheld, and McCullagh, et al. v Dean Winter Reynolds 177 F. 3d 1307, U.S.C.A. 11<sup>th</sup> Circuit (1999) where, although the issue turned on the interpretation of a clause in the AMEX Constitution, the sine qua non, was the fact that both the Court and the parties recognized that Amex's arbitration rules governed the proceedings.

FFP's customer agreements containing the restrictive venue clause were signed Roberta M. Nelson and by James and Mary Lou Lindsay, on June 1, 2000 and on March 14, 2000, respectively. This was approximately five years after NASD had notified its members that such clauses were banned. The evidence thus, supports a holding that FFP either knew, or should have known that the Venue restriction in its contract was unenforceable and in violation of NASD rules.

Further, the three cases cited herein, Thomas James Associates, Inc. et al v. Harrison; in the Matter Of The Application Of McLaughlin Piven Vogel Securities \*\*\* For Review Of Disciplinary Action Taken By The New York Stock Exchange; and McCullagh, et al, v Dean, Witter, Reynolds, supra, were all cited by Respondent in its supplemental brief.

It should be noted that FFP's uniform submission was not considered as competent for the resolution of the issues surrounding this motion. FFP's Uniform Submission Agreement contained an exception, and was not an unqualified submission. On its face, the document recited that it was being submitted, subject to the respondent's pending motion to dismiss, or alternatively to transfer venue, inter alia. For this reason the arbitrators did not accept FFP's Uniform Submission Agreement as controlling in this action, as was urged by Claimants.

Finally, it should be noted that, because there was no evidence of any prior violation of the NASD rules with respect to the venue restriction in its customer contract, no punitive sanctions have been imposed. The sanctions that have been imposed herein have been limited to forum costs and counsel fees-attributable to the defense of the venue restriction aspect of this motion. Clearly, a motion based on the venue restricting provisions of FFP's contract should not have been filed, and claimants should not be made to bear the expense of defending against it.

Counsel for Claimants is directed to file an affidavit of services, detailing, on an hourly basis, the nature of, and all of the work done to defend the venue aspects of the motion, and the hourly cost to the claimants for such work. The amount of counsel fees will be determined by the Arbitrators, after review and consideration of the affidavit.

The arbitrators are in unanimous agreement regarding this ruling.

Dated September 27, 2001

  
Nicholas E. Mountford, Esq.  
Arbitrator Chairman