

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

McLaughlin, Piven, Vogel Securities, Inc., Claimant v. Shahmir J. Moussavi, Vikram J. Chand
and First Union Securities, Inc., Respondents

Case Number: 01-02123

Hearing Site: San Francisco, California

REPRESENTATION OF PARTIES

For Claimant:

Kevin J. Holl, Esq.
Gordon-Creed, Kelley,
Holl & Sugerman, LLP
San Francisco, California

For Respondents:

Jon L. Rewinski, Esq.
Heller Ehrman White &
McAuliffe LLP
Los Angeles, California

CASE INFORMATION

Statement of Claim filed on or about: April 26, 2001

Answer of Claimant McLaughlin, Piven, Vogel Securities, Inc. to the Counterclaims of
Respondents filed on or about: July 3, 2001

Claimant's Motion For Partial Summary Judgment on Respondents' Counterclaims, and
Memorandum of Law in Support filed on or about: July 20, 2001

Claimant's Arbitration Brief filed on or about: July 20, 2001

Respondents' Statement of Answer and Counterclaim against McLaughlin, Piven, Vogel
Securities, Inc. filed on or about: June 19, 2001

Respondents' Arbitration Brief filed on or about: July 20, 2001

Memorandum and Order on Preliminary Injunction filed on or about: May 29, 2001

Memorandum and Order Re: Application For Stay Or, In Alternative, Modification of
Preliminary Injunction filed on or about: July 18, 2001

CASE SUMMARY

Claimant McLaughlin, Piven, Vogel Securities, Inc. ("McLaughlin-Piven") alleged that the above-referenced dispute arises out of the violation by Shahmir J. Moussavi ("Moussavi") and Vikram J. Chand ("Chand") of their contractual obligations to McLaughlin-Piven and their misappropriation and conversion of McLaughlin-Piven's trade secrets and business property, breach of fiduciary duty, and unfair competition, and the improper interference by Respondent First Union Securities, Inc. ("First Union") with McLaughlin-Piven's contractual relations with Moussavi and Chand.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents alleged that McLaughlin-Piven has engaged in unfair competition and conduct in violation of the NASD's standards of just and equitable principles of trade by seeking and obtaining a court order prohibiting Respondents from communicating at all with their own clients, from accepting account transfers from their own clients, and from accepting business from those customers who have transferred their accounts. Respondents also asserted affirmative defenses.

Respondents Moussavi and Chand alleged the following counterclaims: 1) Breach of Employment Contract and Wrongful Failure to Pay Wages; 2) Unfair Competition; 3) Intentional Interference with Economic Relationships; and 4) Declaratory Relief.

McLaughlin-Piven denied any liability with respect to Respondents' counterclaims and asserted affirmative defenses.

RELIEF REQUESTED

Claimant McLaughlin-Piven requested that:

1. A Permanent Injunction Order issue, enjoining Respondents, directly or indirectly, and whether alone or in concert with others, from:
 - (a) soliciting any business from, or initiating any contact with, any client of McLaughlin-Piven whom the Individual Respondents served or whose name became known to them while in the employ of McLaughlin-Piven; and further, from accepting any business or account transfers from any of said clients whom the Individual Respondents or anyone acting on their behalf or in concert with them, have solicited at any time in the past for the purpose of doing business with the Individual Respondents' new employer, Respondent First Union (excluding members of Individual Respondents' immediate families);
 - (b) using, disclosing, or transmitting for any purpose, including solicitation of said clients, the information contained in the records of McLaughlin-Piven; and that

all original records and copies and/or other reproductions thereof, in whatever form, be returned to McLaughlin-Piven immediately; and

(c) any and all other such acts as this Panel deems appropriate for injunctive relief.

McLaughlin-Piven also requested compensatory and punitive damages against the Respondents and requested other relief to be specified at the hearing.

Respondents and Counter-Claimants requested:

1. That all of Claimant's claims be denied and dismissed with prejudice;
2. That the arbitrators award Counter-Claimants monetary damages against McLaughlin-Piven to compensate them for all wages owed, plus penalties and interest, according to proof;
3. That the arbitrators award Counter-Claimants compensatory damages against McLaughlin-Piven in an amount according to proof;
4. That the arbitrators award Counter-Claimants punitive damages against McLaughlin-Piven in an amount according to proof;
5. That the arbitrators issue an award declaring that sections 1(a), (b), (c), (d), and (e) of McLaughlin-Piven's employment agreements are void;
6. That the arbitrators order that the bond previously posted by McLaughlin-Piven be paid over directly to Counter-Claimants as partial payment for any monetary award on the counterclaims; and
7. That the arbitrators order that McLaughlin-Piven reimburse Counter-Claimants for their attorney's fees, expert fees, forum fees, and costs incurred in these proceedings.

McLaughlin-Piven requested that the Panel deny Respondents' counterclaims, and award in favor of McLaughlin-Piven any and all damages, and just and equitable relief.

OTHER ISSUES CONSIDERED AND DECIDED

The parties did not file with NASD Dispute Resolution, Inc. ("NASD-DR") properly executed submissions to arbitration. The Panel determined that the parties are subject to NASD-DR jurisdiction pursuant to the Memorandum and Order on Preliminary Injunction filed on or about May 29, 2001, and pursuant to the NASD-DR Code of Arbitration Procedure ("the Code"). The Panel further determined that the parties having appeared and testified at the hearing are bound by the determination of the Panel on all issues submitted.

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. After hearing the testimony of all witnesses, reviewing the evidence and exhibits submitted at the arbitration, reviewing the Arbitration Briefs by all parties, the Motion for Partial Summary Judgment submitted by claimant, and the authorities cited (including those of which copies were given to the panel) and considering the arguments of counsel, the panel concludes that (1) the individual respondents, Moussavi and Chand, breached their Employment Agreements with claimant, (2) said individual respondents and respondent First Union, and each of them, violated the California Trade Secrets Act, and (3) First Union interfered with claimant's contracts with respondents Moussavi and Chand. The letter sent by First Union on behalf of, and to that extent as agent for, respondents Moussavi and Chand to clients formerly serviced by respondents Moussavi and Chand while employed by claimant constituted a prohibited "solicitation" by the individual respondents of securities business in breach of their Employment Agreements with claimant. First Union's actions in connection with the planning of that letter, including First Union having the individual respondents bring to First Union, while employed by claimant, confidential and trade secret information of claimant, constituted interference with claimant's Employment Agreements with the individual respondents. (During the arbitration hearing claimant withdrew its claims of alleged breaches by the individual respondents of their Diskette Loan Agreements with claimant.) All respondents violated the California Trade Secrets Act as a result of the same and related conduct arising out of their misappropriation and misuse of claimant's trade secrets. After considering the testimony and evidence, the panel concludes that the telephone calls by the individual respondents, after they had resigned from claimant, to the clients who they had serviced while employed by claimant, did not constitute "solicitations."

As to damages resulting from the actions of the respondents, claimant presented evidence that the total "trailing twelve months" commissions on business last generated by the individual respondents was \$905,000 but did not offer evidence of what, if any, profits were alleged to have been lost or what other expenses may be attributable to conduct by the respondents. In reviewing the evidence and testimony, it appears that many of the larger, or more major, clients transferred their accounts to respondents, and based on the panel's review and assessment of the evidence presented, that lost profits resulting therefrom is \$75,000, which is the amount that the panel awards to claimant as compensatory damages, to be assessed jointly and severally against the respondents and each of them. Claimant also sought punitive damages and attorneys fees. Clear and convincing evidence of conduct warranting the imposition of punitive damages has not been presented to the panel's satisfaction. Attorneys' fees are not recoverable, under applicable law, absent contractual or statutory entitlement thereto, and no such contractual or satisfactory statutory authority has been presented to the panel. Claimant has not proved the malice required for an award of attorneys' fees under the Trade Secrets Act, Civil Code Sec. 3426.4. Therefore, claimant's requests for punitive damages and attorneys' fees are denied.

Claimant also requested injunctive relief. During closing argument claimant limited that request to a request that respondents be enjoined from soliciting clients of claimant in violation of its Employment Agreements for a period of twelve (12) months or such other period that the panel may deem reasonable. The majority of the panel concludes that no sufficient reason remains for further injunctive relief given the injunctive orders previously entered by the United States District Court. However, arbitrator Farnsworth dissents and would grant claimant's request for an injunction against solicitation for the balance of the twelve (12) months as provided in the Employment Agreements. Therefore, claimant's request for injunctive relief is denied.

In addition to the compensatory damages of \$75,000 hereinabove described, Respondents are jointly and severally liable for and shall pay to Claimant McLaughlin-Piven the sum of \$3,000 as reimbursement for the \$500 filing fee and \$2,500 injunctive surcharge previously paid by McLaughlin-Piven.

2. Respondents' counterclaims are denied in all respects.
3. Each party shall bear its own costs incurred in this matter.
4. Except as herein ordered, all other claims are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$500.00
Injunctive surcharge	= \$2,500.00
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(s) that employed the associated person(s) at the time of the event(s) that gave rise to the dispute, claim or controversy. In this matter, the member firms, McLaughlin-Piven and First Union, are parties and the following fees are assessed:

Member Surcharge	= \$1,200.00
Pre-Hearing Process Fee	= \$600.00
<u>Hearing Process Fee</u>	<u>= \$2,000.00</u>
Total Member Fees	= \$3,800.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(1) Pre-hearing conference session with the Panel @ \$1,000.00/session = \$1,000.00

Pre-hearing conference: June 15, 2001 1 session

(5) Hearing sessions @ \$1,000.00/session = \$5,000.00

Hearings: July 25, 2001 2 sessions

July 26, 2001 2 sessions

July 27, 2001 1 session

Total Forum Fees = \$6,000.00

The Panel assessed the \$6,000.00 in forum fees jointly and severally to Respondents, First Union, Moussavi and Chand.

Administrative Costs

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and other requests. The parties did not incur administrative costs.

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 3,800.00
Injunctive Surcharge	= \$ 2,500.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$ 6,800.00
<u>Less Payments</u>	= \$(7,800.00)
Balance (Refund)	= \$ 1,000.00

2. Respondent, First Union, is charged with the following fees and costs:

Member Fees	= \$ 3,800.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$ 3,800.00
<u>Less Payments</u>	= \$ (0.00)
Balance Due NASD-DR	= \$ 3,800.00

3. Respondents, Moussavi and Chand are charged with the following fees and costs:

Counterclaim Filing Fee	= \$ 250.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$ 250.00
<u>Less Payments</u>	= \$ (0.00)
Balance Due NASD-DR	= \$ 250.00

4 Respondents, First Union, Moussavi and Chand are charged with the following fees and costs:

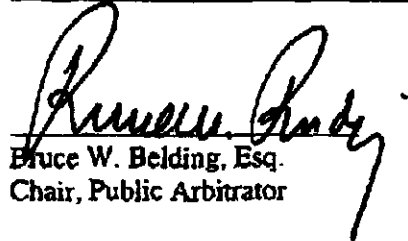
Forum Fees	= \$ 6,000.00
<u>Administrative Costs</u>	= \$ 0.00
Total Fees	= \$ 6,000.00
<u>Less Payments</u>	= \$ (0.00)
Balance Due NASD-DR	= \$ 6,000.00

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

ARBITRATION PANEL

Bruce W. Belding, Esq.	-	Public Arbitrator, Presiding Chair
Charles E. Farnsworth, Esq.	-	Public Arbitrator
Mary Curran, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Bruce W. Belding, Esq.
Chair, Public Arbitrator

August 14, 2001
Signature Date

Charles E. Farnsworth, Esq.
Public Arbitrator

Signature Date

Mary Curran, Esq.
Non-Public Arbitrator

Signature Date

Date of Service

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Charles E. Farnsworth, Esq.	Public Arbitrator
Mary Curran, Esq.	Non-Public Arbitrator


Concurring Arbitrators' Signatures

Bruce W. Belding, Esq.
Chair, Public Arbitrator

Signature Date

Charles E. Farnsworth, Esq.
Public Arbitrator

Signature Date



Mary Curran, Esq.
Non-Public Arbitrator

8-21-01

Signature Date

Date of Service

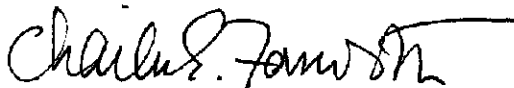
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Mary Curran, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce W. Belding, Esq.
Chair, Public Arbitrator

Signature Date



Charles E. Farnsworth, Esq.
Public Arbitrator

8 / 21 / 2001

Signature Date

Mary Curran, Esq.
Non-Public Arbitrator

Signature Date

Date of Service