

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

American Express Financial Advisors, Inc., Claimant v. Steven G. Bacon, David M. Newbore and S. Kenneth Wilmot, Respondents

Case Number: 02-04840

Hearing Site: Portland, Oregon

REPRESENTATION OF PARTIES

For Claimant:

Bruce L. Campbell, Esq.
Carolyn Guy, Esq.
Miller Nash LLP
Portland, Oregon

For Respondents:

Ronald T. Adams, Esq.
Michael B. Merchant, Esq.
Kelly R. Tilden, Esq.
Black Helterline LLP
Portland, Oregon

CASE INFORMATION

Statement of Claim (Application to Convert Temporary Restraining Order Entered by the U.S. District Court to Regular Injunctive Order) filed: August 19, 2002

Amended Statement of Claim filed: February 19, 2003

Claimant's Uniform Submission Agreement signed: August 16, 2002

Statement of Answer filed by Respondent Steven G. Bacon: October 7, 2002

Statement of Answer and Counterclaim filed by Respondent David M. Newbore: October 7, 2002

Statement of Answer filed by Respondent S. Kenneth Wilmot: October 7, 2002

Respondents Steven G. Bacon, David M. Newbore, and S. Kenneth Wilmot's Joint Uniform Submission Agreement signed: September 20, 2002

CASE SUMMARY

In its Statement of Claim and Amended Statement of Claim, Claimant alleged breach of franchise agreement, misappropriation of trade secrets, breach of fiduciary duty and unfair competition. The dispute involved Respondents' continued contact with investment account clients after leaving positions as brokers employed by Claimant.

Respondents each denied the allegations of wrongdoing set forth in the Claimant's Statement of Claim. In his Counterclaim, Respondent David M. Newbore alleged economic duress and contract of adhesion, bad faith, violation of ORS § 693.295, reckless disregard for the actual facts and law, and that the clients were not subject to the non-competition provision of the Franchise Agreement.

Claimant denied the allegations of wrongdoing set forth in Respondent David M. Newbore's Counterclaim.

RELIEF REQUESTED

In its Statement of Claim, Claimant requested entry of an order converting the court's anticipated temporary restraining order to a regular injunctive order. In its Amended Statement of Claim, Claimant requested unspecified actual and compensatory damages, and costs, including attorney's fees.

Respondents requested dismissal of the Claimant's Statement of Claim in its entirety, costs, and attorney fees. In his Counterclaim, Respondent David M. Newbore requested that the Franchise Agreement be declared void and unenforceable or, in the alternative, have no application to Newbore's clients or, in the alternative, should be limited in its scope and duration to no more than four months with a finding that only the solicitation provisions should be enforced. He also requested punitive damages of \$10,000,000.00.

OTHER ISSUES CONSIDERED AND DECIDED

On August 20, 2002, The U.S. District Court, District of Oregon, denied Claimant's Motion for Temporary Restraining Order.

On February 19, 2003, Claimant filed a Motion for leave to file an Amended Statement of Claim pursuant to the NASD Code of Arbitration Procedure Rule 10328(b). After consideration of evidence presented by the parties in this matter, the Panel granted the motion.

On February 27, 2002, Claimant filed Motions to Dismiss Respondents' Fifth Affirmative Defense alleging of Violations of NASD Interpretive Material IM-2110-7, and to Strike Respondent David M. Newbore's Counterclaim alleging of Violations of NASD Interpretive Material IM-2110-7. On March 18, 2003, Respondent David M. Newbore's withdrew his Counterclaim.

At the hearing, Respondents filed a Motion for Failure of Proof. After consideration of evidence presented by the parties in this matter, the Panel denied the motion.

Following the adjournment of the April, 2003, hearing dates, the Panel requested briefing from the parties regarding the issue of attorney's fees for Respondents. The Panel reconvened the hearing on June 4, 2003. The Panel's ruling on this issue is contained below.

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:

The arbitration panel finds in favor of Respondents. Claimant failed to prove its case by a preponderance of the evidence. Although Respondents may have breached the contract, any such breaches were relatively technical, isolated, and minor. To the extent breaches occurred, there was insufficient evidence establishing a causal connection between those breaches and the damages claimed. Additionally, Claimant's damage analysis was highly speculative and based on flawed or unsubstantiated assumptions. Accordingly, the Panel rules as follows:

1. Claimant's claims are denied in their entirety.
2. Claimant's request for attorney's fees is denied.
3. Respondents' request for attorney's fees is denied.
4. The parties shall bear their respective costs, including attorney's fees.
5. All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
Respondent David M. Newbore's Counterclaim filing fee	= \$ 600.00

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. In this matter, Claimant is assessed the following fees:

Injunctive Relief Surcharge	= \$ 2,500.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm American Express Financial Advisors, Inc., was a party at the time of the events giving rise to this dispute and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$ 5,500.00
Total Member Fees	= \$ 7,750.00

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Linsco Private Ledger employed the Respondents at the time of the events giving rise to this dispute and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	= \$ 5,500.00
Total Member Fees	= \$ 7,750.00

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:

Two (2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$ 2,400.00

Pre-hearing conferences:	January 7, 2003	1 session
	March 18, 2003	1 session

Eight (8) Hearing sessions @ \$1,200.00/session = \$ 9,600.00

Hearings:	April 8, 2003	2 sessions
	April 9, 2003	2 sessions
	April 10, 2003	3 sessions
	June 4, 2003	1 session

Total Forum Fees = \$ 12,000.00

The Panel assessed \$ 12,000.00 of the forum fees to the Claimant.

Fee Summary

1. Claimant, American Express Financial Advisors, Inc., is charged with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Injunctive Relief Surcharge	= \$ 2,500.00
Member Fees	= \$ 7,750.00
Forum Fees	= \$ 12,000.00
Total Fees	= \$ 22,750.00
Less payments	= \$(8,450.00)
Balance Due NASD Dispute Resolution	= \$ 14,300.00

2. Respondent, David M. Newbore, is charged with the following fees and costs:

Counterclaim Filing Fee	= \$ 600.00
Total Fees	= \$ 600.00
Less payments	= \$(1,800.00)
Refund Due from NASD Dispute Resolution	= \$(1,200.00)

3. Member, Linsco Private Ledger, is charged with the following fees and costs:

Member Fees	= \$ 7,750.00
Total Fees	= \$ 7,750.00
Less payments	= \$(4,450.00)
Balance Due NASD Dispute Resolution	= \$ 3,300.00

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

ARBITRATION PANEL

Andrew K. Chenoweth, Esq.
Paul R. Meyer
Joseph L. Mangan

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Public Arbitrator: Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures



Andrew K. Chenoweth, Esq.
Chair, Public Arbitrator

6-6-03
Signature Date

Paul R. Meyer
Public Arbitrator

Signature Date

Joseph L. Mangan
Industry Arbitrator

Signature Date

6/06/03
Date of Service

ARBITRATION PANEL

Andrew K. Chenoweth, Esq.	-	Public Arbitrator, Presiding Chair
Paul R. Meyer	-	Public Arbitrator
Joseph L. Mangan	-	Non-Public Arbitrator

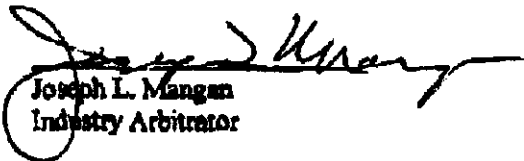
Concurring Arbitrators' Signatures

Andrew K. Chenoweth, Esq.
Chair, Public Arbitrator

Signature Date

Paul R. Meyer
Public Arbitrator

Signature Date


Joseph L. Mangan
Industry Arbitrator

6/6/03
Signature Date

6/06/03
Date of Service