

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

David Matthew Ferris (Claimant) v. Thomas Weisel Partners, LLC (Respondent)

Case Number: 03-03476

Hearing Site: New York, New York

Nature of the Dispute: Associated Person v. Member.

REPRESENTATION OF PARTIES

Claimant David Matthew Ferris ("Ferris") hereinafter referred to as "Claimant": John R. Climaco, Esq., Climaco, Lefkowitz, Peca, Wilcox & Garofoli, Co., LPA, Cleveland, OH.

Respondent Thomas Weisel Partners, LLC ("TWP") hereinafter referred to as "Respondent": Julie L. Taylor, Esq., Keesal, Young & Logan, P.C., San Francisco, CA.

CASE INFORMATION

Statement of Claim filed on or about: May 9, 2003.

Claimant signed the Uniform Submission Agreement: May 9, 2003.

Statement of Answer filed by Respondent on or about: July 21, 2003.

Respondent signed the Uniform Submission Agreement: July 16, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: wrongful termination; and failure to pay commissions and compensation.

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

RELIEF REQUESTED

Claimant requested compensatory damages of approximately \$3,000,000.00; punitive damages; costs; attorneys' fees; and interest; and other case-related costs.

Respondent requested that the Statement of Claim be dismissed with prejudice; that it be awarded costs; and that the Arbitrators award such other relief as they deem proper.

OTHER ISSUES CONSIDERED AND DECIDED

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.

ARBITRATORS' REPORT

This case proceeded to a full evidentiary hearing before a panel of three non-public arbitrators on July 19, 20, 21, and October 14, 2004. The Claimant alleges that he is entitled to commissions on three investment banking transactions executed by his former employer in 2002 (two for Emulex Corp. and one for Telera Corp.), damages as a result of the inability to include the allegedly lost commissions in his 12-month trailing revenues presented to his new employer, damages for wrongful termination of employment, punitive damages, and attorneys' fees. The panel heard testimony from David Ferris, Edward Mruk and Prem Uppaluru on behalf of the claimant. The respondents called Roy Corr, John Varughese, Jason Pederson, Joseph Klein, Jeffrey Handy and Hayley Lindsay. For the reasons that follow, the panel has determined to issue an award in favor of the claimant in the amount of \$185,165.

The claimant was hired as a registered representative and broker with respondent Thomas Weisel Partners, LLC (TWP, or the "Firm"), in March of 2000, after executing an employment agreement dated February 2, 2000. He was terminated on or about September 10, 2002, effective one week later. The claimant was assigned to the Firm's private client division (PCD) under the supervision of Roy Corr, and he was the first PCD broker assigned to the Firm's Boston office. The Firm closed its Boston PCD office in September 2002 simultaneously with its discharge of the claimant, and the need to downsize and close the Boston office was given as the Firm's reason for terminating the claimant.

The claimant's employment agreement provides that the Firm "will pay you a draw against your commission, sales credit and fee payout at the rate of \$300,000 annually, less payroll deductions and all required withholdings." (Claimant's Exhibit 1). However, the employment agreement, while guaranteeing the claimant a draw against commissions, does not define upon what business the claimant will receive such commissions; nor does the agreement define the percentage commissions that will be provided. Both parties appear to agree that there were oral discussions between the claimant and his supervisor, Roy Corr, concerning the percentage commissions to be paid the claimant and their basis. However, the parties are not in agreement as to whether or not commissions were to be paid to Mr. Ferris based upon *all* business he generated, regardless of its nature, as claimed by the claimant, or, conversely, whether he was to be paid commissions only on PCD brokerage work he generated.

The claimant testified that Corr orally promised him that he would be paid a percentage of all commission revenues generated by his work, including finder's fees for

investment banking business which he generated, even though he was not assigned to the investment banking department. Respondent counters that: (a) a "Chinese wall" prevents retail brokers from access to and involvement in non-public investment banking deals; and (b) TWP internal policy dictates that a member of one department may receive a referral payment for work generated on behalf of another department only in the exclusive discretion of the department that did the work.

Corr agreed that he discussed commissions with Ferris, but insisted that the claimant was never promised a fixed percentage payment for non-PCD business which he generated. Rather, Corr testified that, "I promised we would do everything we could," to get the claimant a referral fee. In fact, the testimony of Corr, documents produced by respondent in the course of discovery and respondent's answers to discovery responses leave little doubt that several other PCD brokers did in fact receive commissions for "finder's fees" for originating referrals to the investment bankers at TWP. Moreover, the respondent's incomplete responses to discovery requests and failure to produce documents in this regard tend to suggest that the payments of banking commissions to retail brokers were even more extensive than those conceded by the respondents.¹

The claimant's expert, Edward Mruk, is a specialist in executive compensation, with a number of clients in the securities industry. He testified that it is industry practice, particularly with respect to the larger firms, for retail brokers to receive a finder's fee in consideration for originating a referral of investment banking business. The respondent, while not seriously disputing this proposition, and not calling an expert of its own, contends that this practice is essentially confined to the larger, publicly traded "bulge" firms, and that TWP, as a smaller partnership, awards bonuses for "cross-selling" by retail brokers solely at the discretion of its investment bankers. TWP further argues that retail brokers may not work on investment banking deals because of the need to guard their access to material, non-public information; hence the Chinese wall concept. Respondent further notes that one of the major clients at issue in this case, Emulex, specifically requested that the claimant not work on an August 2002 convertible buy-back deal because the claimant's father served on the Emulex board, creating a potential conflict by the awarding of substantial fees to the son of a board member. Respondent

¹ In the course of discovery, respondent produced documents reflecting payments of "finder's fees" to two retail brokers in connection with generating investment banking business. During the course of the hearing, various witnesses, notably Roy Corr, identified additional PCD brokers who were paid finder's fees for generating investment banking business, but for whom no monthly templates were produced. The panel directed the respondent to produce any such documents. The respondent has, through its counsel, assured the panel that their client conducted a thorough and diligent search for additional documents and the panel has no reason to doubt the representations or professionalism of respondent's counsel. Moreover, respondent conceded in discovery responses that finder's fees were paid to PCD brokers on past occasions. Accordingly, the panel is prepared to reach the conclusion that the missing monthly templates, if produced, would have tended to establish that other PCD brokers were paid finder's fees for generating investment banking business.

cites no authority prohibiting the payment of banking commissions to retail brokers², and its last witness, Lindsay, did not identify any written firm policy prohibiting such payments.³

The initial transaction with Emulex was a January 24, 2002 convertible offering of \$300 million of convertible bonds which generated a total fee to TWP of approximately \$1.2 million. At all times, Claimant's father, Neil Ferris, was a member of the Board of Directors of Emulex, and there is no dispute that Claimant's familial connection to Emulex greatly aided Claimant's ability to introduce TWP to that company. Later that year, the TWP investment banking team, led by Jason Pederson, arranged for a buy-back of approximately \$150 million of these convertible bonds on August 28, 2002, generating a banking fee to TWP of approximately \$1.9 million, and, significantly, a trading commission to the PCD group of \$250,000.

The third transaction was the May 29, 2002 acquisition of Telera by Alcatel, a French concern, for which TWP earned a fee of \$1.5 million. There is little dispute as to the expertise of TWP's investment banking department, which worked around the clock on the deals, provided numerous presentations, and reports, and competed successfully with older, larger investment banking firms. The respondent argues that the expertise and hard work of Pederson's investment banking team was instrumental in securing these commissions of over \$3 million. On the other hand, the panel credits the claimant's testimony and, with respect to Telera, the testimony of Telera CEO Prem Uppaluru, that *claimant's* hard work and family connections played a substantial role in securing the initial relationships with Emulex and Telera. The record supports the claimant's testimony that he originated the business, as he claims, and that the expertise, diligence, industry knowledge, and hard work of TWP's investment bankers were responsible for closing and executing the deals, which the parties agree were done in a professional and satisfactory manner. Under these circumstances, is David Ferris entitled to a finder's fee for generating this investment banking business?

The respondent initially argues that the claim is foreclosed as an initial matter due to the self-executing nature of the February 2, 2000 employment agreement. However, the plain language of the agreement merely defines the claimant's "draw against your commissions, sales credit and fee payout" at \$300,000, and does not define the basis for commissions and other remuneration. The parties agree that the claimant was not a salaried employee, but rather was paid on the basis of the revenue he generated on behalf of the firm. In fact, respondent points out that, in his best year at TWP, Mr. Ferris earned nearly \$900,000. Since the contract is silent on the question of whether PCD brokers can

² Respondent's July 7, 2004 Arbitration Brief cites no authority in support of the proposition that the payment of an investment banking commission to a retail broker violates securities law or regulations.

³ Lindsay also testified that firm's prohibition of "over the wall" conflicts would be reflected in its compliance manual. Respondent did not reference its written policy on this issue or press this point in closing arguments.

be paid commissions for cross-selling on investment banking deals, the panel looks, under principles of contract law⁴ and equity, at the conduct of the parties and industry practice as a whole.

Mr. Mruk testified that finder's fees are common in the securities industry for originating investment banking business. And the claimant testified that he was explicitly promised a commission on all business he generated. It does appear that the claimant played an instrumental role in introducing and landing the three deals at issue, a role that was acknowledged by various clients and, at least indirectly by TWP itself, in a series of e-mails introduced into evidence by the claimant. Corr testified that banking commissions were sometimes paid to retail brokers, albeit on a discretionary basis. Moreover, there can be little doubt that respondent encouraged its PCD brokers, and claimant in particular, to generate investment banking business, and there was certainly precedent at TWP for compensating retail brokers for generating investment banking business.

In the first instance, Corr sent a June 14, 2002 electronic mail message to all of his retail brokers encouraging them to "open a dialog" with existing clients in order to solicit "buy-backs" of securities. (See claimant's Exhibit 32). Pederson, a TWP investment banking partner, requested Ferris' help in soliciting business from Emulex's chief financial officer, asking in a September 24, 2001 e-mail whether the claimant had "any luck in getting through to [Emulex CFO] Rockenbach?" (Claimant's Exhibit 10). When the claimant dutifully promised to follow up on the client, Pederson responded: "Great. It would be nice to get a piece of the buyback." Ferris aggressively plied his family connections, both phoning and e-mailing his colleagues from his honeymoon about the Emulex trade, writing to Corr and Pederson that "we have a good shot at this business. We should be very aggressive and pull out all of the stops on this one..." (Claimant's Exhibit 20). At this time, neither Pederson nor Corr warned Ferris of the dangers of crossing the "Chinese wall" between retail brokerage and investment banking.⁵ Neither did they mention that they had no intention of compensating him for his efforts. To the contrary, they both encouraged Ferris to help land the business. Moreover, Joseph Klein, a principal in the TWP convertible securities department, testified that he in fact recommended paying Ferris \$80,000 in connection with his role in generating the Emulex buyback.

In addition to the substantial evidence that other retail brokers were paid banking commissions, there is evidence that TWP authorized a payment of \$20,000 to Ferris in

⁴ The claimant contends that Massachusetts law applies to this transaction, due to his residence in and execution of the contract in Massachusetts, citing several Massachusetts cases.

⁵ Respondent also argues, as to the August 2002 Emulex buy-back, that Ferris is not entitled to a commission because the client itself requested Ferris' removal from the account since his father was a member of the Emulex board. There was no competent evidence tendered as to this point. Further, Lindsay was unable to identify a TWP policy prohibiting the payment of banking commissions to a retail broker, or any policy allowing a TWP customer to determine the compensation of a TWP employee. Thus, the argument that Ferris was not allowed to work on the deal does not necessarily establish that he is not entitled to a commission for originating it. In any event, as detailed below, the panel has determined that claimant is not entitled to a commission for the banking fees from this second Emulex transaction.

connection with the August 2000 Emulex convertible buy-back, representing his share of the brokerage fee for the first of three tranches which in total generated PCD fees of \$250,000. In an August 29, 2002 e-mail, Corr instructed his assistant to issue Ferris a "\$20,000 sales credit" in connection with the Emulex convertible buy-back. This credit was calculated, according to testimony at the hearing, as a 20% commission on PCD's brokerage fee for the initial portion of the buy-back, consisting of \$50 million of convertible securities. (The total buyback ultimately constituted \$150 million.) Corr wrote Ferris that his assistant would pay \$20,000 to Ferris unless he wished to share with his partner, prompting the claimant to cut his junior partner in on the 20% commission. (See Claimant's Exhibit 37).

Corr testified that this payment to Ferris was subsequently reversed on direct order of TWP CEO Thomas Weisel after an August 21, 2002 dinner meeting at which Emulex executives complained about the apparent conflict of interest arising from David Ferris's being involved in Emulex's investment banking business when his father was a member of the Emulex board. Interestingly, the respondent has produced no written revocation of the August 29, 2002 sales credit to Ferris. In short, the record amply supports the conclusion that Ferris is entitled to a finder's fee in connection with originating the Emulex and Telera deals. Since the claimant is entitled to a fee, the question is the extent of damages which would be fair and equitable to assess given the complex facts and circumstances of this case.⁶

Mruk testified that the brokerage industry tends to pay finder's fees ranging between 7 % and 20% of commissions, yet conceded that his figures were skewed toward larger, publicly traded firms as opposed to smaller partnerships such as TWP. Corr testified that finder's fees were discretionary with investment bankers, and tended to be closer to 5% to 10% of net commissions, net of expenses. While neither side introduced evidence of the expenses in connection with the Emulex or Telera deals, Pederson testified that a team of as many as five professionals worked around the clock and traveled globally on the deals, generating dozens of brochures and reports.

The panel has considered all of the evidence submitted by both sides, and has reviewed the submissions of the parties. The arbitrators have considered the legal arguments made by both side, and have also considered the equities of the situation and the concept of *quantum meruit*.

The panel has determined to award the claimant origination fees of 5% for the initial deals with Emulex and Telera, which generated investment banking fees of \$1,203,000 and \$1,500,000, respectively. The panel will not, however, award the claimant the requested fee on the \$1.9 million banking commission for the second Emulex deal, *i.e.*,

⁶ The claims of wrongful termination are insufficiently developed on this record, which clearly establishes that the claimant was an at-will employee. Even had the claimant established that his termination was in some way wrongful, his own testimony establishes that he suffered no damages in that he had no difficulty securing as many as half a dozen offers from competing brokerage firms. His current employment, with Merrill Lynch, included a substantial remuneration package in which he received \$2.4 million over two years—an amount in excess of his earnings at TWP.

the August 28, 2002 convertible buyback of \$150 million of Emulex convertible securities. The claimant did not establish that a broker who is entitled to an origination fee for initially bringing in an investment banking client would necessarily be entitled to referral fees on all subsequent work for the same client. Moreover, the testimony of both Pederson and Uppaluru tends to suggest that the professionalism, hard work and expertise of the TWC investment banking staff played a significant role in landing the subject transactions. Nonetheless, the claimant is entitled to the lesser commission of \$50,000, representing 20% of the \$250,000 commission on the actual trade of the convertible buyback, which, the evidence shows, was a PCD function.

The claimant further claims that he is entitled to consequential damages due to the non-inclusion of the finder's fee in his 12-month trailing earnings. The claimant alleges that the failure to include these fees damaged him in his salary negotiations with Merrill Lynch, the firm that hired him as a retail registered representative in September 2002, immediately after his termination by respondent.⁷ The panel rejects this claim as speculative, as there is no evidence that Merrill or any other firm would have credited a retail representative such as the claimant for such one time, non-recurring transactions as the investment banking deals with Emulex and Telera. In fact, the evidence appears to establish that a brokerage firm will not credit a retail broker with a "one-off" or one of a kind, one-time transaction, since there is no assurance to the firm that these non-recurring transactions would form a basis for the broker's future productivity. Moreover, as respondent points out, the claimant landed a \$2.4 million, two-year contract with Merrill within a month of his termination by respondent. Since the claimant earned more money at Merrill than he did at TWP, his claim for consequential damages is not supported by the record.

Based on all of the foregoing, and considerations of equity, the panel believes that the fairest damage calculation would be to award the claimant \$185,165, which it calculates as 5% of banking commissions on the two initial deals with Telera and Emulex, plus 20% of the PCD brokerage commission on the Emulex buyback. All other claims are denied, including the claims for punitive damages and attorneys' fees.

Forum fees are to be shared equally by the parties.

Counsel for both sides are to be commended for their excellent written and oral presentations.

AWARD

After considering the pleadings, and 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:

⁷ Indeed, respondent points out that claimant entered into negotiations with Merrill prior to his termination by TWP.

1. Respondent is liable for and shall pay to Claimant compensatory damages in the amount of \$185,165.00.
2. Any and all relief not specifically addressed herein, including punitive damages and attorneys' fees, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee = \$500.00

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, Thomas Weisel Partners, LLC is a party.

Member surcharge = \$2,800.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$5,000.00

Forum Fees and Assessments

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

Three (3) Pre-hearing sessions with a single arbitrator @ \$450.00 = \$ 1,350.00

Pre-hearing conferences: February 23, 2004 1 session
May 18, 2004 1 session
May 25, 2004 1 session

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

Pre-hearing conference: January 15, 2004 1 session
August 6, 2004 1 session

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

Hearing Dates: July 19, 2004 2 sessions
July 20, 2004 2 sessions
July 21, 2004 2 sessions
October 14, 2004 2 sessions

Total Forum Fees = \$13,350.00

1. The Panel has assessed \$6,675.00 of the forum fees against Claimant.
2. The Panel has assessed \$6,675.00 of the forum fees against Respondent.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 500.00
<u>Forum Fees</u>	= \$ <u>6,675.00</u>
Total Fees	= \$ 7,175.00
<u>Less payments</u>	= \$ <u>1,800.00</u>
Balance Due NASD Dispute Resolution	= \$ 5,375.00

2. Respondent is solely liable for:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	= \$ <u>6,675.00</u>
Total Fees	= \$15,225.00
<u>Less payments</u>	= \$ <u>8,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 6,675.00

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

ARBITRATION PANEL

Barry R. Temkin	-	Non-Public Arbitrator, Presiding Chairperson
Mitchell F. Colen	-	Non-Public Arbitrator
Thomas J. Luz	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument is which is my award.



Barry R. Temkin
Non-Public Arbitrator, Presiding Chairperson

Signature Date

Mitchell F. Colen
Non-Public Arbitrator

Signature Date

Thomas J. Luz
Non-Public Arbitrator

Signature Date

October 27, 2004
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Barry R. Temkin	-	Non-Public Arbitrator, Presiding Chairperson
Mitchell F. Colen	-	Non-Public Arbitrator
Thomas J. Luz	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument in which is my award.

Barry R. Temkin
Non-Public Arbitrator, Presiding Chairperson

Signature Date

Mitchell F. Colen
Mitchell F. Colen
Non-Public Arbitrator

12/10/04
Signature Date

Thomas J. Luz
Non-Public Arbitrator

Signature Date

October 27, 2004
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Barry R. Temkin	-	Non-Public Arbitrator, Presiding Chairperson
Mitchell F. Colen	-	Non-Public Arbitrator
Thomas J. Luz	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument is which is my award.

Barry R. Temkin
Non-Public Arbitrator, Presiding Chairperson

Signature Date

Mitchell F. Colen
Non-Public Arbitrator

Signature Date



Thomas J. Luz
Non-Public Arbitrator

October 22, 2004

Signature Date

October 27, 2004

Date of Service (For NASD Dispute Resolution use only)