

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant/Counterrespondent
American Express Financial Advisors, Inc.

Case Number: 03-04719

Name of the Respondent/Counterclaimant
Desmond Brivik

Hearing Site: Kansas City, Missouri

Type of Controversy: Member Firm v. Associated Person

REPRESENTATION OF PARTIES

American Express Financial Advisors, Inc. was represented initially by Ahna M. Thoresen, Esq. and subsequently by Karen E. Wilson, Esq. both of the firm of Faegre & Benson LLP located in Minneapolis, Minnesota.

Desmond Brivik was represented by David R. Nachman, Esq. of the firm Brown & Nachman, LLC located in Kansas City, Missouri.

CASE INFORMATION

American Express signed the Uniform Submission Agreement: June 26, 2003.

Brivik signed the Uniform Submission Agreement: August 29, 2003.

Statement of Claim for Injunctive Relief and Damages filed on or about: June 30, 2003.

Statement of Answer and Counterclaim filed by Brivik, on or about: August 28, 2003.

American Express' Memorandum Concerning Brivik's Defense of Unclean Hands filed on or about: September 9, 2003.

Amended Statement of Answer and Amended Counterclaim filed on or about: September 12, 2003.

Reply to Counterclaim filed on or about: September 22, 2003.

American Express' Motion for Summary Judgment and Memorandum on the Counterclaim filed on or about: January 21, 2004

Brivik's Response to American Express' Motion for Summary Judgment filed on or about: February 11, 2004

American Express' Reply to the Motion for Summary Judgment filed on or about: February 12, 2004

Brivik's Surreply to the Motion for Summary Judgment filed on or about: February 13, 2004.

American Express' Partial Motion to Dismiss on Collateral Estoppel filed on or about: March 31, 2004.

Brivik's Response to American Express' Partial Motion to Dismiss on Collateral Estoppel filed on or about: April 16, 2004.

CASE SUMMARY

American Express asserted the following causes of action: Breach of Contract – Violation of Franchise Agreement and the Stipulation Regarding Confidentiality.

Unless specifically admitted in his Answer, Brivik denied the allegations made in the Statement of Claim and asserted the following defenses:

- American Express cannot show compliance with NASD Code of Arbitration Procedure Rule 10335(b) because there is no clear showing it is likely to succeed on the merits, that it will suffer irreparable injury, and that the equities lie in its favor.
- American Express has already been found by a prior NASD Arbitration Panel to have violated its duty of good faith and fair dealing to Brivik.
- American Express has libeled and defamed Brivik, acted inequitably, and therefore is not entitled to impose any obligations from the Franchise Agreement or the Stipulation on Brivik.
- American Express comes to this panel with unclean hands, having acted inequitably, and therefore this panel cannot grant any equitable relief to American Express.
- American Express' Statement of Claim fails to state a claim for which relief can be granted against Brivik.
- Brivik incorporated as affirmative defenses to American Express' claims all of his counterclaims against American Express.

Brivik asserted the following causes of action in his counterclaim: Defamation and Libel; Infliction of Emotional Distress; Failure to Comply with NASD Panel Orders to Expunge his U-4 and U-5 Filings; Breach of NASD Bylaws; Interference with Brivik's Business Expectancy; and Equitable Clean Up Doctrine.

Unless specifically admitted in its Answer, American Express denied the allegations made in the Counterclaim and asserted the following defenses:

- *Res Judicata*: In the prior arbitration proceeding Brivik sought expungement of the Form U-4 and Form U-5, and recovery of the value of his financial advisory business and his

lost lifetime earnings in the securities industry. Since Brivik's counterclaims in this proceeding assert the same claims and seek the same relief, they are barred under the doctrine of *res judicata*.

- Collateral Estoppel: The appropriate content of Brivik's Form U-4 and Form U-5 was litigated in the prior arbitration proceeding and ruled on by the prior panel. Under the doctrine of collateral estoppel, Brivik is barred from relitigating that issue.
- Lack of Causation: Brivik's U-4 lists a number of client complaints that predate his affiliation with American Express. In addition, Brivik has a history of mental health problems that arose before the termination of his Franchise Agreement with American Express. As a result, Brivik cannot establish that his inability to find work or his current mental health problems, are the result of any conduct on the part of American Express.
- Mitigation of Damages: Brivik has failed to mitigate his alleged damages by obtaining alternate employment. Even assuming that he cannot obtain employment in the securities industry, it does not permit him to refuse other types of employment.
- Lack of jurisdiction: Brivik's counterclaim seeks enforcement of an order issued by a prior panel. Enforcement of an order issued by a different arbitration panel is outside the scope of this proceeding.

RELIEF REQUESTED

American Express requested:

- Issuance of a permanent injunction restraining and enjoining Brivik from disclosing its confidential client and business information to any third parties;
- Order Brivik to return all documents containing American Express' confidential client and business information to American Express;
- Award American Express damages for all losses caused by Brivik's wrongful actions, along with American Express' reasonable attorney's fees and costs; and
- Denial and dismissal of claims.

Brivik requested:

- Issuance of a permanent injunction mandating and compelling American Express to expunge the false and defamatory statements contained in its filing with the NASD;
- Award actual damages of \$4,000,000.00 and punitive damages of \$12,000,000.00 as a result of American Express' wrongful actions and omissions;
- Assess all costs and attorneys fees of this proceeding against American Express; and
- That the panel make such other awards as it deems just and proper.

ISSUES CONSIDERED AND DECIDED

On October 10, 2003, the panel issued an Order for Permanent Injunctive Relief granting American Express Financial's Request for Permanent Injunctive Relief. The panel also granted Desmond Brivik's request for Permanent Injunctive Relief by directing the NASD to change Brivik's Form U-4 and Form U-5.

On May 1, 2004, the panel (consisting of Merrs. Phillips and Wilson) granted American Express'

Motion for Summary Judgment of Respondent's counterclaims.

On May 5, 2004, the panel amended its aforementioned grant of American Express' Motion for Summary Judgment of Respondent's counterclaims by limiting it to only those counterclaims related to Brivik's U-4.

On May 7, 2004, the panel took up American Express' renewed Motion for Judgment in its favor on Respondent's remaining counterclaims and the Respondent orally moved for judgment in his favor on these same counterclaims.

On June 2, 2004, the panel granted American Express' renewed Motion for Judgment in its favor on Respondent's remaining counterclaims, denied Respondent's Motion for Judgment in his favor on these same counterclaims and determined that the June 14, 2004 scheduled hearing would not be necessary. This award confirms that decision.

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. Any and all claims asserted by Claimant/Counterrespondent American Express Financial Advisors, Inc. were ruled upon in the panel's October 10, 2003 order. No further rulings were necessary.
2. Any and all claims asserted by Respondent/Counterclaimant Desmond Brivik against Claimant/CounterClaimant American Express Financial Advisors, Inc. are dismissed with prejudice as a result of the panel rulings granting Claimant/CounterClaimant's Motion for Judgment and denying Respondent/Counterclaimant's Motion for Judgment.
3. Except as specified herein, parties shall bear their own costs, including attorney's fees.
4. Any and all relief not specifically addressed herein, including punitive damages, is denied and dismissed with prejudice.

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
Counterclaim filing fee	= \$ 600.00

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, pursuant to rule 10333 and 10328(b) of the Code, American Express is assessed the following fees:

Member surcharge	= \$ 1,500.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 5,500.00</u>
Total	= \$ 7,750.00

Adjournment Fees

In accordance with 10319 of the Code the panel granted the following adjournments during these proceedings for which fees were assessed:

August 12, 2003 adjournment requested by Brivik	= \$ 1,000.00
September 3, 2003 adjournment requested by Brivik	= \$ 1,500.00
March 8 - 11, 2004 adjournment requested by American Express	= \$ 1,000.00

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. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

1. American Express is assessed:	
Injunctive relief surcharge	= \$ 2,500.00
Additional arbitrator honoraria	= \$ 462.50
2. Brivik is assessed:	
Injunctive relief surcharge	= \$ 2,500.00
Additional arbitrator honoraria	= \$ 462.50

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) Permanent Injunctive Relief sessions at \$1,200.00	= \$ 3,600.00
September 15, 2003 3 sessions	
One (1) Pre-hearing session with Panel at \$1,200.00	= \$ 1,200.00
Pre-hearing conference: November 12, 2003 1 session	

Six (6) Hearing sessions at \$1,200.00 = \$ 7,200.00

Hearing Dates: May 5, 2004 2 sessions
May 6, 2004 2 sessions
May 7, 2004 2 sessions

Total Forum Fees = \$ 12,000.00

1. The Panel has assessed \$6,000.00 of the forum fees to American Express Financial Advisors, Inc.
2. The Panel has assessed \$6,000.00 of the forum fees to Desmond Brivik.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Brivik requested six tapes at \$15.00 each = \$ 90.00

FEE SUMMARY

1. American Express Financial Advisors, Inc. is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 7,750.00
Adjournment Fees	= \$ 1,000.00
Injunctive Relief Fees	= \$ 2,962.50
Forum Fees	= \$ 6,000.00
Total Fees	= \$18,212.50
Less payments	= \$10,962.50
Balance Due NASD Dispute Resolution	= \$ 7,250.00

2. Brivik is solely liable for:

Counterclaim Filing Fee	= \$ 600.00
Adjournment Fees	= \$ 2,500.00
Injunctive Relief Fees	= \$ 2,962.50
Administrative Fees	= \$ 90.00
Forum Fees	= \$ 6,000.00
Total Fees	= \$12,152.50
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$10,352.50

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

ARBITRATION PANEL

Thomas B. Phillips, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Elrod P. Wilson	-	Non-Public Arbitrator
Thomas P. Hoover	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ Thomas B. Phillips

July 8, 2004

Thomas B. Phillips, Esq.
Non-Public Arbitrator, Presiding Chairperson

Signature Date

/s/ Elrod P. Wilson

July 14, 2004

Elrod P. Wilson
Non-Public Arbitrator

Signature Date

/s/ Thomas P. Hoover

July 13, 2004

Thomas P. Hoover
Non-Public Arbitrator

Signature Date

July 16, 2004

Date of Service (For NASD Dispute Resolution office use only)

ARBITRATION PANEL

Thomas B. Phillips, Esq.

Non-Public Arbitrator, Presiding
Chairperson

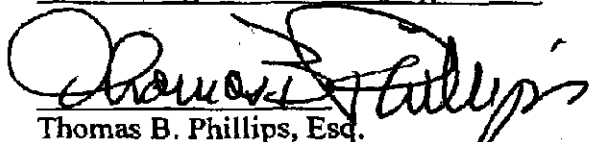
Elrod P. Wilson

Non-Public Arbitrator

Thomas P. Hoover

Non-Public Arbitrator

Concurring Arbitrators' Signatures



Thomas B. Phillips, Esq.

Non-Public Arbitrator, Presiding Chairperson

July 8, 2004
Signature Date

Elrod P. Wilson
Non-Public Arbitrator

Signature Date

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Non-Public Arbitrator

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Elrod P. Wilson	-	<i>Non</i> - Public Arbitrator
Thomas P. Hoover	-	Non-Public Arbitrator

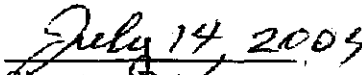
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Thomas B. Phillips, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date



Elrod P. Wilson
Public Arbitrator



Signature Date

Thomas P. Hoover
Non-Public Arbitrator

Signature Date

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Elrod P. Wilson	-	<i>Non</i> - Public Arbitrator
Thomas P. Hoover	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Thomas B. Phillips, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Elrod P. Wilson
Public Arbitrator

Signature Date

Thomas P. Hoover

Thomas P. Hoover
Non-Public Arbitrator

7-13-04

Signature Date

Date of Service (For NASD Dispute Resolution office use only)