

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Mark S. Muller

92-04341

Name of Respondent

Howard. Weil. Labouisse. Friedrichs, Inc.

REPRESENTATION

For Claimant: Mark S. Muller ("Muller") was represented by Mary Wimbush, Esq. of Mary Wimbush, P.C., located in Houston, Texas.

For Respondent: Howard, Weil, Labouisse, Friedrichs, Inc. ("Howard Weil") was represented by David Israel, Esq. and Stephen P. Beisor, Esq. of McGlinchey Stafford Lang, New Orleans, Louisiana.

CASE INFORMATION

Statement of Claim filed: December 29, 1992.

Claimant's Submission Agreement signed on: January 15, 1993.

Statement of Answer and Counterclaim filed by Respondent Howard Weil on: March 25, 1993.
Respondent Howard Weil's Submission Agreement signed on: March 25, 1993 by Barbara L. Weaver, Assistant Secretary, Howard Weil, Labouisse, Friedrichs, Inc.

Claimant's Answer to Respondent's Counterclaim filed: May 7, 1993.

Supplementation to Statement of Claim filed: August 27, 1993.

Claimant's Motion for Leave to Amend Statement of Claim filed: September 13, 1993.

Motion for Leave to File Partial Motion for Summary Judgment filed by Respondent Howard Weil on: October 12, 1993.

Motion for Leave to file Motion for Summary Judgment filed by Respondent on: October 12, 1993.

Opposition to Motion for leave to File Motion for Partial Summary Judgment and Summary Judgment filed: October 13, 1993.

Respondent's Motions for Partial Summary Judgment and Summary Judgment filed on: October 15, 1993.

Response to Motions for Partial Summary Judgment and Summary Judgment filed: October 18, 1993.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: October 19, 1993 for Two (2) sessions;
October 20, 1993 for Three (3) sessions;
November 9, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Muller alleged that Respondent Howard Weil failed to pay to him a bonus pursuant to an employment contract entered into by the parties. Muller specifically alleged that:

1. In May of 1990, Muller was working as a senior investment banker when he and his co-worker were contacted by the President of Howard Weil to discuss employment. After interviews and negotiations, Muller and his co-worker began their employment with Howard Weil on May 18, 1990;
2. The terms of employment were set out in a letter of May 17, 1990, which stated that Muller's base salary would be \$120,000.00 per annum with a first year bonus of \$525,000.00 (\$250,000.00 for Muller and \$275,000.00 for his co-worker) if the corporate finance department earned a minimum of \$525,000.00 in net fees within 12 months of the hiring date. Muller and his co-worker would

receive the first \$525,000.00 of the bonus pool payable to the corporate finance department within the twelve month period:

3. Employment bonuses became due in December of 1990 and the corporate finance department accumulated a bonus pool of over \$525,000.00 for the six months of Muller's employment:

4. Muller was approached by the managing director of Howard Weil and told that his bonus would not be paid in full. Instead, Muller was to receive \$71,000.00, in effect an ultimatum to accept the reduced bonus or leave the firm. Muller was forced to accept the reduced bonus instead of being forced into the job market at an extremely inopportune time:

5. In concert with the reduction, Muller was forced to sign a letter dated December 27, 1990 purporting to waive the bonus before he would receive the \$71,000.00. Muller was encouraged to be a team player and was told that Howard Weil would "make up" the remainder of the bonus down the road; and

6. Muller would continue to work in good faith and closed major deals which generated significant revenues for Howard Weil. Muller expected that the remainder of the bonus would be paid by mid-year 1991. However, Muller was dismissed from his employment on May 20, 1991 and the terms of the May 17, 1990 contract were never fulfilled.

Based upon the above allegations, Muller asserted claims for breach of contract; fraud and for fair compensation under the theory of "quantum merit." In addition, the Claimant asserted that the December 27, 1990 waiver letter was unenforceable because it was obtained through coercion and lacked consideration.

Respondent Howard Weil denied the material allegations of the Statement of Claim, alleging that:

1. Muller and his co-worker approached Howard Weil regarding employment, representing that they would bring several business deals they were working on, as well their investment banking "group" with them to Howard Weil. Based upon their representations, Howard Weil offered them employment during May 1990, outlining the terms of the employment in the letter of May 17, 1990;

2. Muller and his co-worker were unable to bring their investment banking group to Howard Weil and were unable to generate the business they represented. Consequently, Muller's co-worker approached the head of the corporate finance department in December of 1990 and requested that his compensation be revised.

He agreed that his bonus would become discretionary based on the Corporate Finance Department's profitability and his contribution to that profitability, and this agreement was incorporated into a letter signed by him on December 27, 1990:

3. Muller met with the head of Corporate Finance thereafter to discuss signing a similar letter. After the meeting, Muller signed a letter on December 27, 1990 that was almost identical to that signed by his co-worker;

4. At the end of December 1990, the department paid six-month bonuses to its members from an accumulated bonus pool and Muller received a bonus of \$71,000.00 pursuant to the agreement of December 27, 1990; and

5. Muller continued to work for Howard Weil with only limited productivity until he was discharged on May 20, 1991 as a result of a reduction in the work force. Muller received his full salary for the portion of 1991 he was employed, but did not receive a bonus for 1991 because of the agreement in the letter of December 27, 1990.

In addition, Howard Weil asserted a counterclaim for breach of contract and fraudulent inducement to contract because of Muller's failure to bring to Howard Weil the business he represented he could.

Muller denied the allegations of the counterclaim.

RELIEF REQUESTED

Claimant Muller requested entry of an award against Respondent for actual damages in the sum of \$178,900.00; interest at the rate of 6% per annum from the date the contract was breached until the claim was paid; reasonable attorneys' fees under Texas contract law; and punitive damages in the sum of \$536,700.00. Muller supplemented his claim to include additional damages for the increased tax burden and for contingent attorneys' fees.

Respondent Howard Weil requested that the Panel deny Muller's Statement of Claim and declare him in breach of the employment agreement he entered into on May 17, 1990, as amended on December 27, 1990, and award it the bonus Muller was given in the amount of \$71,000.00; his salary during the period of May 17, 1990 through May 20, 1991; and costs, pre- and post-award interest and reasonable attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The Panel granted Claimant's Motion for Leave to Amend.

On October 15, 1993, the Panel granted Respondent's Motions for Leave to File Motion for Partial Summary Judgment and Motion for Leave to File Motion for Summary Judgment,, determining that oral argument would be heard as the first matter at hearing on October 19, 1993. After hearing argument from the parties and reviewing all responses, the Panel determined that the Motion for Partial Summary Judgment would be granted, but the Motion for Summary Judgment was denied. Pursuant to this decision, evidence of the potential increased tax liability was not heard.

Respondent Howard Weil withdrew its counterclaim at hearing.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated;
3. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Seven (7) hearing sessions x \$1,000.00 per hearing session = \$7,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 non-refundable

claim filing fee and the \$1,000.00 hearing session deposit previously deposited by the Claimant, Mark S. Muller. In addition, the NASD shall retain the \$500.00 non-refundable claim filing fee and the \$600.00 hearing session deposit previously deposited by the Respondent Howard, Weil, Labouisse, Friedrichs, Inc. Respondent Howard, Weil, Labouisse, Friedrichs, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$5,400.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Date

/s/ Laila M. Asmar, Esq.
Laila M. Asmar, Esq.
Industry Arbitrator
Chairperson

February 9, 1994

/s/ Milton W. Minces, Jr.
Milton W. Minces, Jr.
Industry Arbitrator

February 4, 1994

/s/ Thomas H. Vann
Thomas H. Vann
Industry Arbitrator

February 4, 1994

For NASD Use Only:

Date of Service of Award: 2-10-94