

NASD REGULATION, INC. AWARD

NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

John Harty

95-03726

Name of Respondents

Bancomer Securities International Inc.
Casa De Bolsa Bancomer, S.A.

REPRESENTATION

For Claimant, John Harty, ("claimant") appeared Marshall H. Fishman, Esq. of the law firm Rosenman & Colin located in New York, New York and substitute counsel for Lloyd R. Schwed, Esq. of the law firm Hertz, Schram & Saretsky, West Palm Beach, Florida.

For Respondent, Bancomer Securities International Inc. ("BSI") appeared Richard F. Ziegler, Esq. of the law firm Cleary, Gottlieb, Steen & Hamilton located in New York, New York.

Respondent, Casa De Bolsa Bancomer, S.A. ("CBB") did not submit to jurisdiction and did not appear.

CASE INFORMATION

Statement of Claim filed: July 31, 1995.

Claimant's Submission Agreement signed on: August 2, 1995.

Statement of Answer filed by Respondent BSI filed: October 23, 1995.

Respondent BSI's Submission Agreement signed on: September 12, 1995.

Respondent CBB did not file a Statement of Answer.

Respondent CBB did not execute a Uniform Submission Agreement pursuant to Rule 10314 of the Code of Arbitration Procedure.

HEARING INFORMATION

Pre-Hearing Conference:

April 23, 1996/One Session
June 14, 1996/One Session
January 27, 1997/One Session
February 3, 1997/One Session

Hearing Dates/Sessions:

- July 16, 1996/Two Sessions
- July 17, 1996/Two Sessions
- July 24, 1997/Two Sessions
- July 25, 1997/Two Sessions
- November 11, 1996/Two Sessions
- November 12, 1996/Two Sessions
- November 22, 1996/One Session
- December 16, 1997/Two Sessions
- December 17, 1997/Two Sessions
- January 23, 1997/Two Sessions
- January 24, 1997/Two Sessions
- February 6, 1997/Two Sessions
- February 13, 1997/One Deliberation Session

Hearing Location: The hearings were held at the offices of NASD Regulation, Inc., New York, New York.

CASE SUMMARY

Claimant alleged that BSI, a New York-based brokerage firm, was a wholly owned United States subsidiary of the Mexican securities firm, CBB, which, in turn was owned by Grupo Financiero Bancomer, ("GFB"), a large Mexican bank. Claimant further alleged that Caesar Baez ("Baez"), President and CEO of BSI, hired Claimant to serve as Managing Director and head of Equity Sales for BSI commencing August 1, 1994. Claimant also alleged that, under the terms of the two year Employment Agreement ("Agreement") he signed with BSI, he was guaranteed compensation of \$1.6 million for the period through August 1, 1996. Claimant asserted that, on January 9, 1995, he was terminated without notice. Claimant further asserted that, pursuant to the Agreement, if his employment terminated prior to August 1, 1996 for reasons other than "for cause" he would continue to receive his base salary and minimum bonuses through August 1, 1996. Claimant also alleged that lack of production is not listed in the Agreement's definition of "cause" for termination. Claimant contended that, when he joined BSI, the company was a start-up operation without sufficient personnel, equipment or procedures in place to engage in equity trading. Claimant further contended that he frequently worked 12 to 15 hours a day, six days a week, to establish BSI's operational and compliance functions. Claimant also alleged that, in a memorandum dated October 31, 1994, Pablo Castillo ("Castillo"), head of BSI's Worldwide Equity Business, expressed his confidence and trust in claimant's abilities and job performance.

Claimant alleged that, in the second week of November 1994, he discovered that a trader for BSI, Jorge Gonzalez ("Gonzalez"), caused a false, fictitious trade to be posted on the Mexican stock exchange in order to intentionally mislead a major client, GT Capital, into believing that the price of a stock called Benivedes had declined. Claimant contended that the trade was posted to show that BSI had another client who was selling a major block of Benivedes. Claimant further alleged that the stock had, in fact, declined because of Gonzalez's aggressive solicitation. Claimant also alleged that he immediately notified BSI's legal and compliance officers, senior management in New York and outside counsel of the situation. Claimant asserted that BSI was not alarmed by the fraud and did not feel that disciplinary action was necessary. Claimant further asserted that, on December 1, 1994, he delivered a memorandum ("December 1 memo") to Baez stating that outside counsel should be retained to investigate Gonzalez's action and to give a formal opinion as to the firm's legal and compliance obligations. Claimant also

asserted that because of this December 1 memo, he was ostracized for the next five weeks until he was finally terminated on January 9, 1995.

Claimant contended that Baez stated that claimant's allegations in his December 1 memo were not substantiated or specific. Claimant alleged that Baez therefore rejected claimant's request to retain outside counsel to investigate the matter and instead, decided to have the Director of Compliance conduct an investigation and decide if disciplinary action was necessary. Claimant further contended that, on December 2, 1994, Baez wrote claimant a memorandum ("December 2 memo") in which he said claimant was required to open new accounts and write order tickets as part of his job and stated that unless his productivity increased it would be necessary to reevaluate his compensation and duties. Claimant also contended that, under his employment contract, he was guaranteed compensation of \$1.6 million for two years and that BSI did not have the right to reevaluate that compensation based on claimant's productivity or revenues. Claimant alleged that Baez's December 2 memo was retribution for his December 1 memo.

notified claimant that he would no longer have principal responsibility for BSI employees on the dealer trading desk and that he was required to be an active producer in Equity Sales.

Claimant maintained that, on December 5 and December 6, 1994, a BSI employee in Mexico instructed BSI employees in New York to solicit the sale of Grupo Macma, which were securities unregistered in the United States and that they disregarded claimant's order that they refrain from this illegal activity. Claimant further maintained that he brought this issue to BSI's Director of Compliance in New York who ordered the BSI employees not to solicit the sale of the unregistered securities.

Claimant alleged that, in January 1995, Baez gave him an ultimatum to either agree to a severance package and resign from the firm or stay at the firm with the understanding that BSI would not honor claimant's employment contract. Claimant further alleged that, on January 9, 1995, he gave a memorandum to Baez stating that the ultimatum was in retaliation for his whistleblowing. Claimant alleged that he was terminated that same day. Claimant asserted that BSI waited until June 1, 1995 to file a Form U-5 to report claimant's termination which stated the reason for his discharge as "breach of employment contract-lack of production."

Claimant maintained that he had only received \$137,000.00 in compensation and BSI is obligated to pay him the remaining \$1,463,000 owed under the Agreement. Claimant further maintained that BSI terminated him in retaliation for its own violations of federal securities laws and the rules of the New York Stock Exchange ("NYSE") and the NASD and that such termination constituted wrongful and malicious discharge under New York law.

Respondent maintained that claimant was hired by BSI as Managing Director and head of Equity Sales pursuant to the terms of the Agreement dated August 1, 1994. BSI contended that claimant has been paid \$137,000.00. BSI further contended that it was served with a Notice of Levy from the IRS against claimant for nonpayment of Federal income taxes totalling \$92,000.00 .

Respondent asserted that claimant was terminated for gross negligence in the performance of his duties for his failure to generate sales. BSI further asserted that, as head of Equity Sales, sales production was one of claimant's duties and that his total revenue was less than \$5,000.00. Respondent maintained that claimant opened only six of BSI's approximately 130 institutional accounts. BSI also asserted that the principal representation claimant made about his qualifications while seeking to be hired by BSI was his ability to generate income through his alleged considerable institutional client contacts. BSI maintained

that it cannot be concluded that claimant did not have any duties as head of Equity Sales simply because the Agreement does not delineate any such responsibilities.

BSI further maintained that claimant breached the Agreement by failing to supervise or train the salesmen on the Equity Desk. BSI also contended that two of the junior salesmen on the Equity Desk were Mexican and one was Spanish and that claimant was hostile toward them because of their ethnic origins. BSI asserted that claimant spent little time at his trading desk and, as a result of this behavior, failed to effectively train or supervise the salesmen. BSI further asserted that claimant was grossly negligent in his refusal to speak with Miguel Cortina ("Cortina"), head of international sales equity at CBB, which led to claimant's failure to formulate joint business plans with the Equity Desk at CBB.

BSI asserted that claimant was grossly negligent because he went on vacation during December 1994 during a time BSI was required to deal with the upheaval resulting from the devaluation of the peso.

expenses when viewed in light of his failure to generate significant revenue for BSI.

BSI further contended that, even if the termination was not initially for cause within the meaning of the Agreement, claimant's termination could be deemed for cause if it were determined subsequent to the termination that cause existed within the meaning of the Agreement. BSI contended that the Agreement defined cause as any act involving dishonesty or fraud harmful to BSI.

BSI maintained that claimant had materially misrepresented the true status of his prior employment because he wrongly stated that he had been a partner at Morgan Stanley. BSI also maintained that claimant expressly represented that he had a book of institutional clients that could unquestionably generate a couple of hundred thousand dollars in gross commissions from secondary trading during the remaining five months of 1994 and \$2-3 million during the second year. BSI asserted that claimant was dismissed from Morgan Stanley for lack of production and contended that his dismissal from a job he held at Republic was probably due to similar reasons. Respondent maintained, therefore, that claimant's representations were false and constituted a dishonest act and/or a fraud that was harmful to BSI because the misrepresentations induced BSI to enter into an overly generous employment contract with the claimant.

BSI further asserted that claimant was not discharged in retaliation for his written complaints regarding BSI's purported compliance violations and that such allegations were a smokescreen to mask his inability to produce revenue. BSI also asserted that claimant did not have to build the firm's operational and compliance functions because the department was fully functioning at the time that claimant was hired. BSI contended that it was an "introducing" broker and not an "executing" broker so the bulk of the back office work was done by the clearing/carrying broker, not BSI.

BSI further contended that the incident in November 1994 regarding the Benevides stock arose when a large institutional investor client asked Gonzalez, a salesman for BSI, to seek bids for a substantial amount of Benevides stock. BSI also contended Gonzalez tried to market the stock to at least one broker/dealer who contacted the selling client offering to sell it a large block of Benevides stock. BSI maintained that, to mollify the client, Gonzalez arranged for a cross trade of Benevides stock between two BSI managed funds in order to make the client believe they had been contacted by the broker/dealer because another, separate, block of Benevides stock was for sale. BSI further maintained that the price of the Benevides stock was not affected. BSI also asserted that it reported the matter to the NASD and fined Gonzalez \$25,000.00.

BSI further contended that its New York salesmen did not solicit the sale of unregistered Mexican securities. BSI also maintained that its Director of Compliance investigated the situation by interviewing the salesmen and listening to the day's tapes. BSI contended claimant's accusation was created as an excuse for his own failure to adequately perform his responsibilities.

BSI further contended that claimant cannot claim a cause of action for wrongful discharge based on his allegations of whistleblowing because New York law only allows recovery when the employer is in violation of a law that presents a substantial and specific danger to the public health or safety. BSI also contended that claimant is not entitled to punitive damages or attorney fees even if it were decided that claimant had been wrongfully discharged.

RELIEF REQUESTED

Claimant requested compensatory damages of \$1,471,620.94 for breach of the Employment Contract; prejudgment interest in the amount of \$152,702.97 as of February 5, 1997 at the rate of 9% per annum for each day thereafter through the date of the Award; punitive damages of \$3,000,000.00; attorneys' fees and disbursements in the amount of \$221,892.36; NASD fees; court reporter fees in the amount of \$6,464.00; and a direction that BSI amend claimant's Form U-5 to reflect that BSI wrongfully terminated claimant's employment.

Respondent BSI requested that the claimant's Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & 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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with NASD Regulation, Inc.

OTHER COSTS

The panel of arbitrators has determined that respondent be and hereby is liable for the sum of \$16,900.00 representing the increased arbitrator honorariums assessed for each day of hearings. Respondent shall pay the outstanding fees as set forth below to NASD Regulation, Inc. and shall reimburse claimant for any expenses claimant has previously paid to NASD Regulation, Inc.

The respondent be and hereby is liable for the costs of court reporter fees as set forth below in the amount of \$6,464.00.

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. Respondent be and hereby is liable and shall pay to claimant the sum of \$1,462,500.00 plus prejudgment interest in the amount of \$141,292.47 as of February 7, 1997 and at the rate of 9% per annum for each day

thereafter through the date of the Award;

2. Respondent be and hereby is liable and shall pay to claimant court reporter fees in the amount of \$6,464;
3. Respondent be and hereby is liable and shall pay to claimant all fees paid by claimant to NASD Regulation, Inc.
4. Respondent is directed to and shall amend claimant's Form U-5 to state that an NASD Regulation, Inc. arbitration panel has determined that claimant was terminated for reasons other than for cause under his Employment Agreement with respondent.

FORUM FEES

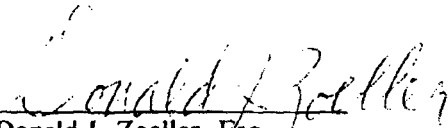
Pursuant to Rule 10205 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee and have assessed the following Forum Fees:

4 prehearing conferences X \$1500	= \$ 6000.00
25 hearing sessions X \$1500	= <u>\$37,500.00</u>
TOTAL	= \$43,500.00
MINUS claimant's hearing session deposit	- <u>\$1500.00</u>
TOTAL OUTSTANDING	= \$42,000.00

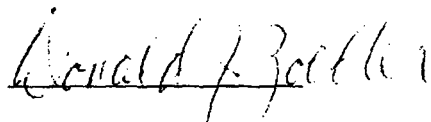
Respondent be and hereby is liable for the sum of \$43,500.00 representing 100% of the forum fees assessed.

Respondent be and hereby is liable for a total sum of \$60,400.00 representing 100% of the arbitrator honorariums and 100% of the forum fees assessed.

Respondent has already paid \$26,350.00 to NASD Regulation, Inc. Claimant has already paid \$8,350.00 plus the \$500.00 non-refundable filing fee to NASD Regulation, Inc. Therefore, respondent shall pay \$25,700.00 to NASD Regulation, Inc. Respondent owes claimant the sum of \$8,850.00.


Donald J. Zoeller, Esq.

I, Donald J. Zoeller, Esq., 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 which is may award.


Donald J. Zoeller, Esq.

Date of Decision: April 14, 1997



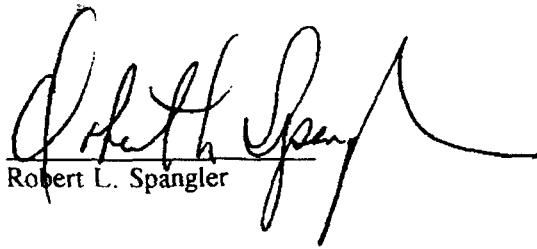
Joseph J. Arata, Esq.

I, Joseph J. Arata, Esq., 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 which is my award.



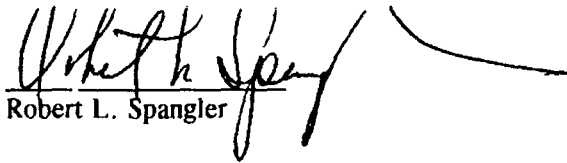
Joseph J. Arata, Esq.

Date of Decision: April 14, 1997



Robert L. Spangler

I, Robert L. Spangler, 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 which is my award.



Robert L. Spangler

Date of Decision: April 14, 1997