

6/95

N.A.S.D. AWARD

9506135

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Richard C. Bentley

93-04874

Name of Respondents/Counter-Claimants

PaineWebber Incorporated;
Frederick Duncan;
Grover Miller;
James R. Frayard;
Ronald Peck;
JoAnn Dohanich.

REPRESENTATION

For Claimant/Counter-Respondent: Richard C. Bentley ("Bentley") was represented by Victor J. Versaggi, Esq. of Lafayette, Louisiana, and Stephen H. Myers, Esq., of Roy, Forrest, Lopresto, DeCourt & Myers, located in Lafayette, Louisiana.

For Respondents/Counter-Claimants: PaineWebber Incorporated ("PaineWebber"), Frederick Duncan ("Duncan"), Grover Miller ("Miller"), James R. Frayard ("Frayard"), Ronald Peck ("Peck"), and JoAnn Dohanich ("Dohanich") were represented by George C. Freeman, III, Esq. and John P. Cerise, Esq., of Stone, Pigman, Walther, Wittman & Hutchison, L.L.P., located in New Orleans, Louisiana.

CASE INFORMATION

Statement of Claim filed: November 24, 1993.

Bentley's Submission Agreement signed on: January 7, 1994.

Statement of Answer and Counterclaim filed by Respondents/Counter-Claimants on: May 5, 1994.

Respondent/Counter-Claimant PaineWebber's Submission Agreement signed on: May 5, 1994.

Respondent/Counter-Claimant Duncan's Submission Agreement signed on: May 5, 1994.

Respondent/Counter-Claimant Miller's Submission Agreement signed on: May 4, 1994.

Respondent/Counter-Claimant Frayard's Submission Agreement signed on: May 4, 1994.

Respondent/Counter-Claimant Peck's Submission Agreement signed on: May 4, 1994.

N.A.S.D. Arbitration No. 93-04874

Award Page 2 of 7

Respondent/Counter-Claimant Dohanich's Submission Agreement signed on: May 10, 1994.

Bentley's Answer to Counter-Claim of Respondents filed on: May 10, 1994.

HEARING INFORMATION

Pre-Hearing Conference: October 19, 1994 for One (1) session before One (1) arbitrator;
March 22, 1995 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: March 27, 1995 for Two (2) sessions;
March 28, 1995 for Two (2) sessions;
March 29, 1995 for Two (2) sessions;
March 30, 1995 for Two (2) sessions; and
March 31, 1995 for Two (2) sessions.

Hearing Location: New Orleans, Louisiana.

CASE SUMMARY

Bentley alleged that PaineWebber, Duncan, Miller, Frayard, Peck and Dohanich were liable for wrongful termination, invasion of privacy, trade defamation, defamation of character, theft, civil conversion of property, unfair trade practices, and intentional and/or negligent infliction of personal injury for the following reasons;

1. Bentley was employed by PaineWebber as an investment executive from November 1985 until September 8, 1992. Bentley was terminated without cause on September 8, 1992;
2. Several weeks prior to termination, Bentley was informed that Dohanich, a computer consultant, had entered his office in his absence, turned on his computer and damaged the information contained in it. Upon inquiry, Dohanich told Bentley that she had received permission from Duncan to see how he had networked with another staff member and had inadvertently damaged Bentley's data. Bentley's computer and software were purchased by him exclusively, and neither PaineWebber or its employees had claims or rights to the equipment or its use without Bentley's permission;
3. While being terminated on September 8, 1992, Duncan stated to Bentley in the presence of a Lafayette Parish sheriff that Bentley had "down-loaded" a computer, taken proprietary information or property, and should not use it. The statement was not true and Bentley's character and reputation were damaged;

9506135

N.A.S.D. Arbitration No. 93-04874

Award Page 3 of 7

4. On September 8, 1992, Bentley was asked to leave his office without delay and was denied all his personal belongings on the premises. These items were finally returned to him after three days of requests and police intervention. Upon the return of the material, Bentley noticed a back-up copy of a computer disk in Frayard's handwriting which contained Bentley's complete list of contacts, leads, and prospects. The back-up copy was made two days after his termination;

5. Following his termination, PaineWebber inaccurately reported to the NASD on a Form U-5 that Bentley had failed to follow instructions to liquidate a variable annuity as requested, resulting in the restriction of the transfer of his license. In addition, PaineWebber made other untruthful and defamatory statements to the NASD and/or New York Stock Exchange;

6. Following Bentley's termination, PaineWebber interfered with customers' attempts to transfer accounts by arbitrarily and unreasonably requiring guaranteed signatures of transfer documents as well as by failing to supply customer information and instructions upon request; and

7. Based upon the above allegations, Bentley suffered humiliation, damage to reputation, embarrassment, mental anguish and suffering, and emotional distress.

It was further alleged that Respondents/Counter-Claimants were joint tortfeasors and that PaineWebber was vicariously liable for the acts of Duncan, Miller, Frayard, Peck and Dohanich under the theory of respondeat superior and/or vicarious liability.

Respondents/Counter-Claimants denied the material allegations of the Statement of Claim, asserting that:

1. Bentley was terminated for cause because he was publicly disrespectful of PaineWebber authority and refused to follow management's directives on how he should conduct himself and treat other people in the office. As a result of his conduct, Bentley created an unpleasant working environment in the office;

2. Duncan and Dohanich attempted in August of 1992 to investigate a suspicion that Bentley had misappropriated information from another PaineWebber broker. It was suspected that Bentley had downloaded information from the other broker's computer into his own files which was prohibited by PaineWebber policy. Duncan and Dohanich were unsuccessful in accessing Bentley's computer, but did not damage the information and Dohanich never told Bentley otherwise;

3. When terminated, Duncan did advise Bentley in front of a Lafayette police officer that an allegation had been made the Bentley had downloaded and

misappropriated confidential and proprietary customer information of PaineWebber, that such misappropriation would violate PaineWebber's policies and that Bentley should not use any such information he had obtained, if any;

4. On September 8, 1992, Duncan did not permit Bentley to remove his possessions immediately because he wanted to avoid an ugly and potentially disruptive scene. Duncan also wanted to protect the integrity of the business and the firm's customers by following standard firm practice and prevent Bentley from removing and information or property belonging to PaineWebber. This permitted PaineWebber to sort through Bentley's documents and disks to ensure that he did not remove, either intentionally or unintentionally, any company property or proprietary information. In addition, PaineWebber copied two of Bentley's computer disks because it is required to maintain a permanent record of the transactions he executed for his customers; and

5. On November 26, 1992, PaineWebber filed an Amended Form U-5 that reported a settlement entered into between PaineWebber and one of Bentley's former customers who had "alleged" that Bentley had failed to follow his instructions to liquidate a variable annuity account. Bentley filed a complaint with the NASD claiming that PaineWebber filed a materially inaccurate Form U-5 and the NASD determined that no action would be taken.

Respondents asserted the following affirmative defenses:

1. Bentley has failed to state a claim upon which relief can be granted;
2. Certain relief Bentley seeks is barred by the doctrine of *res judicata* and collateral estoppel; and
3. The claim fails to allege any compensable loss or damage and Bentley may have actually made money upon switching employers.

Respondents/Counter-Claimants asserted a counterclaim based upon Bentley's failure to initially arbitrate his claims, his later attempt to pursue the matter in court and his efforts to obstruct or hinder the arbitration process, compelling Respondents/Counter-Claimants to defend the matter in court in spite of the parties' agreement to arbitrate. In addition, Respondents/Counter-Claimants asserted a counterclaim for malicious prosecution, alleging that the claims were calculated primarily, if not solely, to annoy and harass Respondents/Counter-Claimants and in concurrently filing a lawsuit alleging the same matters he alleged in his Statement of Claim.

Bentley denied the material allegations of the counterclaim.

RELIEF REQUESTED

Bentley requested entry of an award against Respondents/Counter-Claimants for general and special damages of \$2,500,000.00, plus attorneys' fees and costs pursuant to applicable law. In addition, Bentley requested that the counterclaim be dismissed.

Respondents/Counter-Claimants requested that the Statement of Claim be dismissed and denied, and that they receive damages on their counterclaim for reimbursement of all attorneys' fees and cost incurred, and any additional fees ,and costs they have incurred and will incur in this matter.

OTHER ISSUES CONSIDERED & DECIDED

The Panel hereby makes the following findings:

1. After considering all the evidence and testimony taken in this matter, the Panel is of the opinion that the Bentley failed to prove the elements of his claim, and none of the allegations asserted by Bentley rise to an actionable level;
2. Louisiana is an employment "at will" state, and PaineWebber had the right to terminate Bentley for any reason whatsoever. Bentley's allegation that the manner in which he was terminated is actionable is not supported by the factual testimony adduced. Dismissal of the claims should not be interpreted as an approval or disapproval of the attempt to access Bentley's computer without his consent or the retention of his personal property after termination for up to 48 hours;
3. During the five day hearing, the Panel heard no evidence to support any allegations of wrongdoing on the part of Respondent/Counter-Claimants Ronald Peck or James R. Frayard, and accordingly, the Panel can only conclude that the prosecution of the claims against Respondents/Counter-Claimants Peck and Frayard was malicious;
4. In regard to the claim for attorneys' fees, the Panel is of the opinion that the general rule in American law that each party bear its own costs does not merit exception in this matter, except for the refusal of Claimant/Counter-Respondent Bentley to arbitrate. The Panel, having reviewed the evidence, including the state court memoranda, concludes that the refusal of Bentley to arbitrate and his apparent failure to disclose all material facts to his counsel, was improper and, accordingly, Respondents are entitled to attorneys' fees incurred in connection with the filing of the Motion to Stay and opposition to the Motion to Lift Stay, as well

as related discussions, negotiations, etc.

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 and the hearing memoranda submitted, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant/Counter-Respondent Richard C. Bentley's Statement of Claim is dismissed with prejudice and denied in its entirety;
2. Claimant/Counter-Respondent Richard C. Bentley is liable for and shall pay to Respondent/Counter-Claimant Ronald Peck the sum of \$2,500.00 as damages with respect to the malicious prosecution claim asserted. In addition, Claimant/Counter-Respondent Richard C. Bentley is liable for and shall pay to Respondent/Counter-Claimant James R. Frayard the sum of \$2,500.00 as damages with respect to Frayard's claim for malicious prosecution;
3. Furthermore, Claimant/Counter-Respondent Richard C. Bentley is liable for and shall pay to Respondents PaineWebber Incorporated, Frederick Duncan, Grover Miller, James R. Frayard, Ronald Peck and JoAnn Dohanich the sum of \$15,000.00 as attorneys' fees. In deciding to award attorneys' fees, the Panel considered the arguments of the parties, the evidence and the state court memoranda, and determined that authority existed for an award of attorneys' fees to Respondents in connection with Claimant/Counter-Respondent's failure to arbitrate;
4. The malicious prosecution claims asserted by Respondent/ Counter-Claimants PaineWebber Incorporated, Frederick Duncan, Grover Miller and JoAnn Dohanich are dismissed with prejudice and denied in their entirety;
5. All remaining costs of arbitration shall be borne by the party incurring the cost, including any additional attorneys' fees, except for those specifically enumerated herein;
6. Any relief not specifically awarded is hereby denied.

9506135

N.A.S.D. Arbitration No. 93-04874

Award Page 7 of 7

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) pre-hearing conference sessions x \$300.00 per sessions = \$600.00; Ten (10) hearing sessions; x \$1,000.00 per session = \$10,000.00; Total Forum Fees = \$10,600.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and the \$1,000.00 hearing session deposit previously deposited by the Claimant/Counter-Respondent, Richard C. Bentley. Claimant/Counter-Respondent Richard C. Bentley is liable for and shall pay to the NASD additional forum fees in the sum of \$9,600.00. In addition, the NASD shall retain the \$500.00 claim filing fee and refund the \$600.00 hearing session deposit previously deposited by Respondents/Counter-Claimants PaineWebber Incorporated, Frederick Duncan, Grover Miller, James R. Frayard, Ronald Peck and JoAnn Dohanich.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Robert A. Kutcher, Esq.

June 7, 1995

Robert A. Kutcher, Esq.

Public Arbitrator

Chairperson

/s/ William D'Zurilla, Esq.

June 6, 1995

William D'Zurilla, Esq.

Public Arbitrator

/s/ Charles E. Melancon, Jr.

June 6, 1995

Charles E. Melancon, Jr.

Industry Arbitrator

For NASD Use Only

Date of Decision: June 16, 1995