

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Christopher Schmidt and
PaineWebber, Incorporated,
Claimant/Counterrespondent,

v.

No. 94-02101

Carty & Company, Inc.,
Respondent/Counterclaimant

REPRESENTATION OF PARTIES

Martin Aussenberg, Esq., Memphis, Tennessee, represented Claimants/Counterrespondents Christopher Schmidt and PaineWebber Incorporated ("Claimants").

Shepard D. Tate, Esq., and Christopher G. Lazarini, Esq., of Martin, Tate, Morrow & Marston, P.C., Memphis, Tennessee, represented Respondent/Counterclaimant Carty & Company, Inc. ("Carty").

CASE INFORMATION

Claimants' Statement of Claim was filed on or about June 6, 1994.

Claimants' Submission Agreements were signed on June 6 and 8, 1994.

Carty's Response to Statement of Claim and Statement of Claim was filed on or about June 8, 1994.

Carty's Submission Agreement was signed on June 6, 1994.

Claimants' Memorandum in Support of Their Claim and In Response/Opposition to Statement of Claim of Respondent was filed on or about June 13, 1994.

HEARING INFORMATION

This matter came to be heard by the undersigned panel pursuant to an expedited hearing request made by the parties after a TRO had been entered on June 2, 1994, by the Chancery Court of Shelby

County, Tennessee, in Carty & Company, Inc. v. PaineWebber Incorporated and Christopher Schmidt, No. 104267-2.

Pre-Hearing conference date: June 10, 1994. One (1) session.

Hearing date: June 13, 1994. Two (2) sessions.

Hearing Location: Memphis, Tennessee.

CASE SUMMARY

Claimants stated that on June 2, 1994, Carty commenced an action in the Chancery Court of Shelby County, Tennessee, captioned Carty & Company, Inc. v. PaineWebber Incorporated and Christopher Schmidt, No. 104267-2 (the "Action"). Claimants alleged that the Action had been commenced in violation of the NASD Constitution and contravened Carty's absolute obligation to arbitrate. Claimants further asserted that the Action concerns claims against them arising out of the termination of Christopher Schmidt's ("Schmidt") employment with Carty and his current employment with PaineWebber Incorporated ("PaineWebber"). Claimants sought a declaration by the panel that they are not liable to Carty in law or equity in any respect as a result of the termination of Schmidt's employment with Carty, and his current employment with PaineWebber. Schmidt also sought relief from the panel regarding the injury done to him by Carty's allegedly impermissible filing of a plenary lawsuit in Court and its obtaining allegedly ex parte injunctive relief.

In its Statement of Claim, Carty alleged that: Schmidt is liable for breach of his employment Agreement with Carty; Schmidt is liable for breach of the common law duty of loyalty he owed to Respondent; Schmidt is liable for conversion of Carty's tangible property and proprietary information; Schmidt is liable for his interference with the prospective business advantage of Respondent; Schmidt and PaineWebber are liable for interference with the prospective business advantage of Respondent; PaineWebber is liable for aiding and abetting Schmidt in converting Respondent's tangible property and proprietary information; PaineWebber is liable for violating the NASD's Rules of Fair Practice, including Article III, Section 1; PaineWebber is liable for tortiously interfering with and/or conspiring to tortiously interfere with the contractual and business relations between Carty and its employees and customers; PaineWebber is liable for its predatory "raiding" of Carty; and PaineWebber is liable for inducing the breach of defendant Schmidt's Employment Agreement in violation of Tenn. Code Ann. Section 47-50-109. The allegations arose out of the resignation of Schmidt from Carty, and his subsequent employment at PaineWebber. Carty asserted that Schmidt had signed an Employment Agreement containing clauses prohibiting him from the removal of trade secrets and a non-compete provision. Carty alleged that these provisions were broken by Schmidt when he resigned from

Respondent and went to work for PaineWebber with Carty's proprietary customer information.

In its Response to Claimants' Statement of Claim, Carty incorporated the allegations and assertions contained in its Statement of Claim. Respondent additionally denied all claims made by the Claimants.

For their Answer to Carty's Statement of Claim, Schmidt and PaineWebber denied Carty's allegations. In addition, Schmidt and PaineWebber asserted that the restrictive covenant contained in Schmidt's Employment Agreement is unenforceable because: There is no threatened danger to Carty; the harm from the enforcement of the restrictive covenant to Schmidt outweighs the benefit of enforcement; the restrictive covenant is restrictive on its face for its lack of reasonable restrictions as to time and territorial limits; and because the contract is void under the provisions of the federal securities laws. Claimants further asserted that the restraining order granted to Carty should be dissolved because: Carty has not satisfied the equitable requirements for the grant of injunctive relief; Carty has an adequate remedy at law; the restraining order results in an unfair balance of harm to Schmidt and his customers; and because Carty cannot establish a substantial likelihood of success on the merits.

RELIEF REQUESTED

Claimants Schmidt and PaineWebber requested that:

1. The panel declare that Claimants are not liable to Carty in any respect;
2. The panel declare that Carty is liable to Schmidt for contravening its agreements to arbitrate; and
3. The panel grant Claimants such other and further relief as it deems just and proper.

In its Statement of Claim, Carty requested the arbitration panel to:

1. continue the injunctive relief agreed to by the parties in the state court action throughout the hearing in this matter.
2. issue an injunctive order permanently restraining Schmidt and PaineWebber and all persons acting in concert with them:
 - a. from destroying, secreting or altering any documents or information (including but not limited to the contents of or information from any computer tapes, discs, records, printouts or the product thereof) obtained from Carty or relating to any customer of Carty, whether such information be in written or computer generated form;

b. from using, disclosing or providing to any third party any documents or information (including but not limited to the contents of or information from any computer tapes, discs, records, printouts or the product thereof) obtained from Carty or relating to any customer of Carty, whether such information be in written or computer-generated form;

And enjoin Schmidt, and any person acting in concert with him or using any information provided by him:

c. from contacting, soliciting or transacting any business with any customer of Carty for the period provided for in his contract;

d. from assisting any person or party in the conduct of any business (or solicitation of business or opening of accounts) with any customer of Carty for the period provided for in his contract;

e. from participating in the municipal bond business for the period provided for in his contract; and

f. from otherwise violating Schmidt's Employment Agreement.

3. require Claimants to return all Carty property to Carty, including copies, extracts and the product thereof;

4. award Carty direct, consequential damages against the Claimants in an amount not yet determined;

5. award Carty punitive and exemplary damages in an amount which the panel deems appropriate to punish Claimants' conduct and to deter and prevent such conduct in the future;

6. award Carty treble damages against PaineWebber for its violation of Tenn. Code Ann. Section 47-50-109;

7. award Carty reasonable costs and attorneys' fees in bringing this action;

8. reimburse Carty for its filing fees and the other costs of this arbitration proceeding; and

9. award Carty prejudgment interest and other such relief as the panel finds just and appropriate.

In Response to Claimants' Statement of Claim, Carty requested that Claimant's Statement of Claim be dismissed and Carty be awarded its requested permanent injunctive relief and damages, both actual and exemplary, on its Statement of Claim.

In their Answer to Carty's Statement of Claim, Schmidt and PaineWebber requested that the panel of arbitrators in this matter make the following determinations:

1. That the restrictive covenant in the agreement between Schmidt and Carty is void, invalid and/or unenforceable;

2. That the agreement between Schmidt and Carty is

otherwise void, invalid and/or unenforceable;

3. That the temporary restraining order entered on June 2, 1994 by the Shelby County Chancery Court should be permanently lifted;

4. That the business practices of Carty, brought to the arbitrators' attention in this proceeding should be referred to the NASD for appropriate investigation and disciplinary action;

5. That Carty's Statement of Claim be dismissed in its entirety;

6. Award Claimants their attorney's fees in connection with the Chancery Court proceedings and this arbitration;

7. Award Claimants their filing and forum fees in connection with this arbitration; and

8. Such other and further relief as the arbitrators found just and appropriate in the circumstances.

OTHER ISSUES CONSIDERED & DECIDED

At the commencement of the hearing on June 13, 1994, Carty made a request that the restraining order entered by the Court be extended until the time the panel ruled on the issues raised in this hearing. After hearing argument from the parties, and deliberations, the panel ruled that they would not extend the restraining order. However, the panel went on to hold that if PaineWebber did anything in regards to the customers at issue, the panel would re-open this arbitration.

At the close of Bill Carty's testimony, Claimants made a Motion to Dismiss Carty & Company, Inc.'s Statement of Claim. After hearing argument from the parties, and deliberation, the panel denied the motion.

The parties have agreed that the Award in this matter may be executed by 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 original(s) 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. Claimants/Counter Respondents Christopher Schmidt and PaineWebber, Incorporated are ordered to return all information of every nature and description, whether

originals, copies, or in a computer useable format, including computer disks or similar materials developed while Schmidt was employed at Carty & Co. or taken from Carty & Co.

2. That paragraph 3 of the contract between Respondent/Counterclaimant Carty & Co. and Claimant/Counterrespondent Christopher Schmidt be reformed to provide that for a period of 90 days from and after June 2, 1994, Schmidt and PaineWebber, Inc. shall not, directly or indirectly, call upon, have contact with, or sell or purchase securities to or from the approximately 280 customers that Schmidt sold to while employed by Carty & Co.; and

3. Paragraph number 4 of the contract between Respondent/Counterclaimant Carty & Co. and Claimant/Counterrespondent Christopher Schmidt be declared void because it is broader than is reasonably necessary to protect legitimate business interests of Carty & Co., and that Schmidt, subject to the award above relating to refraining from calling upon his customers, be allowed to continue working for PaineWebber, Inc.

4. PaineWebber be ordered to pay attorney's fees to Carty & Co. of \$13,800.00 and to pay as a money judgment to Carty & Co. the \$2,500 expedited filing fee paid to the NASD by Carty & Co.; and

5. All other damages, including treble damages. as requested by any party, be denied.

FORUM FEES

Pursuant to Section 44(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

1 pre-hearing conference sessions x \$300.00 = \$300.00

2 hearing sessions x \$650.00 = \$1,300.00

Pursuant to Section 44(c) of the Code, the NASD shall retain the nonrefundable expedited hearing filing fee in the amount of \$2,500.00 and retain the filing fee in the amount of \$250.00, and shall retain the hearing session deposit of \$850 previously paid to the NASD by the Claimants.

Pursuant to Section 44(c) of the Code, the NASD shall retain the nonrefundable expedited hearing filing fee in the amount of \$2,500.00. Additionally, Carty and Company, Inc. shall pay to the

NASD ARBITRATION NO. 94-02101
AWARD PAGE 7 OF 7

NASD the sum of \$250.00 for its nonrefundable Counterclaim filing fee.

Additional forum fees in the amount of \$750.00 are assessed against Claimant/Counterrespondent PaineWebber. Inc.

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

CONCURRING ARBITRATORS

Dated:

Name:

June 13, 1994

Michael Richards
Michael Richards
Presiding Chair
Industry Arbitrator

June 13, 1994

Richard D. Bingham
Richard D. Bingham
Industry Arbitrator

June 13, 1994

Judith Lawson Johnson
Judith Lawson Johnson
Industry Arbitrator

Date of Service by the NASD: by fax, 6/13/94