

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between:

J.J.B. Hilliard, W.L. Lyons, Inc. and
William Mark Boehmler,

Claimants,

V.

No. 95-03545

First Citizens Financial Plus, Inc.,

Respondent.

REPRESENTATION OF PARTIES

J.J.B. Hilliard, W.L. Lyons, Inc. and William Boehmler ("**Claimants**") were represented by Saul C. Belz, Esq. of Waring Cox, Memphis, Tennessee.

First Citizens Financial Plus, Inc. ("**Respondent**") was represented by David Burn, Esq. of Gerrish & McCreary, Nashville, Tennessee, John M. Lannom of Lawson & Lannom, Dyersburg, Tennessee, and J. Cecil McWhirter of McWhirter & Wyatt, Memphis, Tennessee.

CASE INFORMATION

Claimants Statement of Claim was filed on or about July 24, 1995. Claimants Submission Agreement was signed on July 21, 1995.

Respondent's Statement of Answer was filed on or about August 23, 1995. Respondent's Submission Agreement was signed on or about August 21, 1995.

HEARING INFORMATION

Pre-hearing conference were held on November 7 and 10, 1995 for a total of two (2) sessions.

Hearings were held on November 7, 1995 for one (1) session, and December 5, 6, 18, and 19, 1995 for two (2) sessions each day in Memphis, Tennessee for a total of nine (9) sessions.

CASE SUMMARY

Claimants asserted in their statement of claim that respondent's pre-arbitration action in the local circuit court for a temporary restraining order ("TRO") violated NASD Arbitration by-laws and its constitution. Respondent received a TRO from Dyer County Circuit Court which barred claimants from direct solicitation with respondent's clients and ordered arbitration concerning the substantive issues of whether Boehmler's actions violated fiduciary duties owed to First Citizens Financial Plus ("FCFP"). Claimants allege that Boehmler was an at-will employee, with no explicit employment agreement defining his rights and obligations, and that his conduct upon leaving FCFP was conducted within his fiduciary obligations and that subsequent contact with FCFP clients, by both claimants, did not violate any express agreement with FCFP. Furthermore, they asserted that Boehmler's conduct prior to termination, specifically copying client files, was done in compliance with "know your customer rules". On this basis, claimants sought to have the arbitration panel order the respondent to withdraw the TRO from the circuit court.

Claimants, pursuant to respondent's counter-claim, also asserted affirmative defenses: (1) denying that any FCFP employment code applied to Boehmler's actions; (2) that respondent did violate NASD procedure and rules, that they have a private right of action for such violation; (3) denying that Boehmler breached any fiduciary duty or that Hilliard Lyons aided or abetted any such violation; and (4) that claimant's communications with FCFP clients was at all times legitimate.

Respondent, in its answer to the statement of claim, asserted that claimant certified during his employment that he would act in accordance with certain employee guidelines, restricting his post-employment activities as well as creating certain fiduciary duties while employed. On this basis, respondents deny that they violated NASD procedures and its constitution when they applied for the TRO to the circuit court and also assert affirmative defenses that: (1) claimants have failed to state a claim upon which relief can be granted because the TRO was set to expire after a hearing on the merits of the action; and (2) that no private right of action exists for violations of the NASD constitution and by-laws.

Respondent counterclaimed against claimants that Boehmler breached his fiduciary duty owed to FCFP both under the common law and Tennessee statutes, that he violated the employer confidentiality agreement, that he breached the employment contract and that Hilliard Lyons conspired with Boehmler to breach said contract and his fiduciary duties.

RELIEF REQUESTED

Claimants requested non-monetary relief to the extent of an order requiring the respondent's to withdraw the TRO obtained from the circuit court and to desist from any further proceeding in the state court action until the NASD Arbitration Panel had completed a hearing on the merits. Claimant further requested actual and compensatory damages in the amount of \$500,000.00; consequential and punitive damages in an amount to be fixed by the arbitration panel; and costs and attorneys fees.

Respondent, based on its counterclaim, sought compensatory damages, to be fixed against Boehmler and Hilliard Lyons, jointly and severally, in the amount of \$1,000,000.00; punitive damages in the amount of \$1,000,000.00; and costs and attorneys fees as the panel deemed appropriate.

OTHER ISSUES CONSIDERED & DECIDED

When the arbitration panel assembled on November 7, 1995, due to respondent's failure to provide the panel with a witness list, it was only then discovered that the expert was a close friend of one of the panelists, Mr. Getchell. On this basis, Mr. Getchell recused himself and the panel assessed a \$1,000.00 adjournment fee against respondents. As the parties would not agree to proceed with only two panelists, another panelist, Paul Mann, was later found to fill the vacancy, in time for the December 5 and 6, 1995 hearings.

At the end of the hearings on December 6, 1995, claimants moved to dissolve the temporary injunction in place since July 1995, prohibiting the claimants from soliciting FCFP clients. The panel denied the motion. On December 15, 1995, respondent made a challenge for cause to remove Mr. Richards from the panel on the basis that his comments made on December 6, 1995, allegedly reflected a bias contrary to FCFP's position. On December 18, 1995, after review of the request and response, Mr. Richards recused himself. The parties agreed, on the record, to proceed with the two remaining arbitrators.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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:

Respondent First Citizens Financial Plus, Inc. is liable for, and shall pay to William Mark Boehmler the sum of \$70,000.00 as satisfaction of his claims made herein.

The undersigned arbitrators recommend that the Temporary Restraining Order be dissolved immediately.

Respondent First Citizens Financial Plus, Inc. is liable for, and shall pay to J.J.B. Hilliard, W.L. Lyons, Inc. and William Mark Boehmler attorneys' fees in the amount of \$64,045.87.

William Mark Boehmler is liable for, and shall pay to First Citizens Financial Plus, Inc. the sum of \$9,500.00 for data reclamation costs.

Except as set forth in this Award, the parties shall bear their own costs and fees associated with this arbitration. Further, the forum fees to be assessed for this arbitration shall be divided equally between J.J.B. Hilliard, W.L. Lyons, Inc. and First Citizens Financial Plus, Inc..

All other claims/requests for relief not specifically set forth herein, are, and each of them, denied and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were nine regular sessions x \$750, and two (2) pre-hearing sessions x \$300 = \$7,350 in forum fees. Pursuant to §44(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §44(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimant .

Pursuant to §44(c) of the Code, the NASD shall **retain** the non-refundable counterclaim filing fee in the amount of \$500 and shall **retain** as forum fees the counterclaim hearing session deposit in the amount of \$1000 previously deposited with the NASD by the Counterclaimant.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$500 previously paid by .

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Pursuant to §§30(b) and 44(c) respondent is liable for and shall pay to the NASD the sum of \$1,000.00 as a postponement fee charged for the cancellation of the November hearing dates.

Additional forum fees in the amount of \$2,675 are assessed against respondent. This assessment of additional forum fees is to be set off against the excess funds in the amount of \$2,500 paid by respondent in filing their counterclaim. The remaining additional forum fees due and owing to the NASD are \$175.

Additional forum fees in the amount of \$2,925 are assessed against J.J.B. Hilliard, W.L. Lyons, Inc..

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

Dated:

John J. Colcolough, III

s/s

January 16, 1996

John J. Colcolough, III

Industry Arbitrator

Paul Mann

s/s

January 15, 1996

Paul Mann

Industry Arbitrator