

NASD Regulation, Inc. AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant(s)

Raymond James & Associates, Inc.
Brent E. Peoples
Mark G. Thompson
Robert W. Fritz
The Estate of William C. French

95-05555

Name of Respondent(s)

Smith Barney Shearson, Inc.
Marileigh Fay Hensley

REPRESENTATION

Claimants Raymond James & Associates, Inc. ("RJA"), Brent E. Peoples ("Peoples"), Mark G. Thompson ("Thompson"), Robert W. Fritz ("Fritz"), and the Estate of William C. French ("French") were represented by Jonathan Perlman, Esq. and W. Barry Blum, Esq. of Schulte, Blum, McMahon & Joblove, Miami, Florida.

Respondents Smith Barney Shearson, Inc. ("Smith Barney") and Marileigh Fay Hensley ("Hensley") were represented by Nancy VanSant, Esq. and Jeffery W. Sacher, Esq. of Hornsby, Sacher, Zelman, Stanton & Paul, Miami, Florida.

CASE INFORMATION

Statement of Claim filed: November 27, 1995. Answer to Counterclaim filed on February 20, 1996. Claimants' Submission Agreements signed on: November 22, 1995 by Michael Alford, Esq. on behalf of RJA and on November 11, 1995 by Thompson, French, Fritz and Peoples. Additionally, a Uniform Submission Agreement was signed by Marion French as personal representative of the Estate of William C. French on January 7, 1997.

Joint Statement of Answer and Counterclaim filed by Respondents RJA and Hensley on: January 16, 1996. Respondent Hensley's Submission Agreement signed on: December 15, 1995. Respondent Smith Barney's Submission Agreement signed on: January 15, 1996 by Marie Mintz on behalf of Smith Barney.

HEARING INFORMATION

On March 14 and 21, 1996 two telephonic pre-hearing conferences were conducted with a single arbitrator.

On April 24, 25 and 26, 1996, May 13 and 15, 1996, June 4, 5, 6 and 7, 1996, August 5, 6, 7, 8, 9, 26, 27, 28 and 29, 1996, September 24, 25, 26 and 27, 1996, October 10 and 11, 1996, November 18, 19, 20, 21 and 22, 1996, December 4, 5 and 6, 1996, January 8, 9 and 10, 1997, and February 27 and 28, 1997 hearings lasting a total of 73 sessions were conducted in Ft. Lauderdale, Florida.

CASE SUMMARY

Claimants alleged that when Peoples, Thompson, Fritz and French (collectively known as "the individual Claimants") resigned their employment with Respondent Smith Barney and joined Claimant RJA, Respondents falsely accused Claimants of wrongful conduct, including theft of confidential information and trade secrets, and defamed the individual Claimants to clients that were serviced by them while they were employed at Smith Barney. Claimants alleged that the individual Claimants' resignations from Smith Barney and their hiring by RJA was conducted properly and that Claimants were not liable in anyway to Smith Barney as a result of the resignations or subsequent employment with RJA. Claimants further alleged that Respondents were liable for defamation, tortious interference with business relationships and unfair competition. Claimants further alleged that Smith Barney should be precluded from instituting any action in court to prevent Claimants from doing business with any clients.

Respondents denied all allegations of wrongdoing and alleged that the information reported on the individual Claimants' Forms U-5 was true and accurate and Smith Barney did not tortiously interfere with the Claimants' business relationships. Smith Barney denied liability for unfair competition and maintained that it was Claimants who should be found liable for unfair competition.

Smith Barney filed a counterclaim alleging that RJA and the individual Claimants conspired to "raid" the Smith Barney branch office in Melbourne, Florida of over 3,000 Smith Barney accounts representing over \$160,000,000.00 in assets and which generated in excess of \$850,000.00 in annual commissions. Smith Barney also maintained that Claimants intended to divert these accounts, commission revenues and assets from Smith Barney to RJA. Smith Barney alleged that the group recruitment, timed departure and misappropriation of originals and copies of client records, data and information, and the deliberate deletion of computer information from the records of Smith Barney by certain of the individual Claimants interfered with Smith Barney's ability to contact and service its own customers and violated well-established industry standards against raiding and unfair competition.

Smith Barney further alleged that the individual Claimants improperly solicited their former Smith Barney clients to move their accounts to RJA in violation of non-compete and non-solicitation agreements executed by Claimants Fritz and Peoples. Smith Barney next maintained that RJA wrongfully acquired client information by inducing the individual Claimants to confiscate client records. Smith Barney further alleged that this information was wrongfully converted by RJA and that the names, addresses and all other confidential information regarding Smith Barney's clients constitutes proprietary and confidential business property and "trade secrets" of Smith Barney within the meaning of Florida's Uniform Trade Secrets Act, Florida's Civil Theft Statute and under common law. Smith Barney next maintained that the individual Claimants used the misappropriated confidential customer information in violation of applicable Florida law and the standards against unfair competition. Smith Barney next maintained that, in return for Smith Barney providing numerous benefits and advantages to the individual Claimants during their employment at Smith Barney, Claimants owed a fiduciary duty to Smith Barney not to confiscate or destroy Smith Barney records and not to divert the business of Smith Barney clients or otherwise engage in acts of unfair competition. Smith Barney next maintained that the individual Claimants also expressly agreed in writing not to confiscate Smith Barney's records or to divert Smith Barney's clients to a competitor firm and that the Claimants conspired to breach this fiduciary duty owed by the individual Claimants which constituted unfair competition and breach of Smith Barney's contractual rights.

In response to the counterclaim, Claimants denied all allegations of wrongdoing and alleged that their actions, including the taking of copies of holding pages and customer account statements for the purpose of servicing their clients and preparing solicitation and "welcome packages," which were sent to clients after the individual Claimants resigned from Smith Barney, were common and accepted industry practice. Claimants next maintained that Smith Barney did not take reasonable steps to protect the confidentiality of client records in the branch and that it allowed every departing broker who had left in previous years to retain copies of client information. Claimants further alleged that if the customer information is in anyway confidential, the confidentiality belongs to the customers and, Smith Barney's interest in the information is equal to that of the individual Claimants. Claimants next maintained that Smith Barney regularly engages in the same practice when it recruits brokers from other firms and that it should not be permitted to recover in this proceeding based upon such actions.

Claimants next maintained that their actions did not constitute unfair competition or a raid and that the hiring of four brokers in a branch consisting of eighteen brokers as well as the taking of less than 30% of the branch's production is not a raid. Claimants further alleged that the branch remains open and profitable and is not in danger of closing. Claimants further alleged that the trainee agreements signed by two of the individual Claimants were neither valid nor enforceable and that Smith Barney had taken the position in other proceedings that it does not enforce such agreements after the expiration of the training and in no event more than five years after the agreements were signed. Claimants also alleged that Smith Barney can not enforce trainee agreements entered into by Peoples and Fritz while they were employed at Shearson Lehman Hutton, Inc.

RELIEF REQUESTED

Claimants requested dismissal of the counterclaim plus damages in the amount of \$500,000.00 plus attorney's fees, and an injunction enjoining Respondents from interfering with the relationship between Claimants and their clients or between the individual Claimants and RJA as well as an injunction enjoining Respondents from stating to third parties that Claimants misappropriated Smith Barney documents, and an injunction enjoining Respondents from proceeding in any judicial forum against Claimants. Claimants also requested that the panel declare the trainee agreements to be void and unenforceable and that the panel direct that Claimants' counsel be permitted to release to the Claimants the client holding pages.

Respondents requested dismissal of the claim plus damages in connection with the counterclaim in the amount of \$1,693,718.00, plus treble damages, punitive damages, costs and attorney's fees and assessment of all forum fees against Claimants. Respondents further requested an injunction prohibiting RJA from further solicitation of Smith Barney's customers, an injunction against Claimants using any trade secret information obtained by the brokers, and an injunction prohibiting RJA from soliciting or recruiting any broker from the Melbourne, Florida office of Smith Barney for a period of six years.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Hensley filed a Motion to Amend Answer to Assert Counterclaim which the panel denied without prejudice.

Claimant RJA filed a Motion for Sanctions against Respondent Smith Barney for failure to produce certain discovery documents which the panel has granted. Respondent Smith Barney is hereby found liable and shall pay to Claimant RJA the amount of \$25,000.00. The panel determined that an award of sanctions against Smith Barney is appropriate in light of the panel's belief that Smith Barney's in-house legal department failed to make a diligent effort in responding to certain legitimate discovery requests of RJA. The panel specifically found that such failure was not the fault of Smith Barney's counsel in this matter but, rather, the fault of Smith Barney's in-house legal department. The panel believes that Smith Barney's legal department made only nominal efforts to locate the information by relying solely on the efforts of a paralegal who was required to search computer records which were improperly coded in order to identify documents when the attorneys of the legal department independently knew of the existence of such documents.

Respondent Smith Barney filed a Motion for Sanctions against Claimant RJA for failure to produce certain discovery documents which the panel denied.

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 original(s) remain on file with the NASD.

AWARD

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

1. Respondents Smith Barney and Hensley are found not liable and, therefore, the claims against them are hereby dismissed.
2. Claimants RJA and Thompson are found liable, jointly and severally, to Respondent Smith Barney on the counterclaim and shall pay to Smith Barney the amount of \$70,000.00.
3. Claimants RJA and French are found liable, jointly and severally, to Respondent Smith Barney on the counterclaim and shall pay to Smith Barney the amount of \$20,000.00.
4. Claimants RJA and Fritz are found liable, jointly and severally, to Respondent Smith Barney on the counterclaim and shall pay to Smith Barney the amount of \$3,000.00.
5. Claimants RJA and Peoples are found liable, jointly and severally, to Respondent Smith Barney on the counterclaim and shall pay to Smith Barney the amount of \$10,000.00.
6. Claimant RJA is also found liable to Respondent Smith Barney on the counterclaim and shall pay to Smith Barney the further amount of \$220,096.00.
7. The panel finds no liability under Chapter 772 of the Florida Statutes (the Florida Civil Theft Act), Chapter 688 of the Florida Statutes (the Florida Uniform Trade Secrets Act) or under Respondents' breach of contract claim. Therefore, the panel has denied Respondents' requests for attorney's fees, costs, punitive damages, and treble damages.
8. Claimants' request for attorney's fees is hereby denied.
9. Claimants' request for injunctive relief is hereby denied.
10. Claimants' request that the panel declare the trainee agreements to be void and unenforceable is hereby denied.
11. Claimants' request that their counsel be permitted to release to the Claimants the client holding pages is hereby granted. The panel further orders that each party may retain the documents and information which they currently have in their possession or in the possession of their counsel but shall preserve the confidentiality of any documents which were so marked or stipulated as confidential either before or during the course of the hearing.
12. Respondents' request for injunctive relief is hereby denied.

13. The panel hereby recommends that the Temporary Injunction entered by the Circuit Court of the 18th Judicial Circuit in and for Brevard County Florida in Case Number 95-18898-CA-D be dissolved and that the bond posted by Smith Barney in connection therewith be returned.

OTHER COSTS

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$110,100.00 (73 sessions x \$1,500.00 per session plus \$600.00 for the two pre-hearing conferences).

1. Claimant RJA is hereby assessed \$66,060.00 for which NASD Regulation, Inc. shall retain the \$27,300.00 previously paid by RJA leaving a balance due to NASD Regulation, Inc. of \$38,760.00.
2. Respondent Smith Barney is hereby assessed \$44,040.00 for which NASD Regulation, Inc. shall retain the \$26,500.00 previously deposited by Smith Barney leaving a balance due to NASD Regulation, Inc. of \$17,540.00.
3. Claimants RJA, Thompson, Peoples, Fritz and French are hereby assessed, jointly and severally, \$371.50 for one-half of Arbitrator Judy Avey's travel expenses.
4. Respondents Smith Barney and Hensley are hereby assessed, jointly and severally, \$371.50 for one-half of Arbitrator Judy Avey's travel expenses.
5. NASD Regulation, Inc. shall retain the \$500.00 claim filing fee previously paid by the Claimants.
6. NASD Regulation, Inc. shall retain the \$500.00 claim filing fee previously paid by the Respondents.
7. NASD Regulation, Inc. shall retain the \$2,500.00 expedited hearing fee previously paid by the Claimants.
8. NASD Regulation, Inc. shall retain the \$2,500.00 expedited hearing fee previously paid by the Respondents.

9. NASD Regulation, Inc. shall retain the \$350.00 member surcharge previously paid by Claimant RJA.
10. NASD Regulation, Inc. shall retain the \$350.00 member surcharge previously paid by Respondent Smith Barney.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures
Name

Public/Industry

 /s/
John P. Cullem, Esq.

Public/Chairman

 /s/
Charles T. Steffens

Industry

 /s/
Judy Avey

Public

Date of Decision: April 14, 1997