

NASD Regulation, Inc., Award

In the Matter of Arbitration Between

**Rolf E. Eidbo,
Claimant,**

and

No. 96-02095

**Rauscher Pierce Refsnes, Inc.,
Respondent.**

REPRESENTATION OF PARTIES

Claimant, Rolf E. Eidbo ("Eidbo") was represented by Charles E. Appler, Esquire of Bennett & Weston, P.C., located in Dallas, Texas.

Respondent, Rauscher Pierce Refsnes, Inc. ("RPR") was represented by Bruce W. Collins, Esquire of Carrington, Coleman, Sloman & Blumenthal, L.L.P., located in Dallas, Texas.

CASE INFORMATION

Claimant, Eidbo's Statement of Claim was filed on or about June 21, 1996. Claimant, Eidbo's Answer to Respondent, RPR's Counter Claim was filed on or about July 29, 1996. Claimant, Eidbo's Submission Agreement was signed on June 4, 1996.

Respondent, RPR's Statement of Answer was filed on or about August 13, 1996. Respondent, RPR's First Amended Answer and Counter Claim was filed on or about July 11, 1996. Respondent, RPR's Submission Agreement was signed on June 25, 1996 by James T. Ritt, First Vice President of Rauscher Pierce Refsnes, Inc.

HEARING INFORMATION

There were two pre-hearing conferences held, on February 20, 1998, at 9:30 a.m., for one (1) session and on May 27, 1998, at 2:30 p.m., for one (1) session. The hearing was held on June 3, 4, 5, 6, 1998, at 9:00 a.m., for two (2) sessions each day in Dallas, Texas.

CASE SUMMARY

Claimant Rolf E. Eidbo ("Eidbo") was hired as a broker by Respondent Rauscher Pierce Refsnes, Inc. ("Rauscher Pierce") on March 8, 1993. Eidbo became an assistant branch manager on August 11, 1993. On May 23, 1994 Eidbo became a District Recruiting Director for Rauscher Pierce.

On August 30, 1995, Rauscher Pierce terminated Eidbo's employment and listed the reason on Eidbo's U-5 as "failure to follow firm policies and procedures".

Eidbo claims the U-5 statement of Rauscher Pierce is false and malicious and the termination was for other false and malicious reasons which involve a Wall Street Journal article published August 30, 1995. Eidbo claims the reporter for the Wall Street Journal article based the article on an interview with Eidbo and two other Rauscher Pierce employees, Wm. Barker, research coordinator and Richard Davis, research director. Eidbo alleges any documents provided to the reporter for the interview were approved or prepared by Rauscher Pierce. Eidbo alleges Barker and Davis were not terminated or disciplined because of the interview and that they had as much or more control over the content of the interview as Eidbo.

Eidbo claims he was terminated without an investigation and without an opportunity to respond to accusations made against him. Eidbo alleges that the purported reasons for his termination were fabricated to conceal true reasons for the termination. Eidbo alleges that nothing he had done could have damaged Rauscher Pierce customers or Rauscher Pierce. Eidbo alleges that the Journal article advances a Barker concept which Barker, Eidbo, Davis and Eidbo's branch manager were implementing as an investment strategy to be directed by Barker and utilized by Eidbo for selected sophisticated investors. After termination Eidbo states Rauscher Pierce thought the concepts were good and some concepts were used by Rauscher Pierce.

Eidbo alleges a belief that he was terminated because he unknowingly disclosed trading activities which might reveal questionable and/or illegal practices on the part of other Rauscher Pierce employees and/or problems that did and could arise because, unknown to Eidbo, Barker and Davis were favoring certain Rauscher Pierce brokers with recommendations contrary to Research Department recommendations.

Eidbo alleges that his actions were with the knowledge, assistance and approval of Rauscher Pierce to increase business. Eidbo alleges working with Rauscher Pierce management, compliance Department and Research Department to develop the program.

Eidbo alleges Rauscher Pierce to have published to NASD and to the Wall Street Journal false and malicious reasons for his termination which affected his ability to obtain employment and his reputation and constitute defamation. Eidbo claims that Rauscher Pierce denied Eidbo access to information regarding his customers and destroyed information created by Eidbo so he could not compete and would have to create a new book of business.

Eidbo claims Rauscher Pierce violated the rule of good faith and fair dealing with him; a breach of implied contract and wrongful interference with his business relations.

Eidbo alleges that Rauscher Pierce had adopted the Southwest Equity Portfolio concept and owes him a commission and that he has lost present income and has mental distress and anguish.

Rauscher Pierce asserts that Eidbo had an "at will" employment Agreement which also provided that all business affairs be in accordance with the spirit and full compliance of all securities rules and regulations. Eidbo had previously been employed by Merrill Lynch and terminated therefrom for undisclosed outside trading. Rauscher Pierce reviewed the Merrill Lynch matter and accepted Eidbo as an employee. Eidbo was a commission broker. In 1994, Eidbo was unsuccessful in obtaining compliance approval for a brochure in which Eidbo described himself along with Barker and Davis as a portfolio manager of a Southwest Equity Portfolio. Rauscher Pierce states that no managed fund containing Texas bonds and/or stocks was developed. While Eidbo client accounts varied from client to client in the buying and selling of Texas stocks, there was no managed portfolio in existence.

In a compliance review dated March 14, 1995, Eidbo confirmed that he did not write securities research, marketing or educational materials for client use. In approved mailers, Eidbo had been permitted to use "Vice President for the Private Client Group" but not the phrase "one of the portfolio managers". In August 1995, Eidbo independently hired a public relations firm for his marketing efforts without approval of the Compliance Department or senior management. The Public Relations firm of Eidbo arranged for an interview of Eidbo with the Wall Street Journal on August 16, 1995. Eidbo's public relations firm proposed a press release on Rauscher Pierce letterhead for the reporter of the Wall Street Journal. The press release was not submitted to Compliance for approval. In the Press release, Eidbo is described as co-manager of the "Texas Equities Portfolio" with Barker and Davis and describes the Portfolio as "a carefully managed portfolio of stocks (that) has outperformed the broad market by more than 58% over the past 3 1/2 years". The second page of the press release compares the performance of the "Texas Equity Portfolio" to the

Standard and Poore's 500 in 1992, 1993, 1995 and the first 6 months of 1995 assigning precise percentages for the appreciation of the "Texas Equity Portfolio" in each time period.

The Article repeats the performance figures contained in the press release prepared by Sommers and Eidbo, observing:

Indeed, the Texas Portfolio -- established 2 1/2 years ago -- is already out-pacing the rest of the market. In both 1993 and 1994, it thrashed the S&P 500 with 19.1% and 14.4% returns, respectively, compared with the Index's 10.1% and 1.5% gains. So far this year, the Texas Portfolio has returned 23%, compared with the broader market's 22% showing.

Mr. Eidbo is described as a portfolio manager for the "Texas Equities Portfolio," and in reliance on the press release, the article explains that "Rauscher has earmarked this portfolio for the aggressive-growth portion of an investor's funds."

Rauscher Pierce states there is no "Texas Equities Portfolio" and the performance figures were at best, hypothetical and at worst, fabricated.

At a meeting with Eidbo on August 30, 1995 (the day of the article) he was terminated and the U-5 subsequently issued with the explanation "for failure to follow firm policies and procedures".

Rauscher Pierce alleges it did not subsequently develop a Texas Equity Portfolio. Rauscher Pierce alleges that the Rauscher Pierce Investment Executive manual clearly covers the situation and compliance approval was required and was not obtained by Eidbo. The information provided to the Journal by Eidbo was misleading and the performance information did not meet requirements of Rauscher Pierce and industry regulations. Rauscher Pierce denies any malicious intent in the termination. Rauscher Pierce states Barker and Davis did not initiate the interview and were authorized by their positions to discuss general research matters with the press.

Regarding a STB stock referred to in the article, Davis distributed an article on the stock on May 8, 1995 for customers and brokers and predicted that a "bounce" could occur. Rauscher Pierce denied that Barker and Davis managed a "Texas Equity Portfolio".

Rauscher Pierce states Eidbo's termination did not require any investigation but that they did establish the pertinent facts before termination.

Rauscher Pierce denies publishing any false and malicious reasons for termination, nor prevented Eidbo from access to his customers. Rauscher Pierce denies all of Eidbo's allegations and denies an implied contract exists or that it interfered with Eidbo's business relations, Rauscher Pierce denies any malicious acts.

Rauscher Pierce asserts the affirmative defenses of truth, privilege, failure to state a claim, failure to mitigate damages; breach of his employment contract, negligence and that the contract claim is barred by parole evidence.

First Amended Answer and Counter Claim

Rauscher Pierce filed a Counterclaim for Indemnity in respect to a client claim settled by Rauscher Pierce in May 1997 with an Eidbo client for \$25,000.00. The client had asserted a claim for \$30,337 in actual damages and \$1,400 in attorneys fees from an investment in a speculative stock. In the settlement, the client assigned the claim to Rauscher Pierce.

Eidbo answered that the stock was purchased with Eidbo's discretionary authority; the stock was subject to a class action claim and Rauscher Pierce did not investigate the customer complaint. Eidbo alleges an amended U-5 filed by Rauscher Pierce is not supported by the complaint letter and that Rauscher Pierce settled the complaint to enhance its position in the arbitration.

Eidbo alleges the complaint was not made in good faith, that he is not liable to Rauscher Pierce for Indemnity, failure to mitigate damages and failure to state a claim.

RELIEF REQUESTED

Eidbo claims lost present and future income in a present value in excess of \$5,000,000.00. Eidbo claims lost income from developing and marketing the Southwest Equity Portfolio of \$200,000.00 and that Rauscher Pierce should pay him a commission on the marketing strategy to invest in a limited number of Southwest securities. Eidbo claims \$5,000,000.00 in mental distress and anguish. Eidbo requested attorney fees and costs.

Rauscher Pierce request an award that Eidbo take nothing by his claims and that Rauscher Pierce be awarded recoverable attorney fees and costs.

Counter Claim

Rauscher Pierce requests \$25,000.00 costs and attorney fees.

Eidbo requests the claim be dismissed, attorneys fees and costs.

OTHER ISSUES CONSIDERED AND DECIDED

At a pre-hearing conference, Claimant withdrew his claim for mental distress and anguish.

Upon review of the file and the representations made by/on behalf of Claimant, Rolf E. Eidbo, the undersigned Arbitrators have determined that Respondent, Rauscher Pierce Refsnes, Inc., has been properly served with the Statement of Claim pursuant to Rules 10302 and 10314 of the NASD Code of Arbitration Procedure ("the Code.")

The undersigned Arbitrators have also determined that Respondent, Rauscher Pierce Refsnes, Inc., did receive due notice of the hearing as required under Rule 10318 of the Code.

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 Regulation, Inc. Office of Dispute Resolution.

DISCUSSION OF THE COUNTER CLAIM

As noted hereafter in the Award, the Panel makes no award on the counterclaim

because:

1. While the claim was made against Rauscher Pierce and Eidbo, Rauscher Pierce settled with respect to its alleged liability to the client of Eidbo without the agreement of Eidbo;
 - a)
2. Since the Rauscher Pierce settlement released liability of Rauscher Pierce to the client, Eidbo's liability to either the client or to Rauscher Pierce, if any, is not established by the settlement;
 - a)
3. Liability for the claim by the client would extend to both Eidbo and Rauscher Pierce and would not necessarily encompass nearly 100% liability to Eidbo;
 1. There is insufficient evidence upon which proportioning of liability can be made; and,

5. All of the parties to the claim are not before the panel.

AWARD

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

1. That the Claimant Rolf E. Eidbo take nothing and that the claims against the
a) Respondent be dismissed;
b)
2. That the Counterclaim of Rauscher Pierce for indemnity is dismissed;
a)
3. That Respondent Rauscher Pierce be awarded Attorneys fees of \$43,000.00 to be paid by the Claimant pursuant to State and Federal law and the agreement of the parties as to the awardability of attorneys fees in this matter; and
a)
4. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,500.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There were two (2) pre-hearing conferences x \$300.00 = \$600.00, plus (+) there were eight (8) hearing sessions x \$1,500.00 = \$12,600.00 in forum fees. Pursuant to Rule 10332(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 Rule 10332(c) of the Code, Claimant, Rolf E. Eidbo, has paid to the NASD Regulation, Inc., Office of Dispute Resolution, the non-refundable filing fee of \$500.00 and has also paid the hearing session deposit of \$1,500.00. Respondent, Rauscher Pierce Refsnes, Inc., has not yet paid, and shall pay the non-refundable filing fee of \$250.00 for the Cross Claim filed against Claimant, Rolf E. Eidbo, to NASD Regulation, Inc., Claimant, Rolf E. Eidbo, is liable for the forum fees in this matter and shall pay the sum of \$11,100.00 (\$12,600.00 - \$1,500.00 hearing session deposit already paid) to NASD Regulation, Inc., Office of Dispute Resolution.

Fees are payable to the NASD Regulation, Inc., Office of Dispute Resolution.

OTHER FEES

Pursuant to Rule 10333 of the Code, Respondent, Rauscher Pierce Refsnes, Inc., has paid to the NASD Regulation, Inc., Office of Dispute Resolution, the \$500.00 member surcharge previously invoiced.

Concurring Arbitrators' Signatures:

/s/ Donald H. Fidler

July 27, 1998

Donald H. Fidler, Esq.
Chairperson
Public Arbitrator

Date

/s/ Peter J. Conlon, Jr.

July 23, 1998

Peter J. Conlon, Jr.
Panelist
Public Arbitrator

Date

/s/ Anthony Kashouty

July 23, 1998

Anthony Kashouty
Panelist
Industry Arbitrator

Date