

901 W.C.

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Names of Claimants

Elan Investment Services, Incorporated,
Firstar Bank Iowa, N.A., and
Firstar Insurance Services, Incorporated

and

Case Number 96-02631

Name of Respondent

Barbara Kazma

REPRESENTATION OF PARTIES

Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Services, Inc. were represented by Thomas R. Revnew, Esq. and Kevin J. Kinney, Esq. of Krukowki & Costello, S.C. located in Milwaukee, Wisconsin.

Respondent Barbara Kazma was represented by Thomas Henderson, Esq. and Dave Phipps, Esq. of Whitfield & Eddy located in Des Moines, Iowa.

CASE INFORMATION

The Application for Immediate Injunctive Relief and Statement of Claim was filed on or about June 19, 1996 by Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Services, Inc.

Claimant Elan Investment Services, Inc.'s Submission Agreement was signed on June 14, 1996 by Kay Austermann, Vice President.

Claimant Firstar Bank Iowa, N.A.'s Submission Agreement was signed on June 14, 1996 by Janet E. Burch, Vice President.

Claimant Firstar Insurance Services, Inc.'s Submission Agreement was signed on June 18, 1996 by John C. Mezzanotte, Secretary.

The Resistance to the Application for Immediate Injunctive Relief and Statement of Answer and Counter-Claim was filed on or about June 21, 1996 by Respondent Barbara Kazma.

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Respondent Barbara Kazma's Submission Agreement was signed on August 5, 1996.

Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Services, Inc.'s Response to the Counter-Claim was filed on or about July 1, 1996.

HEARING INFORMATION

The hearing on the application for an immediate injunctive order was held before one arbitrator in Omaha, Nebraska on June 25, 1996 for two (2) sessions.

The hearing was held before three arbitrators in Des Moines, Iowa on October 17, 1996 for two (2) sessions and on October 18, 1996 for one (1) session.

CASE SUMMARY

Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Services, Inc. (hereafter collectively referred to as "Claimants") alleged that Respondent Barbara Kazma (hereafter "Respondent") was employed by the Claimants as a registered representative from September 1, 1992 through June 7, 1996 and on July 15, 1993, as a condition of continued employment, entered into a Confidentiality and Non-Competition Agreement (hereafter the "Agreement"). The Agreement allegedly provided that Respondent agreed: (1) for a period of one year following termination of employment with Claimants, she would not directly or indirectly attempt to or actually sell or solicit the sale of securities, insurance or other investment products to any customer for whom she, or any person she supervised, sold or serviced such products during the one year period prior to termination; (2) all correspondence, reports, records and other data relating to Claimants and their customers would remain the absolute and exclusive property of Claimants; and (3) she would not disclose or use any secret or confidential business methods and techniques, research data, marketing and sales information, customer lists and other information not generally known to the public or competitors except to perform her duties at Claimants or with written consent from Claimants. Claimants contended that Respondent, without prior notice, terminated her employment with Claimants by letter on June 7, 1996 and immediately thereafter commenced dual employment as an employee for Iowa State Bank and a Registered Representative for LaSalle St. Securities, Inc. Claimants further contended that on June 10, 1996 they reminded Respondent of her responsibilities under the Agreement asking her to return all property belonging to Claimants. Claimants alleged that Respondent violated the terms of the Agreement by the following: (1) while employed by Claimants, Respondent unlawfully removed customer files and/or other customer information; (2) upon termination, Respondent immediately began to solicit Firstar customers by requesting them to transfer their accounts to herself and LaSalle St. Securities through direct mailings, telephone calls and personal visits; and (3) Respondent diverted or attempted to divert Claimants' customers to LaSalle St. Securities through the use of confidential and proprietary information taken from Claimants. On June 12, 1996, Claimants again reminded Respondent of her obligations under the Agreement demanding the return of all property belonging to the Claimants.

As alleged, Respondent sent a written response stating, in part, that the Agreement was not enforceable. Claimants asserted that they were entitled to the full benefit and protection of the Agreement and that they suffered monetary damages as well as injury which could not be measured or compensated by money damages. Claimants made the following legal claims: (1) tortious interference with contract; (2) tortious inference with contract; (3) tortious interference with prospective advantage; (4) breach of fiduciary duty and duty of loyalty; (5) misappropriation of trade secrets; and (6) trover and conversion.

Respondent Barbara Kazma denied the allegations or inferences of wrongdoing in the Application for Immediate Injunctive Relief and Statement of Claim. The Respondent specifically stated there would be no evidence presented that Respondent sold any of the traditional bank services in violation of the Agreement. Respondent alleged that: (1) the contract failed for a lack of consideration since the Claimants reduced and/or restricted Respondent's compensation after the signing of the Agreement; (2) the reducing or restricting of the compensation was also a breach of the Agreement on the part of the Claimants; (3) Respondent did not remove customer files or information without authorization but did take some personal customer lists home for use during employment with the Claimants and had returned such information to the Claimants; (4) she had not attempted to induce any of the Claimants' customers to terminate their relationship with the Claimants yet some of her customers expressed an interest in keeping her as their register representative for security or insurance purposes; and (5) she did not remove documents from the Claimants' premises yet, if she discovered any documents from the Claimants in her home where they were kept for safekeeping in the event of an unforeseen disaster, she had returned those documents and did not use them at her new place of employment. Respondent contended that the Claimant's request for injunctive relief was not proper in light of the financial size of the Claimant financial institutions, the adequacy of money damages and the devastating impact which injunctive relief would have on the Respondent,

In her Counter-Claim against all Claimants, Respondent alleged that (1) after her termination, officers and employees of the Claimants made false and/or misleading statements in writing and orally to third parties and/or customers, with the intent that they be relied on by the third party or customer to the detriment of Respondent, resulting in harm and irreparable damage to Respondent; (2) Respondents breached their agreement to provide continued employment to Respondent by reducing or restricting the Respondent's compensation on four occasions; and (3) Claimants brought this claim without consulting Respondent and based upon affidavits which contained false accusations. Respondents made legal claims for (1) libel, (2) slander, (3) negligent and/or intentional interference with a business relationship, (4) breach of contract and (5) abuse of process.

Claimants denied that any officers or employees made untrue oral or written comments concerning Respondent with the intent that they be relied upon by a third party listener or customer to the Respondent's detriment. Claimants affirmatively stated that in the Agreement Respondent agreed all insurance, securities and related accounts which she produced or serviced during her employment with Claimant Firstar would be for the account of Claimant Elan Insurance or the account of other

third parties designated by Claimant Elan Insurance. Claimants denied that they intentionally or negligently provided its customers with information designed to terminate any future business relationships with the Respondent. Claimants contend that they did not breach the Agreement with Respondent since it provided that Claimant Firststar did not make any promise of employment for a definite term or upon definite conditions and that the employment was strictly employment at-will. Claimants asserted several affirmative defenses including, but not limited to, unclean hands, failure to plead with specificity, any alleged defamatory statements were made in good faith and without malice to bar any defamations claim, any alleged defamatory statements were true or substantially true to bar any defamation claim, and any alleged defamatory comments were conditionally privileged or absolutely privileged.

RELIEF REQUESTED

Claimants Elan Investment Services, Inc., Firststar Bank Iowa, N.A. and Firststar Insurance Services, Inc. requested an award for the following: entry of an order permanently enjoining Respondent from engaging in activities which violate the Confidentiality and Non-Competition Agreement; injunctive relief enjoining the Respondent's use of Firststar's business records; entry of an order directing the immediate return of all of Firststar's business records and all copies thereof not rightfully in possession of the Respondent to Claimants; compensatory damages in an undisclosed amount, all compensation paid to Respondent during the period of employment at Firststar where a fiduciary duty or duty of loyalty owed to Firststar was breached; punitive damages in an amount of twice that awarded in compensatory damages; costs, disbursements; and attorneys' fees. In addition, Claimants requested that the Counter-Claim be dismissed in its entirety.

Respondent Barbara Kazma requested that the claims asserted against her be denied in their entirety and that she be awarded compensatory damages for her monetary loss in an undisclosed amount, all costs, disbursements and attorneys' fees as well as a written retraction from the Bank of any false or misleading statements made by either its officers or employees regarding the Respondent.

OTHER ISSUES CONSIDERED & DECIDED

Following the hearing on the application for an immediate injunctive interim order held June 25, 1996, Arbitrator Roland Santoni, Esq. issued an order on or about June 26, 1996 denying the application for failure to make a clear showing that Claimants would suffer irreparable injury unless such relief was granted.

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 Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, 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) Respondent Barbara Kazma is hereby liable for and shall pay to the Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Service, Inc. the sum of \$19,722.00 in compensatory damages plus simple interest at a rate of 8% per annum from date of award until paid;
- (2) Respondent Barbara Kazma is hereby liable for and shall pay to the Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A. and Firstar Insurance Service, Inc. the amount of \$25,757.50 in attorneys' fees and costs. In determining to award attorneys' fees and costs, the arbitrators considered the provisions contained in the Confidentiality and Non-Competition Agreement as well as the Iowa Uniform Trade Secrets Act which was the legal authority supplied by the Claimants;
- (3) ~~The Counter-Claim filed by Respondent Barbara Kazma is hereby denied in its entirety and dismissed with prejudice;~~
- (5) ~~With the exception of forum fees addressed below, all other requests for relief not specifically granted herein are hereby denied in their entirety.~~

FORUM FEES

Forum fees are calculated at the rate of \$600.00 per hearing session and \$300.00 for each pre-hearing conference. There were three (3) hearing sessions with three arbitrators x \$600.00 plus two (2) hearing sessions with one arbitrator x \$300.00 = \$2,400.00 in forum fees. Pursuant to Section 10205(b) of the Code of Arbitration Procedure, 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 Sections 10205(c) and (h) and 10333 of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers Regulation, Inc. ("NASD Regulation") shall retain the non-refundable filing fee in the amount of \$500.00, the non-refundable surcharge in the amount of \$2,500.00 and shall retain as forum fees the hearing session deposit in the amount of \$600.00 previously deposited with the NASD Regulation, Inc. by Claimants Elan Investment Services, Inc., Firstar Bank Iowa, N.A., and Firstar Insurance Services, Inc. Claimant Elan Investment Service, Inc. is hereby liable for and shall pay to the NASD Regulation, Inc. the sum of \$350.00 for the member surcharge assessed in accordance with Section 10333 of the Code of Arbitration Procedure.

The NASD Regulation, Inc. shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain as forum fees the hearing session deposit in the amount of \$600.00 previously deposited with the NASD Regulation by Respondent Barbara Kazma. Respondent Barbara Kazma is hereby liable for and shall pay to Claimants Elan Investment Services, Inc., Firststar Bank Iowa, N.A. and Firststar Insurance Services, Inc. the amount of \$3,100.00 as reimbursement for the hearing session deposit and the non-refundable surcharge previously paid by the Claimants. Respondent Barbara Kazma is hereby liable for and shall pay to the NASD Regulation, Inc. the sum of \$1,200.00 in additional forum fees.

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

Signed:

Dated:

Roland Santoni, Esa.
Roland Santoni, Esq.
Public Arbitrator, Presiding Chair

November 26, 1996

Thomas J. Tarsnev, Esa.
Thomas J. Tarsney, Esq.
Public Arbitrator

November 27, 1996

Patrick E. Hartigan, Esa.
Patrick E. Hartigan, Esq.
Industry Arbitrator

November 29, 1996

Date served by the NASD Regulation, Inc.: December 2, 1996