

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Rauscher Pierce Refsnes, Inc.,

Claimant,

v.

No. 96-04812

Everen Securities, Inc., Bryan Scott McMillan,
and Leonard V. Mauck,

Respondents.

REPRESENTATION OF PARTIES

Claimant Rauscher Pierce Refsnes, Inc. was represented by Steven E. Aldous, Esquire, of Sayles & Lidji, located in Dallas, Texas.

Respondents Everen Securities, Inc., Bryan Scott McMillan, and Leonard V. Mauck was represented by Brian Hurst, Esquire, of Baker & McKenzie, located in Dallas, Texas.

CASE INFORMATION

Claimant Rauscher Pierce Refsnes, Inc.'s Statement of Claim was filed on or about October 30, 1996. Claimant Rauscher Pierce Refsnes, Inc.'s First Amended Statement of Claim was filed on or about December 2, 1996. Claimant Rauscher Pierce Refsnes, Inc.'s Submission Agreement was signed on October 28, 1996 by James T. Ritt its First Vice President.

Respondents Everen Securities, Inc., Bryan Scott McMillan, and Leonard V. Mauck's Statement of Answer and Counterclaim was filed on or about November 29, 1996. Respondent Everen Securities, Inc.'s Submission Agreement was signed on December 9, 1996 by Brad Brooks, Senior Vice President of Everen Securities, Inc. Respondent Bryan Scott McMillan's Submission Agreement was signed on December 9, 1996. Respondent Leonard V. Mauck's Submission Agreement was signed on December 9, 1996.

HEARING INFORMATION

A pre-hearing conference was held on December 6, 1996.

The hearing was held on: December 9, 1996, for two (2) sessions; and
 December 10, 1996, for two (2) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Rauscher Pierce Refsnes, Inc. ("Rauscher" or "Claimant") alleged that respondents Bryan Scott McMillan ("Mr. McMillan") and Leonard V. Mauck ("Mr. Mauck") breached their employment contracts and Mr. McMillan and Mr. Mauck along with Everen Securities, Inc. ("Everen") (hereinafter collectively referred to as "Respondents") have confiscated confidential and proprietary information of Claimant in violation of contractual obligations. Claimant asserted that Mr. Mauck's employment contract obligated him to repay the portion of a forgivable note remaining at the time of his termination, which was in the amount of \$41,355.00. Claimant also asserted that Mr. McMillan's employment contract obligated him to repay the portion of his training costs which remained at the time of termination, which was a portion of his \$30,000 training costs. According to Claimant, on October 17, 1996, it learned of Mr. Mauck's plan to go to work for Everen and immediately fired him. On October 18, 1996, according to Claimant, Everen and Mr. Mauck sent a mass mailing of transfer forms to the clients Mr. Mauck served while he was at Rauscher, which they were able to do because Mr. Mauck had confiscated the customer information in breach of his employment agreement. Claimant further asserted that Mr. Mauck contacted some of his customers and disclosed to Everen the names of other brokers at Rauscher that Everen should solicit, all while employed by Claimant and in breach of his employment agreement. Mr. McMillan, according to Claimant, left on October 23, 1996, and went to work at Everen and has since also solicited customers he served while at Rauscher, and has taken and used confidential information and allowed Mr. Mauck and Everen to use this information, as well as solicited brokers to leave Claimant and go to work for Everen, all in breach of his employment agreement. Claimant further alleged that Everen has induced Mr. Mauck and Mr. McMillan to violate their contractual duties to Claimant. Claimant made the following legal claims: breach of contract; breach of loyalty constituting unfair competition under Texas law and the NASD Rules of Fair Practice; and breach of fiduciary duties.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that Claimant terminated Mr. Mauck and that his loan provided that any unpaid balance of the note would be forgiven in the event Claimant terminated him, and even if it was not forgiven, the true balance has not been correctly identified by Claimant due to an amendment made which provided for an accelerated forgiveness schedule. Respondents further contended that Mr. McMillan's training costs were to be forgiven at the rate of one-sixth of the total at the end of each six month period ending with the third anniversary of McMillan's registration with the New York Stock Exchange, and that

since he has been registered since March 3, 1995, \$15,000 of the \$30,000 in training costs has already been forgiven. Respondents made the following affirmative defenses: (1) Mr. Mauck was entitled under his employment agreement to take copies of his customer account statements and account information; (2) Claimant cannot complain of taking information about their own customers because Claimant has publicly taken the position that customer account information belongs only to the customer and may be freely moved from firm to firm by the customer's broker; (3) Mr. Mauck owes Claimant nothing on his forgivable loan because he was terminated without cause; (4) in the alternative, any unforgiven balance of Mr. Mauck's loan as of January 1, 1996, should be reduced for his ten months of production for Claimant in 1996; (5) Claimant may not enforce the non-competition provision in Mr. McMillan's agreement because it is inequitable, over-broad, and was imposed in a contract of adhesion without adequate consideration; (6) Mr. McMillan owes Claimant nothing for "training costs" under his agreement because he received no training of value; (7) in the alternative, any "training costs" due under Mr. McMillan's agreement should be reduced for time he spent at Rauscher; (8) it would be manifestly unfair to enjoin Respondents since Claimant's temporary restraining order in state court action was dissolved, since Claimant declined to seek a temporary injunction at a subsequent hearing, and due to the harm it would cause to Respondents customers; (9) Claimant is not entitled to injunctive relief due to its own "unclean hands"; and (10) Claimant is not entitled to injunctive relief against Mr. McMillan because Claimant represented to him that his employment agreement was not going to be enforced, and because Claimant does not uniformly enforce such agreements.

Respondents, in their counterclaim, alleged that Claimant has unlawfully converted the funds in Mr. Mauck's Cash Management Account by refusing to release them to Mr. Mauck and that Claimant has unlawfully converted a \$22,500 finder's fee due to Mr. McMillan, as well as the funds in Mr. McMillan's personal Cash Management Account. Respondents further asserted that Claimant's claims were brought in bad faith.

RELIEF REQUESTED

Claimant Rauscher Pierce Refsnes, Inc. ("Rauscher" or "Claimant") requested the following injunctive relief ordering respondents Everen Securities, Inc., Bryan Scott McMillan ("Mr. McMillan"), and Leonard V. Mauck ("Mr. Mauck") to: immediately return to Claimant its confidential information, including any copies; cease and desist from soliciting Claimant's customers whom Mr. McMillan and Mr. Mauck served while at Rauscher and who were contacted using Claimant's confidential information; cease and desist from soliciting or accepting account transfer from Claimant's customers who Mr. Mauck and Mr. McMillan served while at Rauscher and who were contacted using Claimant's confidential information; and cease and desist from recruiting Claimant's employees for one year. Claimant also requested: an award against Mr. Mauck in the amount of \$41,355.00 for compensatory damages; an award against Mr. McMillan in the amount of \$30,000 for compensatory damages; an award of further compensatory damages in an amount not to exceed \$500,000; and an award of punitive damages.

Respondents Everen Securities, Inc., Mr. McMillan, and Mr. Mauck ("Respondents") requested that the claims asserted against them be denied in their entirety. Respondents further requested that they be awarded actual and punitive damages incurred as a result of Claimant's unlawful conversion of funds. Finally, Respondents requested an award for their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

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 NASD Regulation, Inc. Office of Dispute Resolution.

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. Respondents Everen Securities, Inc. and Bryan Scott McMillan were enjoined, for a period of ninety (90) days commencing October 23, 1996, from soliciting Bryan Scott McMillan's former Rauscher Pierce Refsnes, Inc. customers who had not so far transferred their accounts from Rauscher Pierce Refsnes, Inc. to Everen Securities, Inc.;
2. Respondent Leonard V. Mauck is liable for and shall pay claimant Rauscher Pierce Refsnes, Inc. \$35,000 for compensatory damages in full and final payment of his note;
3. Respondent Bryan Scott McMillan is liable for and shall pay claimant Rauscher Pierce Refsnes, Inc. \$15,000 for compensatory damages in final payment of the amount owed for training costs;
4. Respondent Everen Securities, Inc. is liable for and shall pay claimant Rauscher Pierce Refsnes, Inc. \$30,000 for compensatory damages;
5. Respondents Everen Securities, Inc., Bryan Scott McMillan, and Leonard V. Mauck are individually liable for and shall pay claimant Rauscher Pierce Refsnes, Inc. \$5,000 for a total of \$15,000 for attorney's fees pursuant to Texas statute;
6. Claimant Rauscher Pierce Refsnes, Inc. is hereby ordered to release funds in respondent Leonard V. Mauck's Cash Management Account at Rauscher Pierce Refsnes, Inc.;

7. Claimant Rauscher Pierce Refsnes, Inc. is hereby ordered to release funds in respondent Bryan Scott McMillan's Cash Management Account and in respondent Bryan McMillan's joint account with his father;
8. 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 \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300, and there were four (4) hearing sessions x \$1,000 = \$4,000, for a total of \$4,300 in forum fees. Pursuant to §10332(b) 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 §10205(c) of the NASD Code of Arbitration Procedure (the "Code"), NASD Regulation, Inc. Office of Dispute Resolution 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 \$1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Rauscher Pierce Refsnes, Inc. Pursuant to §10205(h) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable interim injunctive surcharge in the amount of \$2,500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Rauscher Pierce Refsnes, Inc. Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the portion of the non-refundable member surcharge in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Rauscher Pierce Refsnes, Inc.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Everen Securities, Inc.

Claimant Rauscher Pierce Refsnes, Inc. is liable for and shall pay the remainder of its member surcharge fee in the amount of 100 pursuant to §10333 of the Code. Claimant Rauscher Pierce Refsnes, Inc. is also liable for and shall pay forum fees in the amount of \$1,150 (= ½\$4,300 total forum fees - \$1,000 hearing session deposit).

Respondents Everen Securities, Inc., Bryan Scott McMillan, and Leonard V. Mauck are jointly and severally liable for and shall pay forum fees in the amount of \$2,150 (= ½\$4,300 total forum fees).

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

/s/ Charles P. Aberg
Charles P. Aberg, Esquire
Public Arbitrator, Presiding Chair

/s/ Joann Peters
Joann Peters, Esquire
Public Arbitrator

/s/ James R. Augustine
James R. Augustine
Industry Arbitrator

Dated:

February 6, 1997

February 4, 1997

February 3, 1997