

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

First of Michigan Corporation

Claimant and Counter-Respondent,

v.

Case Number 96-04977

Securities America, Inc.

Respondent and Counter-Claimant.

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### **REPRESENTATION OF PARTIES**

Claimant and Counter-Respondent First of Michigan Corporation ("Claimant" or "FOM") was represented by John A. Hubbard, Esq. of Alan R. Miller, P.C. located in Birmingham, Michigan.

Respondent and Counter-Claimant Securities America, Inc. ("Respondent" or "SAI") was represented by Dennis J. Levasseur, Esq. of Bodman, Longley & Dahling LLP located in Detroit, Michigan.

Respondents and Counter-Claimants William P. Mitchell ("Mitchell"), Tim Hofflander ("Hofflander"), and Paul Meyers ("Meyers") (collectively referred to as the "Employee Respondents") were represented by H. Rollin Allen, Esq. of Sommers, Schwartz, Silver & Schwartz located in Southfield, Michigan. Respondents Mitchell, Hofflander, and Meyers were dismissed from this matter by the Claimant prior to the conclusion of the hearing.

### **CASE INFORMATION**

The Statement of Claim and Brief in Support of First of Michigan's Request for Immediate Injunctive Relief was filed on or about November 7, 1996.

Claimant's Submission Agreement was signed on November 11, 1996 by Conrad W. Koski, Executive Vice President of First of Michigan Corporation.

Respondent Securities America, Inc.'s Statement of Answer and Counterclaim was filed on or about November 27, 1996.

- Respondents Mitchell, Hofflander, and Meyers' Counterclaim was filed on or about December 2, 1996.

Respondents Mitchell, Hofflander, and Meyers' Submission Agreements were signed on December 16, 1996.

NASD Regulation, Inc. has no record that Respondent SAI filed a signed submission agreement.

### **HEARING INFORMATION**

Pursuant to Section 10335(d)(1) of the NASD Code of Arbitration Procedure (the "Code"), the telephonic hearing on Claimant's application for an Immediate Injunctive Order was held before Arbitrator Crosby on November 12, 1996 for one (1) session.

Pursuant to Section 10335(f) of the Code, the expedited hearing on the merits was held in Southfield, Michigan before all three arbitrators on: December 2, 1996 for two (2) sessions; December 3, 1996 for two (2) sessions; December 16, 1996 for two (2) sessions; December 17, 1996 for two (2) sessions; January 20, 1997 for two (2) sessions; January 21, 1997 for two (2) sessions; January 22, 1997 for two (2) sessions; January 30, 1997 for two (2) sessions; January 31, 1997 for two (2) sessions; February 3, 1997 for two (2) sessions; February 4, 1997 for two (2) sessions; February 20, 1997 for one (1) session; and March 20, 1997 for two (2) sessions.

### **CASE SUMMARY**

FOM filed this action seeking injunctive and monetary relief for Respondents alleged illegal "raid" of FOM's Adrian, Michigan Branch Office (the "Adrian Branch"). FOM contended that, during the time the Employee Respondents were employed by FOM as stockbrokers, SAI and the Employee Respondents conspired together, orchestrated and carried out the raid of the Adrian Branch. FOM maintained that on November 4, 1996, the Employee Respondents tendered their written resignations from FOM effectively destroying FOM's Adrian Branch. FOM alleged that, on the same day, the Employee Respondents became employed by SAI.

FOM asserted various causes of action, including: (1) Injunctive Relief Against Respondents; (2) Unfair Competition and Raiding by Respondent Securities America; (3) Conversion; (4) Breach of Fiduciary Duty by Employee Respondents; (5) Breach of Contract against Employee

Respondents; (6) Tortious Interference with Contracts and Advantageous Business Relationships against Respondents; (7) Business Defamation; (8) Misappropriation of Trade Secrets and Confidential Information; (9) Unlawful Conspiracy; (10) Fraud and Misrepresentation; and (11) Unjust Enrichment.

SAI denied all liability to FOM in its Statement of Answer and Counterclaim. SAI alleged that the Employee Respondents were free to leave FOM whenever they wanted because their employment was terminable at will. SAI asserted that it was generally the practice for account executives who leave a brokerage firm to take with them information about the clients generated by them. SAI maintained that because the brokerage firm has original records regarding the clients, both the former employers and account executives are equally able to do business with the account executives' clients. According to SAI, the clients are free to decide with whom they want to do business, without regard to where the former employee may be employed.

SAI asserted various affirmative defenses, including: (1) Claimant has failed to state a claim upon which relief can be granted; (2) Claimant has failed to comply with NASD Code Section 25(a); (3) Claimant has not suffered any lost business or other monetary damage as a result of any action or inaction of SAI; (4) Claimant's claims are based, in whole or in part, on illegal and unenforceable contracts; (5) Claimant's claims are barred, in whole or in part, by Claimant's waiver of the rights that it seeks to enforce; (6) Claimant's claims are barred, in whole or in part, by Claimant's unclean hands or other inequitable conduct; and (7) Claimant's claims are barred, in whole or in part, by the statute of frauds.

In its Counterclaim, SAI made various claims against FOM, including: (1) Defamation; (2) Abuse of Process; and (3) Improper Injunction.

In their Joint Counterclaim, the Employee Respondents alleged that FOM filed pleadings containing misrepresentations of fact and, based upon the misrepresentations known by Claimant to be false, secured an Immediate Injunctive Restraining Order ("TRO"). The Employee Respondents contended that, as a result of the TRO, they lost several customers to other brokerage houses and have been unable to service or transfer the accounts of their customers to their new business. In their Counterclaim, the Employee Respondents made various claims against FOM, including: (1) False Pleading and Improper Restraining Order; (2) Slander; (3) Pain and Suffering; (4) Compensation; (5) Tortious Interference with Contract and Economic Benefit; and (6) Exemplary Damages.

### **RELIEF REQUESTED**

- Claimant FOM requested: (1) immediate and permanent injunctive relief; (2) an award against all Respondents, jointly and severally, in the amount of all actual damage caused by each Respondent, together with pre-judgement interest; (3) an award against Securities America for punitive damages; (4) an award against all Respondents, jointly and severally, for all allowable costs, attorney fees, and other litigation expenses to the extent recoverable under applicable law; and (5) that the arbitrators issue such other and further relief as may be just and proper.

Respondent SAI requested dismissal of Claimant's claim with prejudice and the award of costs and attorney fees. Respondent SAI also requested: (1) immediate and permanent injunctive relief enjoining Claimant, whether alone or in concert with others, from further publication of false and defamatory statements about SAI; (2) actual damages suffered by SAI; (3) damages for injury to SAI's reputation; (4) exemplary damages; (5) SAI's costs, including attorney fees, incurred in this matter; and (5) such other and further relief as may be just and proper.

The Employee Respondents sought damages in the sum of \$150,000, plus costs and attorney fees, as well as exemplary damages.

### **OTHER ISSUES CONSIDERED & DECIDED**

Pursuant to Section 10335(d)(1) of the Code, Arbitrator Crosby issued an Immediate Injunctive Order on November 12, 1996.

Respondent SAI's Motion to Set Aside the Immediate Injunctive Order was denied.

Respondent SAI's Motion for a More Definite Statement of Claim was denied.

During the course of the hearing, FOM and the Employee Respondents advised the arbitrators that they were withdrawing their respective claims against each other. Accordingly, all claims of FOM against the Employee Respondents, and all claims of the Employee Respondents against FOM were not adjudicated in this proceeding and not considered in this award.

Respondent SAI did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the Code, and having answered the claim and appeared at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 pleading, 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) That Respondent and Counter-Claimant Securities America, Inc. is liable for and shall pay to Claimant and Counter-Respondent First of Michigan Corporation damages in the amount of Fifteen Thousand Dollars and No Cents (\$15,000.00), which sum shall be inclusive of interest to the date of the award;
- (2) That Securities America, Inc.'s Counterclaim is hereby dismissed in its entirety with prejudice;
- (3) That the parties shall bear their own respective attorneys' fees and costs; and
- (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 dismissed in their entirety with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each hearing session before a single arbitrator. There was one (1) hearing session before a single arbitrator x \$300 = \$300 in forum fees. There were twenty-five (25) hearing sessions before the full panel x \$750 = \$18,750 in forum fees. Total forum fees = \$19,050. Pursuant to §10205(b) of 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 §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall refund the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by FOM. Pursuant to §10205(h) and §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable "expedited

proceedings" surcharge in the amount of \$2,500 and the non-refundable "member" surcharge in the amount of \$350 previously deposited by FOM.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc by SAI.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall refund the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc by the Employee Respondents.

Pursuant to §10205(c) of the Code, Respondent Securities America, Inc. is liable for and shall pay forum fees in the amount of \$18,450 (\$19,050 in total forum fees - \$600 hearing session deposit).

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

**Concurring Arbitrators' Signatures**

\s\ Carole M. Crosby  
Carole M. Crosby, Esq.  
Chairperson  
Public Arbitrator

April 2, 1997  
Dated:

\s\ Robert J. Scafuri  
Robert J. Scafuri, Esq.  
Panelist  
Public Arbitrator

April 3, 1997  
Dated:

\s\ Terry F. Peppard  
Terry F. Peppard, Esq.  
Panelist  
Industry Arbitrator

April 3, 1997  
Dated:

For NASD Regulation use only:  
Date award served on the parties: April 11, 1997