

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Dain Rauscher Incorporated,

Claimant and Counter-Respondent,

v.

No. 98-00118

Edward J. Schiavi,

Respondent and Counter-Claimant.

REPRESENTATION OF PARTIES

Claimant and Counter-Respondent Dain Rauscher Incorporated ("Claimant") was represented by James M. McCown, Esq. of Jackson Walker L.L.P. located in Dallas, Texas.

Respondent and Counter-Claimant Edward J. Schiavi ("Respondent") was represented by Martin K. Holland, Esq. of Moses, Dunn, Farmer & Tuthill, P.C. located in Albuquerque, New Mexico.

CASE INFORMATION

The Statement of Claim was filed on or about January 13, 1998.

Claimant's Submission Agreement was signed on January 9, 1998.

The Statement of Answer and Counter-Claim was filed on or about February 25, 1998.

Respondent's Submission Agreement was signed on February 10, 1998.

Claimant's Statement of Answer to the Counter-Claim was filed on or about April 2, 1998.

Claimant's Post-Hearing Brief was filed on or about September 15, 1998.

Respondent's Post-Hearing Brief was filed on or about September 17, 1998.

HEARING INFORMATION

The hearing was held on August 26, 1998 for three (3) sessions, and August 27, 1998 for two (2)

sessions. The hearing location was Albuquerque, New Mexico.

CASE SUMMARY

In its Statement of Claim, Claimant alleged that it began discussing with Respondent the possibility of employment in early 1994. Claimant alleged that, during the course of these discussions, Respondent intentionally, willfully, and blatantly lied to it in order to gain a \$63,945 bonus in the form of a Promissory Note. Specifically, Claimant contended Respondent misrepresented the amount of commissions (\$200,000) he had generated in the previous twelve months at his former firm, Paine Webber. Claimant also asserted that, prior to his resignation, Respondent destroyed Claimant's client records and took confidential and proprietary information belonging to Claimant.

Respondent denied all liability in his Statement of Answer and Counter-Claim. Specifically, Respondent denied that he misrepresented his trailing twelve, although he believed that Claimant's branch manager, Jim Larkin, may have misrepresented the level of Respondent's trailing twelve. Respondent also denied that he took any action which harmed Claimant's ability to compete or blatantly breached any duty of loyalty. In his Counter-Claim, Respondent asserted that Claimant's actions, through Larkin and others, interfered with Respondent's opportunities to earn a living, both during and after his employment. Respondent contended that Claimant violated the terms of his employment agreement and breached its duties of good faith and fair dealing. Specifically, Respondent asserted that: Larkin misrepresented Respondent's payout schedule; Larkin misrepresented that Respondent would have access to a sales assistant; and that Larkin was openly hostile toward Respondent in an effort to force Respondent to leave his employment.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested that Respondent be ordered to pay Claimant \$63,945, plus interest at 12%; return to Claimant any original documents he removed from Claimant's premises; pay punitive damages; and pay to Claimant the costs and expenses of this proceeding, including attorney's fees.

Respondent requested that the Statement of Claim be dismissed in its entirety with prejudice. In his Counter-Claim, Respondent requested that Claimant be ordered to pay Claimant for business generated or which could have been generated at the original payout schedule promised to Respondent at the time of his employment and refund any deductions for amounts improperly taken from his paycheck; cancel the Promissory Note; award Respondent punitive damages; plus an award of attorney fees and costs; and any other relief deemed appropriate.

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, as well as the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) That Edward J. Schiavi is liable for and shall pay to Dain Rauscher Incorporated compensatory damages in the amount of \$15,986.25, plus simple interest at 12% from June 23, 1997 until the award is paid in full;
- (2) That Edward J. Schiavi is also liable for and shall pay to Dain Rauscher Incorporated its attorney fees in the amount of \$5,325.00. The panel finds that the authority for such award exists under the law of the State of New Mexico;
- (3) That the Counter-Claim of Edward J. Schiavi is dismissed in its entirety with prejudice;
- (4) That other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- (5) That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There were five (5) hearing sessions x \$600 = \$3,000 in forum fees. Pursuant to Rule10205(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 Rule10205(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 retain as forum fees the

hearing session deposit in the amount of \$600 previously deposited by the Claimant.

Pursuant Rule 10205(c) of the Code, Claimant is liable for and shall pay forum fees in the amount of \$900 (1/2 forum fees - hearing session deposit).

Pursuant to Rule 10205(c) of the Code, Respondent is liable for and shall pay forum fees in the amount of \$1,500 (1/2 forum fees). Pursuant to Rule 10205(c) of the Code, Respondent is also liable for and shall pay the \$500 filing fee incurred in connection with Respondent's Counter-Claim.

Pursuant to Rule 10333 of the Code, Claimant has paid to NASD Regulation, Inc. the \$1,000 member surcharge previously invoiced. Pursuant to Rule 10333 of the Code, Claimant has paid to NASD Regulation, Inc. the \$2,100 member process fee (s) previously invoiced.

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

Concurring Arbitrators' Signatures:

\s\ Terry F. Peppard, Esq.

Terry F. Peppard, Esq.
Chairperson
Industry Arbitrator

October 20, 1998

Dated:

\s\ Leon G. Mackey

Leon G. Mackey
Panelist
Industry Arbitrator

October 20, 1998

Dated:

\s\ Edward Allen Hindman

Edward Allen Hindman
Panelist
Industry Arbitrator

October 20, 1998

Dated:

For NASD Regulation use only:

Date award served on parties:

October 21, 1998