UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	:	CIVIL ACTION NO.
V.	:	COMPLAINT
MARK S. FERBER, Defendant.	:	

Plaintiff Securities and Exchange Commission ("Commission"), for its Complaint, alleges that:

SUMMARY

1. This case involves defendant Mark S. Ferber, a former partner of Lazard Freres & Co., who, at all relevant times, was responsible for performing and/or overseeing all financial advisory services provided to the Massachusetts Water Resources Authority ("MWRA"), the District of Columbia ("the District") and the United States Postal Service ("USPS"). Ferber, on behalf of Lazard, negotiated a lucrative contract with Merrill Lynch, Pierce, Fenner & Smith Incorporated. The contract provided that Lazard and Merrill Lynch would jointly market interest rate swaps and that Lazard would be a consultant to Merrill Lynch. Ferber and others under his direct supervision primarily provided Lazard's services to Merrill Lynch under the contract. Pursuant to the contract, between September 1990 and November 1992, Merrill Lynch paid Lazard nearly $5.8 million, which resulted in a substantial financial benefit to Ferber.

2. The contract with Merrill Lynch was a material fact that should have been disclosed to Lazard's financial advisory clients that were serviced by Ferber and were considering the selection of Merrill Lynch as a provider of financial services. The contract created at least a potential conflict of interest for Ferber. It gave rise to a significant risk that Ferber would not provide impartial advice to the financial advisory clients that were considering the selection of Merrill Lynch as a provider of financial services. The contract also created the potential for Ferber to abuse his influence over the financial advisory clients.

3. Ferber knowingly or recklessly failed to adequately disclose the contract to the MWRA, the District and the USPS, all of which selected Merrill Lynch to provide underwriting, interest rate swap or other financial services in connection with municipal securities offerings and/or the purchase and sale of securities. As a result, Ferber defrauded these financial advisory clients and the purchasers of their municipal securities. Accordingly, Ferber violated Sections 10(b) and 15B(c)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder and rule G-17 of the Municipal Securities Rulemaking Board ("MSRB").

JURISDICTION

4. The Commission brings this action pursuant to the authority conferred upon it by Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] to restrain and enjoin permanently Ferber from engaging

in the acts, practices, and courses of conduct as are more fully described herein, and for disgorgement and prejudgment interest.

5. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d) and 78aa].

6. The MSRB was established by the Commission pursuant to Section 15B(b)(1) of the Exchange Act [15 U.S.C. § 78o-4(b)(1)]. Pursuant to Sections 15B(b)(2) and 19(b)(1) of the Exchange Act [15 U.S.C. §§ 78o-4(b)(2) and 78s(b)(1)], the MSRB proposes and adopts, subject to Commission approval, rules governing transactions in municipal securities effected by brokers, dealers and municipal securities dealers. MSRB rule G-17 requires each broker, dealer, municipal securities dealer and their associated persons to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. MSRB rule G-17 was in effect at the time of the transactions alleged in this Complaint and remains in effect. Pursuant to Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], the Commission is authorized to bring an action in this Court to enforce the MSRB rules.

7. Ferber, directly and indirectly, has made use of the means or instruments of transportation or communication in, and the instrumentalities of, interstate commerce, or of the mails, in, and in connection with, the acts, practices and courses of conduct alleged herein. Certain of these acts, practices and courses of conduct have occurred within the District of

Massachusetts, including the offer and sale of municipal securities.

8. Ferber, directly and indirectly, has engaged, or is about to engage in, acts and practices that constitute and would constitute violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder, Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)], and MSRB rule G-17.

9. Unless Ferber is restrained and permanently enjoined by this Court, he will continue to engage in the acts, practices, and courses of conduct set forth in this Complaint and in acts, practices, and courses of conduct of similar type and object.

THE DEFENDANT

10. **Mark S. Ferber** is a resident of Concord, Massachusetts. From January 1982 to July 1993, he was employed as an investment banker by various broker-dealers, including Lazard. Ferber joined Lazard as Senior Vice President in April 1988, was promoted to General Partner in January 1990, and resigned from Lazard in February 1993. Ferber established and managed Lazard's Municipal Department branch office in Boston, Massachusetts.

THE FACTS

Background

11. Ferber was responsible for performing and/or overseeing all financial advisory services provided to the MWRA since it was organized in 1985. In April 1988, Ferber established Lazard's

Boston office. Shortly thereafter, Lazard submitted a proposal to the MWRA to provide financial advisory services. In its proposal, which was prepared under the direction of Ferber, Lazard stated that "It will continue to be our policy to consult with you regarding any potential areas of conflict so as to ensure the most dedicated service to the MWRA. As Project Supervisor, Mark Ferber will ensure that none of the members of the Financial Advisory team develop future commitments that might compete with their responsibilities to the MWRA."

12. In September 1988, the MWRA selected Lazard to be its financial advisor, and Ferber began to advise and assist the MWRA with respect to its planned issuance of $2 billion in revenue bonds over the next three years. Initially, this was to be accomplished through three separate issuances which would be timed in order to take advantage of market conditions. In order to determine which underwriters were best qualified to manage the three planned issuances, the MWRA formed a selection committee that was responsible for evaluating the underwriting candidates. Ferber advised the MWRA throughout the selection process concerning, among other things, the strengths and weaknesses of the potential underwriters.

13. In March 1989, the Board of Directors of the MWRA, which was being advised by Ferber, selected Merrill Lynch as one of three senior managing underwriters to manage the planned issuance of $2 billion of municipal bonds over the next three years. The MWRA decided to rotate the senior managing underwriters. Merrill

Lynch was chosen from this group of three to act as the senior managing underwriter for the MWRA's first bond offering, which ultimately was executed in January 1990.

Ferber Solicits Business from Merrill

14. During the MWRA underwriter selection process described above in paragraphs 12 and 13, Ferber improperly solicited business from Merrill Lynch. For example, on or about December 21, 1988, Ferber met with Merrill Lynch's senior banker for the Northeast Region (the "Northeast Banker"), who was also Merrill Lynch's day-to-day investment banker to the MWRA. During that meeting, Ferber requested that Merrill Lynch allocate bonds to Lazard where Merrill was a lead underwriter, and give Ferber credit for such allocations, because his compensation at Lazard was based on his overall production. Merrill Lynch, however, did not allocate bonds to Lazard for Ferber's credit.

15. On or about September 13, 1989, during the course of preparation for the January 1990 bond offering, Ferber complained to the Northeast Banker that Merrill Lynch had not done anything for him, such as delivering deals and business to him. Ferber further stated that he worked to make a "positive spin" on Merrill Lynch's performance "at every turn." The Northeast Banker concluded that Ferber was not yet "poisoning" the MWRA, but that without a "return on his investment," Ferber would "hurt" Merrill Lynch.

16. Two weeks later, on September 27, 1989, the Northeast Banker introduced Ferber to the head of Merrill Lynch's municipal swaps

department (the "Derivatives Banker") at a meeting in Ferber's office.

17. At that time, the Derivatives Banker was interested in expanding Merrill Lynch's interest rate swap business, and in marketing interest rate swaps to the MWRA in anticipation of the MWRA's first major bond offering, then expected to take place in January 1990.

18. Interest rate swaps are transactions by which an entity may exchange (i.e., swap) its obligation to make periodic payments based on a particular interest rate or index for the right to receive periodic payments based on a different rate or index (e.g., one may swap its obligation to make variable rate payments for the right to receive fixed rate payments).

19. During the meeting on or about September 27, 1989, the Derivatives Banker explained interest rate swaps to Ferber and attempted to persuade him that the MWRA should engage in an interest rate swap with Merrill Lynch following the MWRA's January 1990 bond offering. Ferber immediately expressed interest in Merrill Lynch's interest rate swap product, and offered to help Merrill Lynch sell the product.

20. Shortly after the September 27, 1989 meeting, the Derivatives Banker invited Ferber to learn about the mechanics of structuring and documenting interest rate swaps by participating in an interest rate swap with the Indian Trace Community Development District in Broward County, Florida (the "Florida Transaction").

21. On November 28, 1989, Merrill Lynch closed the Florida Transaction. Although neither Ferber nor any other Lazard personnel worked on the Florida Transaction, Merrill Lynch paid Lazard $90,000 in connection with this transaction.

Ferber Advises MWRA Concerning January 1990 Bond Offering

22. On January 23, 1990, the MWRA priced, issued and sold $836 million in bonds. Merrill Lynch earned $1,922,012 for its work as senior managing underwriter on that bond offering. Ferber advised the MWRA during its negotiations with Merrill Lynch relative to the price that the MWRA would pay the underwriters for the bonds, and what the MWRA would pay Merrill Lynch and its co-managers in fees and expenses.

23. In addition to advising the MWRA during its negotiations with Merrill Lynch concerning the price of the January 1990 bonds and the underwriters' fees and expenses, Ferber also recommended that the MWRA select Merrill Lynch to broker the investment of proceeds from the January bond offering. The MWRA selected Merrill Lynch to broker $350 million of the $836 million in bond proceeds and paid Merrill Lynch $340,508 for that work.

24. In the course of providing this advice to the MWRA concerning the January 1990 bond offering and the reinvestment business, Ferber knowingly or recklessly failed to disclose to the MWRA the facts and circumstances of the Florida transaction.

Ferber Advises MWRA to Execute Swap with Merrill Lynch

25. In January 1990, Merrill Lynch attempted to persuade the MWRA that it should enter into an interest rate swap in conjunction with the January 1990 bond offering. At or about the same time, Ferber recommended to the MWRA that it execute an interest rate swap with Merrill Lynch. Ultimately, on May 23, 1990 and June 13, 1990, based upon Ferber's initial recommendation in January 1990, and subsequent input and advice from Ferber throughout the spring of 1990, the MWRA executed two swaps with Merrill Lynch for a notional amount of $168 million. In connection with these two swaps, the MWRA paid Merrill Lynch an advance fee of $1.68 million, plus $31,500 in expenses.

26. In connection with the MWRA's consideration of the swap transactions, Ferber knowingly or recklessly failed to adequately disclose to the MWRA the facts and circumstances of the Florida Transaction.

The June 1990 Contract/Annual Fee Provision

27. As a result of further negotiations between Ferber and the Derivatives Banker, on or about June 26, 1990, Lazard and Merrill Lynch entered into a written agreement (the "June 1990 Contract"). The June 1990 Contract provided for fee-splitting between Lazard and Merrill Lynch on joint successfully marketed interest rate swaps. The June 1990 Contract further provided that Lazard would consult generally with Merrill Lynch with respect to the presentation, marketing and sales of municipal interest rate swaps, and that Merrill Lynch would pay Lazard an

annual fee in the amount of $800,000 for the period June 26, 1990 through December 31, 1990.

28. In December 1990, before the June 1990 Contract terminated by its own terms, Lazard, acting through Ferber, and Merrill Lynch renewed the June 1990 Contract in writing for calendar year 1991, and increased the annual fee from $800,000 to $1 million.

29. In October 1991, Ferber requested that the annual fee be increased from $1 million to $1.5 million. When a Merrill Lynch representative expressed uncertainty about whether the annual fee would even continue in 1992, Ferber threatened to "hurt" Merrill Lynch if the firm did not continue to pay the annual fee. Thereafter, Lazard, acting through Ferber, and Merrill Lynch orally extended the June 1990 Contract to cover the year 1992 at an annual fee of $1 million.

30. The June 1990 Contract effectively remained in place until it was terminated by agreement in January 1993, when Ferber resigned from Lazard.

31. Ferber and others under his direct supervision primarily provided Lazard's services to Merrill Lynch under the June 1990 Contract. Pursuant to the June 1990 Contract, Merrill Lynch paid Lazard a total of $5,766,878 between September 1990 and November 1992, which included $2,550,000 in annual fees. All of these fees were credited by Lazard to its Boston branch office, and Ferber was compensated based on the overall production of that office.

32. The June 1990 Contract was a material fact that should have been disclosed to Ferber's financial advisory clients that were considering the selection of Merrill Lynch as a provider of financial services. The June 1990 Contract created at least a potential conflict of interest for Ferber. It established an ongoing, continuing relationship between Lazard and Merrill Lynch. This relationship resulted in a direct and substantial financial benefit to Ferber, who was providing financial advisory services to certain clients that were considering the selection of Merrill Lynch as a provider of financial services in connection with municipal securities offerings. The June 1990 Contract gave rise to a significant risk that Ferber would not provide impartial advice to such financial advisory clients, and also created the potential for Ferber to abuse his influence over such financial advisory clients. As the Lazard partner primarily responsible for the June 1990 Contract and the services thereunder, Ferber had a duty to fully disclose it to these financial advisory clients.

MWRA's Reevaluation of Underwriters

33. In late 1991, the MWRA began to reevaluate its underwriting team in contemplation of future bond issues. The MWRA formed a selection committee that was responsible for evaluating the underwriting candidates. As part of his responsibilities as financial advisor to the MWRA, Ferber advised the selection committee throughout the process.

34. The selection committee chose to retain Merrill as one of three senior managers. The committee also decided that Merrill Lynch would be the senior bookrunning manager (the senior underwriting position) for the upcoming issue. As a result, Merrill Lynch served as the senior bookrunning manager on the MWRA's $717 million bond issue in March 1992. The MWRA, with advice from Ferber as its financial advisor, negotiated with Merrill Lynch with respect to bond prices and underwriting fees for that transaction.

Ferber's Failure to Disclose the June 1990 Contract and the Florida Transaction to the MWRA

35. Ferber knowingly or recklessly failed to adequately disclose the June 1990 Contract and/or the facts and circumstances of the Florida Transaction to the MWRA when he provided financial advisory services relating to (a) the January 1990 bond offering and the reinvestment business, (b) the MWRA's selection of Merrill Lynch to execute interest rate swaps in May 1990 and June 1990, (c) the MWRA's selection of Merrill Lynch to serve as the senior bookrunning manager on the MWRA's $717 million bond issue in March 1992, and (d) the MWRA's negotiations with Merrill Lynch with respect to bond prices, underwriting fees and swap fees for those transactions.

36. Moreover, in the course of attempting to renew Lazard's financial advisory contract with the MWRA in May 1992, Ferber certified on behalf of Lazard that there was no potential for

conflict of interest with respect to his financial advisory services to the MWRA.

37. During the years 1990 through 1992, the MWRA paid Lazard $1,690,000 in financial advisory fees for services provided by Ferber and others under his direct supervision. All of these fees were credited by Lazard to the Boston branch office, and Ferber was compensated based on the overall production of that office.

Ferber's Failure to Disclose the June 1990 Contract and the Florida Transaction to the USPS

38. In August 1990, shortly after Merrill Lynch and Lazard executed the June 1990 Contract, Lazard, with Ferber as the responsible Lazard partner, was selected as financial advisor to the USPS.

39. According to the financial advisory contract between Lazard and the USPS, which was signed by Ferber, Lazard agreed that there was no conflict of interest arising from the services to be provided under the contract, and that no employee, principal or affiliate of Lazard was in any such conflict. Furthermore, the USPS reserved the right to refuse to allow Lazard to undertake any conflicting agreements with its clients, or to terminate the contract if the USPS determined that a conflict of interest existed.

40. During the fall of 1990, the USPS decided to refinance the $250 million in bonds it had issued in 1972 by buying the bonds back at less than par value (the "Bond Buy-Back Program").

Ferber recommended to the USPS that it select Merrill Lynch as one of two repurchase agents for the Bond Buy-Back program. Ultimately, between December 1990 and May 1991, Merrill Lynch and another broker-dealer repurchased approximately $30 million of USPS 1972 Series A Bonds on behalf of the USPS. The USPS selected Merrill Lynch as a repurchase agent based on Ferber's recommendation.

41. In connection with the consideration by the USPS of a repurchase agent for the Bond Buy-Back Program, Ferber knowingly or recklessly failed to disclose both the June 1990 Contract and the facts and circumstances of the Florida Transaction.

42. In 1991, the USPS paid Lazard $625,000 in financial advisory fees for services provided by Ferber and others under his direct supervision. All of these fees were credited by Lazard to the Boston branch office, and Ferber was compensated based on the overall production of that office.

Ferber's Failure to Disclose the June 1990 Contract and the Florida Transaction to the District

43. In late 1990, during the existence of the June 1990 Contract, Ferber succeeded another Lazard partner as financial advisor to the District.

44. In the summer of 1991, Ferber recommended to the District that it execute an interest rate swap with Merrill Lynch. Ultimately, in September 1991 and March 1992, the District executed two swaps with Merrill Lynch for a notional amount of

$529.8 million in connection with related municipal securities offerings.

45. The related municipal offerings were a $331 million General Fund Recovery Bond issue in September 1991 and a $229.8 million General Obligation Bond refunding in March 1992. The swap transactions were executed contemporaneously with the two bond offerings for the purpose of converting fixed-rate interest rate obligations arising from the bond offerings into variable-rate obligations.

46. The District decided to execute swaps with Merrill Lynch based on Ferber's recommendation. In connection with these two swaps, the District, with advice from Ferber as its financial advisor, negotiated with Merrill Lynch an advance fee of approximately $3.6 million for those transactions.

47. In connection with the District's consideration of a swap transaction and its negotiations with Merrill Lynch with respect to swap fees, Ferber knowingly or recklessly failed to adequately disclose both the June 1990 Contract and the facts and circumstances of the Florida Transaction.

48. In 1991 and 1992, the District paid Lazard $1,029,267 in financial advisory fees for services provided by Ferber and others under his direct supervision. These fees were credited by Lazard to the Boston branch office, and Ferber was compensated based on the overall production of that office.

FIRST CLAIM

VIOLATION OF SECTION 10(b) OF THE EXCHANGE ACT [15 U.S.C. § 78j(b)] AND RULE 10b-5 [17 C.F.R. § 240.10b-5]

49. The Commission realleges and incorporates by reference, each and every allegation contained in paragraphs 1 through 48.

50. Since at least December 1988 through January 1993, Ferber, directly and indirectly, in connection with the purchase or sale of securities, by the use of the means or instruments of transportation or communication in interstate commerce, or by the use of the means or instrumentalities of interstate commerce, or of the mails, has:

A. employed devices, schemes, and artifices to defraud;

B. made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

C. engaged in transactions, acts, practices and courses of business which operate, operated or would operate as a fraud or deceit upon any persons.

51. In furtherance of this fraudulent conduct:

A. Ferber failed to adequately disclose to the MWRA, the District and the USPS the June 1990 Contract and the facts and circumstances of the Florida Transaction;

B. Ferber made materially false and misleading statements to the MWRA by representing, while the June 1990 Contract was in place, that no potential conflicts of

interest existed with respect to his financial advisory services.

52. By reason of the foregoing, since at least December 1988 through January 1993, Ferber violated and, unless enjoined, will continue to violate, Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

SECOND CLAIM

VIOLATION OF SECTION 15B(c)(1) OF THE EXCHANGE ACT [15 U.S.C. § 78o-4(c)(1)] AND MSRB RULE G-17

53. The Commission realleges and incorporates by reference, each and every allegation contained in paragraphs 1 through 48.

54. Since at least December 1988 through January 1993 Ferber, directly and indirectly, in the conduct of Lazard's municipal securities business, has dealt unfairly with persons and has engaged in deceptive, dishonest, or unfair practices, in violation of MSRB rule G-17, by failing to adequately disclose to the MWRA and the District the June 1990 Contract and the facts and circumstances of the Florida Transaction, and by making materially false and misleading statements to the MWRA by representing, while the June 1990 Contract was in place, that no potential conflicts of interest existed with respect to his financial advisory services.

55. Since at least December 1988 through January 1993, Ferber has made use of the mails or means or instrumentalities of interstate commerce to effect transactions in, or to induce or

attempt to induce the purchase or sale of, municipal securities in contravention of MSRB rule G-17 as set forth above.

56. By reason of and in addition to the foregoing, since at least December 1988 through January 1993, Ferber, directly and indirectly, has violated and, unless enjoined, will continue to violate, Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)].

RELIEF SOUGHT

WHEREFORE plaintiff Commission respectfully requests a Final Judgment:

A. Permanently enjoining Ferber, his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from future violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5].

B. Permanently enjoining Ferber, his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from future violations of Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)] and MSRB rule G-17.

C. Directing Ferber to disgorge the sum of $553,000, which represents the amount by which he was unjustly enriched as a consequence of the foregoing violations, plus prejudgment

interest thereon, pursuant to Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)].

D. Granting such other and further relief as the Court shall deem just and proper.

Respectfully submitted,

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