

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

David Lerner Associates, Inc., (Claimant) vs. Bruce D. Brown and Prudential Securities Incorporated, (Respondents)

Case Number: 00-05138

Hearing Site: New York, New York

REPRESENTATION OF PARTIES

Claimant David Lerner Associates, Inc., hereinafter referred to as "Claimant": Michael G. Shannon, Esq., Brown Raysman Millstein Felder & Steiner LLP, New York, NY. (Mr. Shannon was with the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber LLP, New York, NY, when he first appeared on behalf of Claimant.) Previously represented by: Ruthann G. Niosi, Esq., Law Offices of Ruthann G. Niosi, Esq. P.C., New York, NY.

Respondents Bruce D. Brown ("Brown") and Prudential Securities Incorporated ("PSI"), hereinafter collectively referred to as "Respondents": Leonard Weintraub, Esq., Paduano & Weintraub LLP, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: November 21, 2000.
Amended Statement of Claim filed on or about: May 24, 2002.
Reply to Counterclaim filed by Claimant on or about: February 2, 2001.
Claimant signed the Uniform Submission Agreement: December 4, 2000.

Statement of Answer and Counterclaim filed by Brown on or about: January 16, 2001.
Brown signed the Uniform Submission Agreement: January 12, 2001.

Statement of Answer filed by PSI on or about: June 13, 2002.
PSI submitted a signed Uniform Submission Agreement.

CASE SUMMARY

Claimant asserted the following causes of action: breach of contract; violations of the NASD Rules of Fair Practice; breach of fiduciary duty; tortious interference with contract and business relationships; misappropriation of trade secrets; breach of duty of loyalty to employer and to investor; and unfair competition.

Unless specifically admitted in his Answer, Brown denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief can be granted; the Statement of Claim is barred in whole or in part because Claimant has sustained no injury arising from the conduct alleged; the Statement

of Claim is barred in whole or in part because any and all losses sustained by Claimant were due to its actions, omissions, or negligence; Claimant has failed to mitigate any damages it may have suffered; Claimant is precluded from any recovery because it has breached the purported agreement entered into by Brown; Claimant is precluded from any recovery because it is with unclean hands; Claimant is precluded from any recovery because the purported agreements are void and unenforceable; Claimant is precluded from any recovery because the damages it seeks are necessarily speculative and not recoverable under the law; and Claimant is precluded from seeking any of the equitable relief it demands because of the superior and intervening rights of the investors served by Brown.

In his Counterclaim, Brown asserted the following causes of action: malicious prosecution; defamation; tortious interference with client relations; and unfair competition.

Unless specifically admitted in its Reply, Claimant denied the allegations made in the Counterclaim and asserted the following defenses: Claimant has no knowledge of any broker defaming Claimant in any conversations with clients; a cause of action does not lie for malicious prosecution; Claimant's conduct is in accordance with a State Court Order and an NASD Order; and Brown is intentionally mis-reading the document he submits as a purported "exemption agreement."

Unless specifically admitted in its Answer, PSI denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief can be granted; the Statement of Claim is barred in whole or in part because Claimant has sustained no injury arising from the conduct alleged; the Statement of Claim is barred in whole or in part because any and all losses sustained by Claimant were due to its own actions, omissions, or negligence; Claimant has failed to mitigate any damages it may have suffered; Claimant is precluded from any recovery because it has unclean hands; Claimant is precluded from any recovery because any purported agreements are void and unenforceable; Claimant is precluded from any recovery because the relief it demands would violate NASD Uniform Practice Rule 11870 and NYSE Rule 412; Claimant is precluded from any recovery because the damages it seeks are necessarily speculative and not recoverable under the law; the Statement of Claim is barred in whole or in part because of the superior and intervening rights of the investors served by Brown; and the Statement of Claim is barred in whole or in part because of PSI's right and privilege to engage in the conduct it did as a competitor of Claimant.

RELIEF REQUESTED

Claimant requested that it be awarded compensatory damages including, but not limited to, Claimant's lost profits, disgorgement of all revenues and profits unjustly received by Brown and PSI from Claimant's customers; disgorgement of Brown's \$1,125,000.00 upfront bonus, punitive damages against both Respondents due to their deliberate and wrongful conduct; attorneys' fees, all costs and disbursements incurred in these proceedings, and such other and further monetary and injunctive relief as is just and proper.

In his Answer, Brown requested an Injunctive Order:

- a. Requiring Claimant to comply with Section 11870 of the NASD Uniform Practice Code and NYSE Rule 412;
- b. Requiring Claimant to effect transfers of accounts in compliance with client instructions within three business days and otherwise pursuant to the rules and regulations of the National Securities Clearing Corporation;
- c. Enjoining Claimant not to interfere with the rights of Brown's clients to receive advice and services from him;
- d. Requiring Claimant to refrain from misleading Brown's clients concerning his whereabouts and current affiliation;
- e. Requiring Claimant to refrain from misleading Brown's clients concerning the circumstances of, and reasons for, his change of employment;
- f. Requiring Claimant to refrain from misleading Brown's clients concerning his ability to continue to serve as their financial advisor or their right to have their accounts transferred;
- g. Requiring Claimant to refrain from filing a form U-5 falsely indicating that Brown has engaged in wrongdoing in connection with his change of employment;
- h. Requiring Claimant to pay Brown all earned and unpaid compensation and/or benefits;
- i. Requiring Claimant to adhere to the provisions of Section 10106 of the NASD Code of Arbitration Procedure;
- j. Declaring that any account executive agreement signed by Brown is void and unenforceable; and
- k. Granting Brown such other and further relief as the Panel deems just and proper.

In his Counterclaim, Brown requested that the Panel:

- a. Declare that Brown is not liable to Claimant in law or in equity in any respect as a result of the termination of Brown's employment with Claimant, or regarding his employment with PSI;
- b. Declare that any account executive agreement signed by Brown for the benefit of Claimant is void and unenforceable;
- c. Declare that Claimant's policy manuals are unenforceable to the extent they are construed as contracts;
- d. Grant Brown compensatory and punitive damages for improperly obtaining a temporary restraining order prohibiting Brown from continuing to do business with his clients, and for failing to honor Brown's clients' requests to transfer their accounts to him; and
- e. Grant Brown such other and further relief as it deems just and proper.

In its Reply, Claimant requested that the Counterclaim be denied.

PSI requested that:

- a. The relief sought by Claimant in its Amended Statement of Claim be denied in

- its entirety;
- b. Any employment agreement signed by Brown for the benefit of Claimant be declared void and unenforceable; and
 - c. The Panel grant PSI such other and further relief as it deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to Rule 10335(d) of the NASD Code of Arbitration Procedure, on or about December 13, 2000, injunctive arbitrator John O'Neill, Esq., issued an Order which is attached as Exhibit 'A'.

By letter dated January 14, 2003, Claimant requested that the Panel strike Respondents' post-hearing brief. After reviewing all submissions, the Panel determined to deny this Motion.

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.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents PSI and Brown are jointly and severally liable for and shall pay to Claimant compensatory damages, including attorneys' fees, in the amount of \$515,256.96. The panel awarded attorneys' fees pursuant to the terms of Respondent Brown's employment contract.
2. Respondent Brown's counterclaims are denied in their entirety.
3. All other requests for relief are denied in their entirety.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 2,000.00
Counterclaim filing fee	= \$ 250.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the

dispute. In this matter, David Lerner Associates, Inc. and Prudential Securities Incorporated are parties.

David Lerner Associates, Inc.

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00

Prudential Securities Incorporated

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00

Adjournment Fees

Adjournments requested during these proceedings:

Oct. 3, 2002, adjournment by Claimant	= \$ 1,200.00
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Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Seven (7) Pre-hearing sessions with a single arbitrator x \$450.00	= \$ 3,150.00
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Pre-hearing conferences:	December 8, 2000	1 session
	April 6, 2001	1 session
	April 10, 2001	1 session
	April 16, 2001	1 session
	May 2, 2002	1 session
	October 3, 2002	1 session
	October 29, 2002	1 session

One (1) Pre-hearing session with Panel x \$1,200.00	= \$ 1,200.00
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Pre-hearing conference:	January 24, 2001	1 session
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Twenty-three (23) Hearing sessions x \$1,200.00	= \$27,600.00
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Hearing Dates:	May 6, 2002	2 sessions
	May 7, 2002	2 sessions
	August 6, 2002	2 sessions
	August 7, 2002	2 sessions
	August 12, 2002	2 sessions
	August 13, 2002	2 sessions
	September 27, 2002	2 sessions
	October 9, 2002	2 sessions

October 10, 2002	1 session
October 30, 2002	2 sessions
January 6, 2003	2 sessions
January 13, 2003	2 sessions
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Total Forum Fees	= \$31,950.00

- The Panel has assessed \$15,975.00 of the forum fees against Claimant.
2. The Panel has assessed \$15,975.00 of the forum fees jointly and severally against Respondents PSI and Brown.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. PSI requested copies \$5.25.

Injunctive Relief Fees

Injunctive Filing Fee = \$ 2,500.00

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 2,000.00
Member Fees	= \$ 7,600.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$15,975.00
<u>Injunctive Relief Fee</u>	<u>= \$ 2,500.00</u>
Total Fees	= \$29,275.00
<u>Less payments</u>	<u>= \$ 7,800.00</u>
Balance Due NASD Dispute Resolution	= \$21,475.00

2. PSI is solely liable for:

Member Fees	= \$ 7,600.00
<u>Administrative Costs</u>	<u>= \$ 5.25</u>
Total Fees	= \$ 7,605.25
<u>Less payments</u>	<u>= \$ 3,800.00</u>
Balance Due NASD Dispute Resolution	= \$ 3,805.25

3. Brown is solely liable for:

Counterclaim Filing Fee	= \$ 250.00
<u>Total Fees</u>	<u>= \$ 250.00</u>

<u>Less payments</u>	= \$	<u>0.00</u>
Balance Due NASD Dispute Resolution	= \$	250.00

4. Respondents are jointly and severally liable for:

<u>Forum Fees Type</u>	= \$	<u>15,975.00</u>
Balance Due NASD Dispute Resolution	= \$	15,975.00

All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

Exhibit 'A'

NASD DISPUTE RESOLUTION, INC.

DAVID LERNER ASSOCIATES, INC.,

Claimant,

- and -

BROUCE BROWN and PRUDENTIAL SECURITIES
INCORPORATED,

Respondents.

ORDER

NASD FILE NO. 00-05138

On December 8, 2000 at three o'clock in the afternoon, a telephonic hearing before me as sole arbitrator appointed pursuant to NASD Rule 10335(A) was conducted pursuant to NASD Rule 10335(D). Claimant was represented by Law Offices of Ruthann G. Niosi, Esq., P.C., Ruthann G. Niosi of counsel and both Respondents were represented by Paduano & Waintraub LLP, Anthony Paduano of counsel.

All parties confirmed their acceptance of the composition of the panel.

Briefly stated, Respondent Brown joined Claimant ("DLA") as a financial consultant trainee at its Lake Success, Long Island office in January 1986 and resigned from its Shelton, Connecticut office on November 17, 2000. At or about the time he joined DLA, Brown signed an employment agreement containing non-compete and non-solicitation restrictions of time (one year) and distance (50 miles from the office of his employment) in the event of his voluntary termination. It also declared all records, including any copies or extracts thereof, were the exclusive possession of DLA, including names and addresses of its clients, and contained a confidentiality provision preventing their disclosure to any third parties. It also declared, in the event of a voluntary termination, the signing Employee would be liable in damages, including attorney's fees, to DLA, to the extent possible, and to insure the maintenance of the status quo pending an arbitration panel's determination of the extent of those damages, the signor consented to the imposition of a preliminary injunction to prevent a breach, or continuing breach, of any of the provisions of the contract. In reliance on the contract, DLA obtained a Temporary Restraining Order (the Order) on November 27, 2000. That order was later amended on December 4, 2000. Though it is not part of the record, it has been represented by counsel that, by stipulation of counsel and with the consent of the court, the entire matter was then referred to the NASD for

further proceedings.

Though Rule 10335 does not expressly permit a party to seek both judicial and arbitral injunctive relief, I consider the extant application as a petition to amend, modify and extend an existing, permissible order. As such, the Order is amended, modified and extended as follows:

1. Prudential Securities Incorporated (Pru), as a party to this application and arbitration, is added as a party Respondent to the Order;

2. The Order is extended until a final determination on the matter is rendered by a three member panel or until one year following the termination of Brown's employment at DLA, whichever is sooner;

3. Though not stated in the application, the matter is granted expedited treatment pursuant to NASD Rule 10335(F);

4. Respondents are directed to return to Claimant all records removed from DLA, including all copies and extracts thereof, and to purge or destroy any indications of their existence that can not be returned to DLA within seventy-two (72) hours following receipt of this Order. Receipt by counsel is to be construed as receipt by a party;

5. Respondents, individually and jointly, are to refrain from soliciting any clients of DLA previously serviced by Brown who reside within 50 miles of the DLA Shelton, Connecticut office;

6. To the extent any clients of DLA referred to in No. 5 have already been solicited by Brown and/or Pru and have opened or do open accounts with Pru, the Respondents are directed to account for, and maintain a separate record identifying, all fees, commissions, mark-ups, interest and other income generated by said accounts for one year following Brown's termination from DLA or a final determination is rendered by a full panel, whichever is sooner. Said accounting is to be presented to the panel as directed by its Chair;

7. DLA, and anyone acting in concert with it or on its behalf, including its employees, is restrained from making any misleading or erroneous statements concerning Brown to clients whose accounts Brown serviced at DLA;

8. DLA is directed to promptly comply with the provisions of NASD Rule 11870 and NYSE Rule 412; and

9. In all other respects the Order is adopted and is to remain in effect until vacated by the full panel, or until otherwise terminated.

Dated: December 13, 2000
Garden City, New York

SO ORDERED

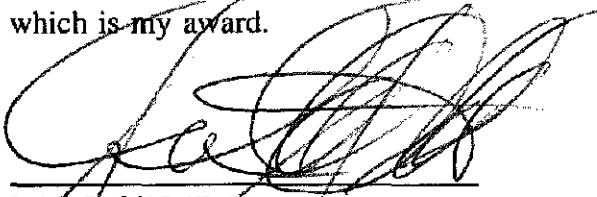

JOHN J. O'NEILL, ESQ.

ARBITRATION PANEL

John J. O'Neill, Esq.	-	Public Arbitrator, Presiding Chair
Gloria Messinger, Esq.	-	Public Arbitrator
Eva H. Posman, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



John J. O'Neill, Esq.
Public Arbitrator, Presiding Chair

2/12/03

Signature Date

Gloria Messinger, Esq.
Public Arbitrator

Signature Date

Eva H. Posman, Esq.
Non-Public Arbitrator

Signature Date

February 12, 2003
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL


John J. O'Neill, Esq.	-	Public Arbitrator, Presiding Chair
Gloria Messinger, Esq.	-	Public Arbitrator
Eva H. Posman, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

John J. O'Neill, Esq.
Public Arbitrator, Presiding Chair

Signature Date



Gloria Messinger, Esq.
Public Arbitrator

February 12, 2003

Signature Date

Eva H. Posman, Esq.
Non-Public Arbitrator

Signature Date

February 12, 2003

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

John J. O'Neill, Esq.	-	Public Arbitrator, Presiding Chair
Gloria Messinger, Esq.	-	Public Arbitrator
Eva H. Posman, Esq.	-	Non-Public Arbitrator

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I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

John J. O'Neill, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Gloria Messinger, Esq.
Public Arbitrator

Signature Date



Eva H. Posman, Esq.
Non-Public Arbitrator

2/12/03
Signature Date

February 12, 2003
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