

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Name of the Claimant
Bates Securities, Inc.

Case Number: 01-00240

Name of the Respondents
First Union Securities, Inc. and Douglas E. Loner

Hearing Site: Chicago, Illinois

REPRESENTATION OF PARTIES

Claimant Bates Securities, Inc. ("Bates"): David A. Genelly, Esq. of the firm Vanasco Genelly & Miller located in Chicago, Illinois.

Respondents First Union Securities, Inc. ("First Union") and Douglas E. Loner ("Loner"), hereinafter collectively referred to as "Respondents": Konstantinos Armiros, Esq. of the firm Levenfeld Pearlstein located in Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on or about: January 17, 2001.

Amended Statement of Claim filed on or about: March 01, 2001.

Claimant Bates Securities signed the Uniform Submission Agreement: January 16, 2001.

Joint Statement of Answer to Amended Statement of Claim filed by Respondents on or about: May 02, 2001.

Respondent First Union signed the Uniform Submission Agreement: May 02, 2001.

Claimant's Trial Brief filed on or about: February 25, 2002.

Respondents' Trial Brief filed on or about: February 25, 2002.

CASE SUMMARY

This case is about unfair competition, breach of fiduciary duty, tortuous interference, subterfuge and deceit. It is about the taking and use of confidential, encrypted business information by a former manager, Douglas Loner. Loner, prompted and encouraged by his new employer, First Union, used the information, all of which was by his own admission confidential, to convert a customer base of business his former employer Bates had taken years to develop. For its part, First Union conspired with Loner and encouraged his activity, indeed prompted it by providing a signing bonus which was based in large part on what dollar value of Bates' business Loner could convert to First Union.

Loner's activities featured a pattern of deceit: lying to employees to obtain confidential information, at one point, the night before he left Bates' employment taking 21 boxes of information from Bates' office under cover of night. Bates was damaged by these actions in excess of 1 million dollars by this willful behavior. In addition to compensatory damages Bates should receive attorney's fees and double damages or punitive damages.

Claimant alleged the following causes of action:

- First Union's Tortious Interference with Bates' Contract with Loner.
- Unfair Competition.
- Conversion by Loner and First Union.
- Breach of Fiduciary Duty of Loyalty against Loner.
- Tortious Interference with Business Expectancies and Client Relationships against Loner and First Union.
- Misappropriation of Corporate Property against Loner and First Union.
- Violation of the Illinois Trade Secrets Act against Loner and First Union.
- Violation of Non-Solicitation Agreement against Loner.

Unless specifically admitted in its Answer, Respondent First Union denied the allegations made in the Statement of Claim and asserted the following defenses:

- Violation of the parole evidence rule
- The entire agreement between Bates and Loner is merged into the Agreements attached to the Amended Statement of Claim.
- The so-called Employment Agreement sought to be enforced by Bates, did not contain post-term restrictions regarding competition.
- The "agreement" that Claimant is seeking to enforce is an agreement that violates public policy as an improper restraint of trade, and is thus void and unenforceable.
- With respect to the "agreement" that Bates seeks to enforce, it contains no limitations as to time or geographic scope and thus is unenforceable.
- The information alleged by Bates to be of proprietary nature is readily ascertainable by public and third party sources, and this is not proprietary or confidential.
- The matters asserted by Bates are unenforceable, as they violate the Statute of Frauds, as it is impossible for the "handshake" deal that Bates asserts existed to have been performed in one year.
- The post-termination actions of competition exhibited by Loner and First Union are privileged actions.
- All causes of action based upon the alleged misappropriation or misuse of confidential information is preempted by the Illinois Trade Secrets Act, and, therefore, any claims alleging misappropriation or misuse of confidential information must be brought only under this statute.
- The facts alleged by Bates do not demonstrate that there is a breach of contract.
- There is no cause of action for conversion of intangible property under Illinois law.
- Bates' relationship with Loner was an "at will" relationship and could be terminated at any time.

- Bates' relationship with the alleged customers in questions was "at will" and could be terminated at any time; consequently, there was no reasonable expectancy that it would continue. There can be no tortious interference.

RELIEF REQUESTED

Claimant Bates Securities requested:

Compensatory Damages:

- Actual and projected lost business from clients wrongfully taken.

Punitive Damages:

- To be set by the arbitrators.

Attorneys' Fees:

- To be set at hearing.

Costs:

- Not specified.

Other Monetary/Non-Monetary Relief if any:

- Permanent injunction against Respondents preventing them from soliciting clients of Bates which originated from NIU with G. Bates for a reasonable period to be set by the arbitrators.

Respondents requested:

Other Monetary/Non-Monetary Relief if any:

- Dismissal of all claims.

OTHER ISSUES CONSIDERED AND DECIDED

At the end of Claimant's case Respondents orally motioned to dismiss Claimant's claims for failure to state a cause of action. The panel denied Respondents' motion.

The panel has determined that NASD will retain a copy of all exhibits submitted at hearing for its records. NASD will retain the records as long as necessary.

Respondent Douglas E. Loner did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the 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 originals remain on file with the NASD.

AWARD

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

1. The panel finds in favor of Claimant on the Breach of Fiduciary Duty of Loyalty against Douglas E. Loner.
2. Additionally, the Panel finds in favor of Claimant on the Tortious Interference with Business Expectancies and Client Relationships against Douglas E. Loner and First Union Securities.
3. Moreover, the Panel finds in favor of Claimant on the Violation of the Illinois Trade Secrets Act against Douglas E. Loner and First Union Securities, Inc.
4. First Union Securities, Inc. and Douglas E. Loner are jointly and severally liable for and shall pay to Bates Securities, Inc. the sum of \$200,000.00 as compensatory damages.
5. In addition, First Union Securities, Inc. and Douglas E. Loner are jointly and severally liable for and shall pay to Bates Securities, Inc. the sum of \$108,063.75 as attorney's fees. After review of the parties' submissions and arguments, the Panel finds authority to grant attorney's fees.
6. Furthermore, First Union Securities, Inc. and Douglas E. Loner are jointly and severally liable for and shall pay to Bates Securities, Inc. the sum of \$5,911.41 as costs. After review of the parties' submissions and arguments, the Panel finds authority to grant costs.
7. The Panel additionally orders that any customer files, folders or documents in Respondents First Union Securities, Inc. and Douglas E. Loner's possession shall be turned over to Claimant Bates Securities, Inc. and any copies or reproductions of any customer files, folders or documents taken by Respondent Loner which relate to customers who did not follow Respondent Loner to First Union Securities, Inc. shall be destroyed or turned over to Bates Securities, Inc. within 30 days of service of this award.
8. Parties shall bear their own costs, except as specified herein.
9. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. First Union Securities, Inc. and Bates Securities are parties.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
<u>Hearing process fee</u>	<u>= \$2,000.00</u>
Total	= \$3,800.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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:

One (1) Pre-hearing session with a single arbitrator at \$450.00 = \$ 450.00

Pre-hearing conference: March 08, 2002 1 session

Two (2) Pre-hearing session with Panel at \$1,000.00 = \$ 2,000.00

Pre-hearing conferences: November 12, 2001 1 session

June 07, 2002 1 session

Twenty (20) Hearing sessions at \$1,000.00 = \$20,000.00

Hearing Dates: September 24, 2002 2 sessions

September 25, 2002 2 sessions

September 26, 2002 2 sessions

October 08, 2002 2 sessions

October 09, 2002 2 sessions

November 05, 2002 2 sessions

November 06, 2002 2 sessions

November 07, 2002 2 sessions

November 26, 2002 2 sessions

November 27, 2002 2 sessions

Total Forum Fees = \$22,450.00

1. The Panel has assessed \$11,225.00 of the forum fees to Bates Securities, Inc..
2. The Panel has assessed \$11,225.00 of the forum fees jointly and severally to First Union Securities, Inc. and Douglas E. Loner.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

First Union Securities, Inc. and Douglas E. Loner requested tapes = \$90.00

FEE SUMMARY

1. Claimant Bates Securities, Inc. is solely liable for:

Initial Filing Fee = \$ 500.00

Member Fees = \$ 3,800.00

Forum Fees = \$11,225.00

Total Fees = \$15,525.00

Less payments = \$ 3,300.00

Balance Due NASD Dispute Resolution, Inc. = \$12,225.00

2. Respondent First Union Securities, Inc. is solely liable for:
- | | |
|---|----------------------|
| Member Fees | = \$ 3,800.00 |
| <u>Less payments</u> | <u>= \$ 2,600.00</u> |
| Balance Due NASD Dispute Resolution, Inc. | = \$ 1,200.00 |
3. Respondents First Union Securities, Inc. and Douglas E. Loner, are jointly and severally liable for:
- | | |
|---|----------------------|
| Administrative Costs | = \$ 90.00 |
| <u>Forum Fees</u> | <u>= \$11,225.00</u> |
| Balance Due NASD Dispute Resolution, Inc. | = \$11,315.00 |

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

ARBITRATION PANEL

Allen D. Schwartz, Esq.	-	Public Arbitrator, Presiding Chairperson
Sheila Reilly, Esq.	-	Public Arbitrator
Phillip M. Petraitis	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ Allen D. Schwartz

12/23/02

Allen D. Schwartz, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

/s/ Sheila Reilly

12/23/02

Sheila Reilly, Esq.
Public Arbitrator

Signature Date

/s/ Phillip M. Petraitis

12/24/02

Phillip M. Petraitis
Non-Public Arbitrator

Signature Date

12/24/02

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution, Inc.

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2. Respondent First Union Securities, Inc. is solely liable for:
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Phillip M. Petraitis	-	Non-Public Arbitrator

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Allen D. Schwartz
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Public Arbitrator, Presiding Chairperson

12/23/02
Signature Date

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Public Arbitrator

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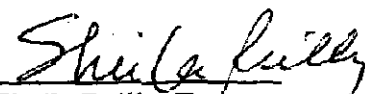
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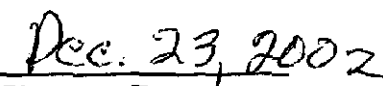
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Public Arbitrator, Presiding Chairperson

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Public Arbitrator



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