

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Steven Marcus, (Claimants) vs. Bear Stearns & Co., Inc. and Samuel Masucci, (Respondents)

Case Number: 01-00371

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Steven Marcus, hereinafter referred to as "Claimant": Scott S. Balber, Esq., Kelly & Balber LLP, New York, NY.

Respondent, Bear Stearns & Co., Inc. ("Bear"): Arthur D. Felsenfeld, Esq., Andrews & Kurth L.L.P., New York, NY.

Respondent, Samuel Masucci ("Masucci"): David S. Smith, Esq., Smith Campbell, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: January 22, 2001.

Claimant signed the Uniform Submission Agreement: January 18, 2001.

Statement of Answer filed by Bear on or about: April 19, 2001.

Bear signed the Uniform Submission Agreement: March 15, 2001.

Statement of Answer filed by Masucci on or about: April 20, 2001.

Masucci signed the Uniform Submission Agreement: November 13, 2001.

**CASE SUMMARY**

Claimant asserted the following causes of action: deprivation of Claimant's rights to the property and proceeds of a joint venture formed between Claimant and Masucci; breach of fiduciary duty; breach of express contract; breach of implied-in law contract; breach of the duty of good faith and fair dealing; misappropriation of trade secrets; unfair competition; unjust enrichment; common law fraud; promissory estoppel; aiding and abetting common law fraud; and tortious interference with contract.

Unless specifically admitted in its Answer, Bear denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a cause of action as against Bear; Bear had no knowledge of the existence of any fiduciary relationship between Claimant and Masucci; no enforceable contract existed between Claimant and Masucci with which Bear could have tortiously interfered; the tortious interference with contract claim is barred by the Statute of Frauds; the claim of misappropriation of trade secrets must fail because any information obtained by Bear did not constitute a trade secret owned by Claimant; Claimant cannot prevail on his unfair competition claim because Claimant and Bear were not business competitors; Claimant cannot prevail on his unfair competition claim because there was no use by Bear of material which was the exclusive property of Claimant; the claim of unjust enrichment is barred by reason of the existence of an enforceable contract between Masucci and Bear concerning the same subject matter; Bear lacked knowledge of any fraud against Claimant; the Statement of Claim fails to allege with specificity the facts constituting fraud on the part of Bear; and any recovery by Claimant is barred by his failure to mitigate damages.

Unless specifically admitted in his Answer, Masucci denied the allegations made in the Statement of Claim and asserted the following defenses: the allegation that Masucci and Bear misappropriated trade secrets focuses on a handful of outdated documents that never amounted to trade secrets in the first place; the unfair competition claim is frivolous because Claimant is not a competitor of either Masucci or Bear; there was never any joint venture between Claimant and Masucci, in law or in fact; Claimant will not be able to carry his burden of proof that the improbable joint venture ever existed, much less that it was legally enforceable; Claimant's claims are unenforceable under the Statute of Frauds; Claimant's allegations are factually and legally flawed on several levels; and neither Respondent has been unjustly enriched as a result of access to the materials that Claimant refers to as trade secrets.

### **RELIEF REQUESTED**

Claimant requested judgement as follows:

- a. Directing Masucci and Bear to pay Claimant his actual damages (including direct and consequential damages) in an amount to be determined at the hearing;
- b. Directing Masucci and Bear to pay punitive damages to Claimant;
- c. Directing Masucci and Bear to provide Claimant with access to their books and records relevant to the joint venture at issue;
- d. Imposing a constructive trust over all property of and gross revenues generated by the joint venture at issue;
- e. Awarding Claimant pre- and post-judgement interest at the highest rate allowed by law;
- f. Awarding Claimant his costs and disbursements incurred in the prosecution of this action, including reasonable attorneys' fees and experts' fees; and
- g. Granting Claimant such other and further relief as the Panel may deem just and proper.

Bear requested that this claim be dismissed in all respects, that Bear be awarded its costs and disbursements in defense of this proceeding, including attorneys' fees, and that forum fees be charged to Claimant in their entirety.

Masucci requested that this claim be dismissed in its entirety, and that the Panel issue an Award directing Claimant to pay Masucci's reasonable costs and attorneys' fees, including all forum costs.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Masucci did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

Bear and Masucci each moved to dismiss this claim at the close of Claimant's case. The Panel denied both motions.

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Bear and Masucci be and hereby are jointly and severally liable for and shall pay to Claimant the sum of \$276,000.00 as compensatory damages, plus interest at the rate of 5% accruing from November 27, 2001 until paid.
2. Claimant's request for punitive damages is hereby denied.
3. All other requests for relief are hereby 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	= \$ 250.00
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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. In this matter, Bear Stearns & Co., Inc. is a party.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,000.00

### 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:

One (1) Pre-hearing session with Panel x \$1,000.00	= \$1,000.00
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Pre-hearing conference:	August 13, 2001	1 session
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Seven (7) Hearing sessions x \$1,000.00	= \$7,000.00
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Hearing Dates:	November 13, 2001	2 sessions
	November 14, 2001	2 sessions
	November 15, 2001	2 sessions
	November 26, 2001	1 session

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Total Forum Fees	= \$8,000.00
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1. The Panel has assessed \$2,666.67 of the forum fees against Claimant.
2. The Panel has assessed \$2,666.67 of the forum fees against Bear.
3. The Panel has assessed \$2,666.67 of the forum fees against Masucci.

### 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. Masucci, requested tapes, \$120.00.

Fee Summary

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 250.00
Forum Fees	= \$2,666.67
Total Fees	= \$2,916.67
<u>Less payments</u>	<u>= \$1,250.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$1,666.67

2. Bear be and hereby is solely liable for:

Member Fees	= \$3,800.00
Forum Fees	= \$2,666.67
Total Fees	= \$6,466.67
<u>Less payments</u>	<u>= \$3,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$2,666.67

3. Masucci be and hereby is solely liable for:

Forum Fees	= \$2,666.67
<u>Administrative Costs</u>	<u>= \$ 120.00</u>
Total Fees	= \$2,786.67
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$2,786.67

All balances are due and payable to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Daniel A. Dolan, Esq.	-	Industry Arbitrator, Presiding Chair
Benjamin D. Krause, Esq.	-	Public Arbitrator
Eugene G.P. Byrne, Esq.	-	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.

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Daniel A. Dolan, Esq.  
Industry Arbitrator, Presiding Chair

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Signature Date

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Benjamin D. Krause, Esq.  
Public Arbitrator

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Signature Date



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Eugene G.P. Byrne, Esq.  
Public Arbitrator



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Signature Date

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December 19, 2001  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

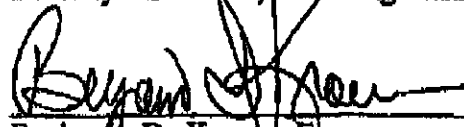
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