

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

First Union Securities, Inc., (Claimant) vs. James D. Becker, (Respondent)

Case Number: 01-03205

Hearing Site: Boston, Massachusetts

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**REPRESENTATION OF PARTIES**

Claimant, First Union Securities, Inc., hereinafter referred to as "Claimant": Ronald Kane, Esq. and Diane C. Fischer, Esq., Kane & Fischer, Ltd., Chicago, IL. Previously represented by: Renan I. Sugarman, Esq., Senior Vice President and Assistant General Counsel, First Union Securities, Inc., Chicago, IL.

Respondent, James D. Becker, hereinafter referred to as "Respondent": Louis M. Ciavara, Esq., Bowditch & Dewey, LLP, Worcester, MA. Previously represented by: Stephen S. Churchill, Esq., Conn Kavanaugh Rosenthal Peisch & Ford, Boston, MA.

**CASE INFORMATION**

Statement of Claim filed on or about: June 15, 2001.

Reply to Counterclaim filed on or about: September 28, 2001.

Claimant signed the Uniform Submission Agreement: June 15, 2001.

Statement of Answer and Counterclaim filed by Respondent on or about: August 14, 2001.

Respondent signed the Uniform Submission Agreement: August 13, 2002.

**CASE SUMMARY**

Claimant asserted the following cause of action: breach of promissory notes.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant has no legal right or standing to seek enforcement of the May 27, 1998 note and agreement, because the note and agreement were not assignable; Claimant constructively discharged Respondent without cause, so Respondent was entitled to forgiveness of the remaining unforgiven portion of the July 31, 2000 note; Neither the May 27, 1998 note nor the July 31, 2000 note are enforceable, because they constitute unreasonable restraints on competition; Neither the May 27, 1998 note nor the July 31, 2000 note are enforceable, because they include terms that are illegal or violate public policy; Neither the May 27, 1998 note nor the July 31, 2000 note are enforceable, based on Claimant's breach of contract; and Neither the May 27, 1998 note nor the July 31,

2000 note are enforceable, based on Claimant's fraudulent or negligent misrepresentations.

In his Counterclaim, Respondent asserted the following causes of action: misrepresentation/fraud; and breach of contract.

Unless specifically admitted in its Reply, Claimant denied the allegations made in the Counterclaim and asserted the following defenses: The notes entered into by Respondent are enforceable and Respondent's payment obligations pursuant to the notes should be enforced; Claimant is the proper party to enforce note 1 and has the legal right to enforce the note pursuant to its terms; Respondent voluntarily resigned his employment; Respondent's claim for misrepresentation/fraud must be dismissed for failure to allege the required elements for the claim and Respondent will be unable to prove the necessary elements at the hearing in this matter; and Respondent's claim for breach of contract must be dismissed because Respondent has failed to establish the existence of a contract.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages in the sum of \$641,943.00, plus accrued interest in the sum of \$34,023.42, and interest on the balances due and owing under the notes from date of default to date of payment. Claimant further requested costs of collection, fees of the NASD and attorneys' fees as agreed to under the terms of the notes. Finally, Claimant requested any other relief as the Panel deem just and equitable.

Respondent requested Claimant's requests for relief be denied and that he be awarded his costs, attorneys' fees and such other relief as is just and equitable. In his Counterclaim, Respondent requested he be awarded damages based on claimant's misrepresentation/fraud and breach of contract.

In its Reply, Claimant requested Respondent's claims be dismissed and that Claimant be awarded the full amount of it's claim, including attorneys' fees and costs incurred in defending respondent's claims.

#### **OTHER ISSUES CONSIDERED AND 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.

### **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. Respondent is liable for and shall pay to Claimant the sum of \$482,000.00 as compensatory damages.
2. Respondent is liable for and shall pay to Claimant interest in the amount of \$43,000.00.
3. Respondent is liable for and shall pay to Claimant attorney's fees in the amount of \$32,000.00 under the terms of the contract and promissory notes.
4. Respondent's Counterclaim is denied in its entirety.
5. All other requests for relief are hereby denied.

### **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	= \$ 1,250.00
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 persons at the time of the events giving rise to the dispute. In this matter, First Union Securities, Inc., is a party.

Member surcharge	= \$ 2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 3,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

July 9, 10, 11 and 12, 2002, adjournment by Respondent = \$ 1,200.00

### **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 a single arbitrator x \$450.00 = \$ 450.00  
Pre-hearing conference: November 5, 2002 1 session

Three (3) Pre-hearing sessions with Panel x \$1,200.00 = \$ 3,600.00  
Pre-hearing conferences: November 26, 2001 1 session  
April 26, 2002 1 session  
July 16, 2002 1 session

Four (4) Hearing sessions x \$1,200.00 = \$ 4,800.00  
Hearing Dates: December 9, 2002 2 sessions  
December 10, 2002 2 sessions

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Total Forum Fees = \$ 8,850.00

1. The Panel has assessed \$4,425.00 of the forum fees against Claimant.
2. The Panel has assessed \$4,425.00 of the forum fees against Respondent.

### **Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 1,250.00
Member Fees	= \$ 6,100.00
Forum Fees	= \$ 4,425.00
Total Fees	= \$11,775.00
Less payments	= \$12,050.00
Refund Due Claimant	= \$ 275.00

2. Respondent is solely liable for:

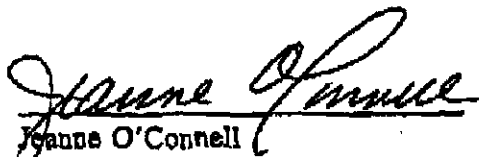
Counter claim Filing Fee	= \$ 250.00
Adjournment Fee	= \$ 1,200.00
Forum Fees	= \$ 4,425.00
Total Fees	= \$ 5,875.00
Less payments	= \$ 1,250.00
Balance Due NASD Dispute Resolution	= \$ 4,625.00

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

**ARBITRATION PANEL**

Jeanne O'Connell	-	Public Arbitrator, Presiding Chair
William I. Carmen, CPA	-	Public Arbitrator
William J. Driscoll	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
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Jeanne O'Connell  
Public Arbitrator, Presiding Chair

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Signature Date

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William I. Carmen, CPA  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
William J. Driscoll  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

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January 7, 2003  
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Jeanne O'Connell	-	Public Arbitrator, Presiding Chair
William I. Carmen, CPA	-	Public Arbitrator
William J. Driscoll	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


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Jeanne O'Connell  
Public Arbitrator, Presiding Chair

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Signature Date

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William I. Carmen, CPA  
Public Arbitrator

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*Dec. 30, 2002*  
Signature Date

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William J. Driscoll  
Non-Public Arbitrator

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Signature Date

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January 7, 2003  
Date of Service (For NASD Dispute Resolution use only)

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Jeanne O'Connell  
Public Arbitrator, Presiding Chair

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Signature Date

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William I. Carmen, CPA  
Public Arbitrator

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*Dec. 30, 2002*  
Signature Date

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William J. Driscoll  
Non-Public Arbitrator

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Signature Date

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January 7, 2003  
Date of Service (For NASD Dispute Resolution use only)