

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

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In the Matter of the Arbitration Between:

Lester N. Himel and Maxcor Financial Inc., (Claimants) vs. Creditex, Inc., (Respondent)

Case Number: 03-01296

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimants, Lester N. Himel ("Himel") and Maxcor Financial Inc. ("Maxcor"), hereinafter collectively referred to as "Claimants": Simon Miller, Esq., Greenberg Traurig, LLP, New York, NY.

Respondent, Creditex, Inc., hereinafter referred to as "Respondent": Robert P. Haney, Esq., Covington & Burling, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: February 21, 2003.

Himel signed the Uniform Submission Agreement: March 4, 2003.

Maxcor signed the Uniform Submission Agreement: March 4, 2003.

Statement of Answer and Counterclaim filed by Respondent on or about: March 7, 2003.

Respondent signed the Uniform Submission Agreement: March 3, 2003.

**CASE SUMMARY**

Claimants asserted the following cause of action: enforcement of unreasonable, overbroad, post-employment restraint provisions (the "Post At-Will Employment Restraints") contained in Himel's employment letter with Respondent.

Unless specifically admitted in its Answer, Respondent 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; Claimant's claims are barred by the employment and confidentiality agreements that Respondent and Himel entered into; Claimant's claims are barred by defenses based upon documentary evidence; Claimant's claims are barred in whole or in part by the doctrine of unclean hands and because Claimants are in pari delicto; and Claimants have failed to mitigate their damages.

In its Counterclaim, Respondent asserted the following causes of action: misappropriation of proprietary business information; breach of employment agreement; and unauthorized disclosures of highly sensitive and confidential business information.

**RELIEF REQUESTED**

Claimants requested that the Panel enter an Award:

- a. Preliminarily enjoining Respondent, directly or indirectly, from enforcing the Post At-Will Employment Restraints;
- b. Declaring that the Post At-Will Employment Restraints are unreasonable and unenforceable;
- c. Declaring that Himel has not breached any employment agreement with Respondent;
- d. Declaring that Maxcor has not violated any of Respondent's rights with respect to Himel, or otherwise;
- e. Declaring that Respondent is not entitled to preliminary or permanent injunctive relief, enjoining or otherwise restraining either Maxcor from employing Himel, or Himel from working on behalf of Maxcor in any manner;
- f. A preliminary and permanent injunction prohibiting Respondent from enforcing the Post At-Will Employment Restraints or any portion of any employment agreement between Himel and Respondent;
- g. Granting Claimants the costs and disbursements in this action; and
- h. Granting such other and further relief in favor of Claimants as is just and proper under the circumstances.

In its Answer and Counterclaim, Respondent requested:

- a. An injunction barring Claimants from using or disclosing Respondent's confidential and proprietary information;
- b. An order directing Himel to provide a full accounting listing all documents, computer files, and business information he has taken from Respondent, whether or not those documents, files, or information items are still in his possession;
- c. An injunction directing Claimants to immediately return all confidential or proprietary information of Respondent that is in their possession;
- d. An injunction barring Himel from soliciting Respondent's clients;
- e. An injunction barring Himel from working as a credit derivatives broker at Maxcor before July 24, 2003 (which will mark the end of the six month non-competition period under his employment agreement);

- f. Expedited discovery - including document discovery and inspection of all personal computers of Himel, and any computer hard drives and servers at Maxcor to which Himel has had any access - to enable Respondent to determine the full extent of Himel's misuse and improper disclosure of the company's confidential and proprietary information;
- g. An award of costs and disbursements (including attorneys' fees) to Respondent;
- h. An order directing Claimants to disgorge and pay to Respondent any revenue that has been generated by Himel through his work at Maxcor in violation of his non-competition and non-solicitation obligations; and
- i. Such other and further relief as may be just and proper.

#### **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. Claimants' claims for relief are hereby denied except to declare that Maxcor has not violated any of Respondent's rights with respect to Himel, or otherwise.
2. Himel is hereby enjoined for a three month period to run from January 23, 2003 through April 23, 2003 from soliciting Respondent's credit derivative clients, in the area of credit derivatives transactions only, pursuant to the non-compete clause.
3. Claimants are hereby permanently enjoined from using or disclosing Respondent's confidential and proprietary information.
4. Himel is hereby ordered to provide a full accounting listing all documents, computer files, and business information he has taken from Respondent, whether or not those documents, files, or information items are still in his possession.
5. Claimants are hereby ordered to immediately return all confidential and proprietary information of Respondent that is in their possession.
6. 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	= \$ 500.00
Counterclaim filing fee	= \$ 500.00

#### **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, Maxcor Financial Inc. and Creditex, Inc. are parties.

#### **Maxcor Financial Inc.**

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

#### **Creditex, Inc.**

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

#### **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:

Two (2) Hearing sessions x \$1,000.00	= \$2,000.00
Hearing Date: March 10, 2003	2 sessions
Total Forum Fees	= \$2,000.00

The Panel has assessed all of the forum fees jointly and severally against Claimants.

**Injunctive Relief Fees**

Injunctive Filing Fee (Claimants)	= \$2,500.00
Injunctive Filing Fee (Respondent)	= \$2,500.00

Additional Honorarium	= \$ 625.00
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The Panel has assessed all of the Additional Honorarium jointly and severally against Claimants.

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Injunctive Fee	= \$2,500.00
Forum Fees	= \$2,000.00
<u>Additional Honorarium</u>	<u>= \$ 625.00</u>
Total Fees	= \$5,625.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$5,625.00

2. Maxcor is solely liable for:

<u>Member Fees</u>	<u>= \$4,450.00</u>
Total Fees	= \$4,450.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$4,450.00

3. Respondent is solely liable for:

Counterclaim Filing Fee	= \$ 500.00
Injunctive Fee	= \$2,500.00
<u>Member Fees</u>	<u>= \$4,450.00</u>
Total Fees	= \$7,450.00
<u>Less payments</u>	<u>= \$4,000.00</u>
Balance Due NASD Dispute Resolution	= \$3,450.00

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

**ARBITRATION PANEL**

Richard S. Peskin, Esq.	-	Non-Public Arbitrator, Presiding Chair
Joseph A. Vallo, Esq.	-	Non-Public Arbitrator
William A. Hohausser	-	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.



Richard S. Peskin, Esq.  
Non-Public Arbitrator, Presiding Chair

3/12/03  
Signature Date

\_\_\_\_\_  
Joseph A. Vallo, Esq.  
Non-Public Arbitrator

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

\_\_\_\_\_  
William A. Hohausser  
Non-Public Arbitrator

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

March 17, 2003

Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Richard S. Peskin, Esq.	-	Non-Public Arbitrator, Presiding Chair
Joseph A. Vallo, Esq.	-	Non-Public Arbitrator
William A. Hohausen	-	Non-Public Arbitrator

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Richard S. Peskin, Esq.  
Non-Public Arbitrator, Presiding Chair

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Signature Date

  
\_\_\_\_\_  
Joseph A. Vallo, Esq.  
Non-Public Arbitrator

March 12, 2003  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
William A. Hohausen  
Non-Public Arbitrator

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

March 17, 2003  
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Date of Service (For NASD Dispute Resolution use only)

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William A. Hohausen	-	Non-Public Arbitrator

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Non-Public Arbitrator, Presiding Chair

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Signature Date

\_\_\_\_\_  
Joseph A. Vallo, Esq.  
Non-Public Arbitrator

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

*William A. Hohausen*  
\_\_\_\_\_  
William A. Hohausen  
Non-Public Arbitrator

*3/12/03*  
\_\_\_\_\_  
Signature Date

March 17, 2003

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Date of Service (For NASD Dispute Resolution use only)