

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Baird, Patrick & Co., Inc. (Claimant) v. Maxcor Financial, Inc., P. Randolph Hill, Brian Lutz, John Drummond, and Peter Vance (Respondents)

Case Number: 03-07325

Hearing Site: New York City, New York

Nature of the Dispute: Member v. Member and Associated Persons

REPRESENTATION OF PARTIES

Claimant Baird, Patrick & Co., Inc. ("Baird") hereinafter referred to as "Claimant": Lawrence S. Leibowitz, Esq., Law Offices of Lawrence S. Leibowitz, New York, NY and Michael J. McAllister, Esq., Satterlee Stephens Burke & Burke LLP, New York, NY.

Respondents Maxcor Financial, Inc., ("Maxcor"), P. Randolph Hill ("Hill"), Brian Lutz ("Lutz"), John Drummond ("Drummond"), and Peter Vance ("Vance") hereinafter collectively referred to as "Respondents": Stephen F. Harmon, Esq., Troutman Sanders LLP, New York, NY and Elyse D. Kovar, Esq., Maxcor Financial, Inc., New York, NY. Previously represented by Stephen F. Harmon, Esq., Jenkins & Gilchrist Parker Chapin LLP, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: October 8, 2003.

Claimant signed the Uniform Submission Agreement: October 7, 2003.

Amended Statement of Claim filed on or about: September 23, 2004.

Joint Statement of Answer and Counterclaim filed by Respondents Maxcor, Hill, Lutz, Drummond, and Vance, on or about: December 19, 2003. The Counterclaim was filed on behalf of the individual Respondents.

Joint Statement of Answer to Amended Statement of Claim filed by Respondents Maxcor, Hill, Lutz, Drummond, and Vance, on or about: October 7, 2004.

Respondent Maxcor signed the Uniform Submission Agreement: December 16, 2003.

Respondent Hill signed the Uniform Submission Agreement: December 9, 2003.

Respondent Lutz signed the Uniform Submission Agreement: December 18 2003.

Respondent Drummond signed the Uniform Submission Agreement: December 14, 2003.

Respondent Vance signed the Uniform Submission Agreement: December 17, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: misappropriation of Baird's proprietary system, misappropriation of confidential customer information, misuse of subscription services, continuing costs to Baird and the individual respondents' unethical conduct.

Unless specifically admitted in their Answer, Respondents Maxcor, Hill, Lutz, Drummond, and Vance denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

In their counterclaim, the individual Respondents asserted the following causes of action: breach of contract and unpaid wages under the New York Labor Law.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$3,621,000.00, interest, attorneys' fees, costs of this proceeding, and such other relief, including punitive damages, as the Panel deems just and equitable.

In their Amended Statement of Claim, Claimant requested compensatory damages in an amount not less than \$3,400,000.00, interest, attorneys' fees, costs of this proceeding, and such other relief, including punitive damages, as the Panel deems just and equitable.

Respondents Hill, Lutz, Drummond, and Vance requested that the Statement of Claim be rejected and their counterclaim for unspecified damages should be, in all respects, credited and a proper award should be rendered in Respondents' favor, together with Respondents' costs and expenses incurred, including, but not limited to, reasonable attorneys' fees, expenses and all other costs in an amount to be determined at the hearing, and such other and further relief as the Panel deems 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.

ARBITRATORS' REPORT

Baird seeks to hold Respondents liable on the ground that four members of Baird's Convertible Department wrongfully left Baird's employ, and became employees of Maxcor, on November 12, 2002. According to Baird, this alleged raiding of its employees constituted unfair competition on the part of Maxcor and a breach of fiduciary duty owed to Baird by its employees, which breach was aided and abetted by Maxcor.

All of the employees in question -- P. Randolph Hill ("Hill"), Brian Lutz ("Lutz"), John Drummond ("Drummond") and Peter Vance ("Vance") -- were employees at will who were not

bound by any contractual commitment to remain at Baird, and had not entered into any covenant not to compete which would preclude their joining another entity in the securities business. Baird had the right to discharge them at any time without cause and without notice. Indeed, that was the fate of two other employees of Baird's Convertible Department who had taken initial steps to seek to rebuild the desk following the departure of the individual Respondents. Two days before Christmas of 2002, Stuart Patrick, President of Baird, with no prior notice or warning, wrote each of these employees (who had had almost twelve years of service with the firm) that "your employment with the firm is terminated effective immediately."

The individual Respondents made the decision, and took the initiative, to leave Baird because of dissatisfaction with their employment situation; this is in no way a case of contented employees being lured away by a competitor through financial or other inducements. The dissatisfaction stemmed from a *bona fide* dispute as to the compensation to which they were entitled for the fiscal year ending June 30, 2002; unhappiness with the facilities and support available to them at Baird; and a rocky relationship with Jill Patrick, another member of the Convertible Department and the daughter of Baird's President. They believed that Maxcor presented them with a better opportunity to advance their careers in the securities industry.

Nor was Baird's management in the dark as to the risk of their departure. For example, Stuart Patrick testified about a meeting in the summer of 2002 that he and his father Joseph Patrick, Chairman of Baird, had with Hill and Lutz to discuss their complaint about fiscal 2002 compensation. At the meeting Baird's management adhered to its position that it would not negotiate or settle the claim that the Convertible Department was entitled to an additional amount of approximately \$100,000. In response to Hill's statement that "if you're not going to do this, . . . then a lot of people may leave," Joseph Patrick replied that "it would be impossible in his estimation [for the individuals] to get a deal like this [at Baird] anyplace else on the street" and that "we will take our chances on that." Baird took its chances, and the employees left.

It is well settled under New York law, which governs this dispute, that employees at will are free to terminate their employment and join a competitor absent fraud or breach of fiduciary duty. *E.g., Headquarters Buick-Nissan, Inc. v. Michael Oldsmobile*, 149 A.D.2d 302 (1st Dep't 1989). While Baird relies on *Duane Jones Co. v. Burke*, 306 N.Y. 172 (1954), we do not find that precedent to be applicable. There the individual defendants, a group that included officers, stockholders and key employees of the plaintiff corporation, secretly solicited its customers while still in its employ and furtively established a competitive company, which within six weeks hired well over half of the plaintiff's employees. Prior to leaving, they tried to pressure the majority shareholder of plaintiff into selling them his interest on their terms by threatening to resign en masse. The Court held that the destruction of plaintiff's business, to the defendants' benefit, was actionable. There is no claim here that any individual Respondent solicited customers to do business with them at Maxcor while still in Baird's employ, or failed to conduct business as usual at Baird at any time prior to their departure. Nor was such Respondents' conduct directed toward "the willful and intentional destruction" of Baird's business. *See id.* at 194. As the Court of Appeals itself noted with respect to the "unusual facts" of *Duane Jones*, "[t]he dominating purpose in the Duane Jones case was to damage and paralyze the plaintiff corporation to enable the defendants to seize it or force a sale to them on their own terms." *Town & Country House & Home Service, Inc. v. Newberry*, 3 N.Y.2d 554, 557 (1958).

The mere fact that employees leave together does not make unlawful what would be lawful if they left separately. *E.g., International Debt Trading Ltd. v. Cantor Fitzgerald L.P.*, Index No. 102515/95, N.Y.L.J., March 9, 1995, p. 28, col. 3 (Sup. Ct. N.Y. Co, 1995) ("the alleged en masse defection is merely an inflammatory description of the common decision made by the individual employees").

As for Baird's claim against Maxcor, it is clear that Maxcor did not initially approach any of the individual Respondents regarding a possible affiliation with Maxcor. Rather, Hill, at Drummond's suggestion, arranged a meeting with a Maxcor employee whom he and Drummond had known for many years to discuss the viability of Hill's starting his own firm. The employee discouraged Hill from doing so, and suggested that Hill consider joining Maxcor. We find no obstacle under New York law to Maxcor's subsequent hiring of the individual Respondents following further discussions and negotiations. As was held in *Headquarters Buick-Nissan*, "[n]or is the mere inducement of an at-will employee to join a competitor actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage." 149 A.D.2d at 304. Maxcor hired the individual Respondents as part of an effort to rebuild the company in the wake of personnel losses resulting from the tragic events of September 11, 2001. It was not motivated by any intent to destroy or injure Baird, about which it had very limited knowledge. We find no support in New York law for Baird's contention that Maxcor could not properly hire the individual Respondents until after it had investigated what the impact on Baird would be of their leaving. We also reject the contention that Maxcor was barred by some industry standard or policy statement not to hire a group of employees whose production constituted at least 30% or 35% of the department of a rival firm.

Baird argues that Hill should be deemed the Manager of the Convertible Department, and as such breached his fiduciary obligations to Baird when he allegedly led a group of Department employees to Maxcor. Hill was not an officer, director or stockholder of Baird. He was never appointed Manager of the Department by Stuart or Joseph Patrick, the management of Baird. His business card did not refer to himself as a Manager. He did not have a Series 24 license which a true manager needed, and thus Baird's position that he was a Department Manager is inconsistent with its own regulatory obligations. He lacked the power, acting alone, to set the compensation of members of the Department, and to hire or fire. He received no extra compensation for duties as a Manager. While Hill did on occasion describe himself as a Manager, and while there are other references to him as a Manager, we conclude from the record as a whole that he is not subject to any greater fiduciary duties than any other non-managerial employee.

Even assuming that Hill were deemed a "Manager", we find that he did nothing wrong. It cannot fairly be said that Hill induced the other three individual Respondents to leave Baird and join Maxcor. As the testimony makes clear, all three had "one foot out the door" in any event, as they were all unhappy at Baird. Vance had talked to "headhunters" about making a move. Lutz had spoken with other potential employers. Drummond was also anxious to make a change, and had inquired about other opportunities. Moreover, as noted above, Hill put Baird's management on notice that its inflexible position on the compensation issue could lead to departures from the desk -- a risk that Baird knowingly took.

We find extremely weak Baird's claims against Lutz, Vance and Drummond. Baird does not even argue, as it does with respect to Hill, that any of these three had heightened duties to Baird because of that person's managerial status. John Glynn, Treasurer, Secretary and a director of Baird, testified that, in contrast to his opinion as to Hill, none of the other three had done anything wrong in leaving Baird's employ. George McGough, Baird's expert witness on liability issues, testified that, in contrast to his views as to Hill, he had not concluded that there was liability on the part of the other three. In his lengthy summation on liability issues, Baird's counsel made no reference to any grounds for liability of Lutz, Vance or Drummond. Baird has approached the brink of irresponsibility in pursuing claims against these three Respondents.

While it is not necessary for us to reach any damage issues, we note that it is highly speculative whether Baird suffered any loss from the departure of the individual Respondents. The revenue of the desk had declined precipitously in the preceding three years. An analysis prepared by Jill Patrick following the departure of the group referred to various adverse developments, and concluded that "[i]f you look at the dramatic fall off in revenue, it is clear that the department would have gone under sooner rather than later without serious assessment and change." The convertible securities business of the individual Respondents continued to be adversely affected by industry trends while they were at Maxcor, and none of them is still employed there. In terms of the value of the desk at the time immediately before the departures, Baird's damage expert, John Finnerty, testified that he would have advised a client not to pay anything for the desk unless the four key people entered into employment contracts.

We also dismiss the individual Respondents' counterclaim, seeking their share of unpaid compensation of \$98,025 allegedly owed to the Department for fiscal 2002. As stated above, we believe that there was a genuine difference of opinion as to the interpretation of the agreement governing the annual pay-out to the desk. We conclude, however, that Baird was correct in excluding from Department revenues S.E.C. fees paid with respect to equity transactions. These fees were deducted by Baird's clearing agents from the proceeds made available to Baird. As Baird never had possession of these sums, they cannot fairly be deemed to constitute revenues to Baird. Baird's financial statements and regulatory filings did not treat these amounts as revenues, and it consistently interpreted the agreement in question to exclude S.E.C. fees from revenues. As Baird has pointed out, under certain circumstances (obviously not those here presented), Baird's interpretation would have redounded to the advantage of the individual Respondents, and their interpretation to their disadvantage.

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. Claimant's claims are dismissed in their entirety.
2. The individual Respondents' Counterclaim is dismissed in its entirety.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent P. Randolph Hill's registration records maintained by the NASD Central

Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent P. Randolph Hill must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.

4. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Brian Lutz's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Brian Lutz must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
5. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent John Drummond's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent John Drummond must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
6. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Peter Vance's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Peter Vance must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
7. 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 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 persons at the time of the events giving rise to the dispute. Accordingly, Baird, Patrick & Co., and Maxcor Financial, Inc., are parties.

Baird, Patrick & Co.

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,000.00

Maxcor Financial, Inc.

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00

= \$5,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

May 16, 2005, adjournment by Respondents = Waived

September 15, 2005, adjournment by Respondents = Waived

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

May 16, 2005, adjournment by Respondents = Waived

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:

Three (3) Pre-hearing sessions with Panel @ \$ 1,200.00 = \$ 3,600.00

Pre-hearing conferences:	June 15, 2004	1 session
	July 27, 2004	1 session
	January 26, 2005	1 session

Forty-eight (48) Hearing sessions @ \$ 1,200.00 = \$57,600.00

Hearing Dates:	March 16, 2005	2 sessions
	March 17, 2005	2 sessions
	March 30, 2005	2 sessions
	March 31, 2005	2 sessions
	April 14, 2005	2 sessions
	April 15, 2005	2 sessions
	April 18, 2005	2 sessions
	May 23, 2005	2 sessions
	June 6, 2005	2 sessions
	June 7, 2005	2 sessions
	June 8, 2005	2 sessions
	June 21, 2005	2 sessions
	June 28, 2005	2 sessions
	July 27, 2005	2 sessions
	July 28, 2005	1 session
	September 14, 2005	1 session
	October 10, 2005	2 sessions
	October 14, 2005	1 session
	October 17, 2005	2 sessions
	October 19, 2005	2 sessions
	October 20, 2005	2 sessions

November 18, 2005	2 sessions
February 22, 2006	2 sessions
February 23, 2006	2 sessions
February 24, 2006	1 session
March 27, 2006	2 sessions

Total Forum Fees	= \$61,200.00
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1. The Panel has assessed \$61,200.00 of the forum fees to Claimant.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 2,000.00
Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$61,200.00</u>
Total Fees	= \$71,750.00
<u>Less payments</u>	<u>= \$11,750.00</u>
Balance Due NASD Dispute Resolution	= \$60,000.00

2. Respondent Maxcor is solely liable for:

Member Fees	= \$ 8,550.00
Total Fees	= \$ 8,550.00
<u>Less payments</u>	<u>= \$ 8,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Hill, Lutz, Drummond, and Vance are jointly and severally liable for:

<u>Counterclaim filing fee</u>	<u>= \$ 250.00</u>
Total Fees	= \$ 250.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 250.00

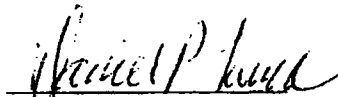
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

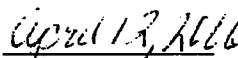
Daniel P. Lund, Esq.	-	Public Arbitrator, Presiding Chairperson
Stephen A. Weiner, Esq.	-	Public Arbitrator
Harry D. Frisch, Esq.	-	Non-Public Arbitrator

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.



Daniel P. Lund, Esq.
Public Arbitrator, Presiding Chairperson



Signature Date

Stephen A. Weiner, Esq.
Public Arbitrator

Signature Date

Harry D. Frisch, Esq.
Non-Public Arbitrator

Signature Date

April 13, 2006
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Daniel P. Lund, Esq.	-	Public Arbitrator, Presiding Chairperson
Stephen A. Weiner, Esq.	-	Public Arbitrator
Harry D. Frisch, Esq.	-	Non-Public Arbitrator

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Daniel P. Lund, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date



Stephen A. Weiner, Esq.
Public Arbitrator

April 12, 2006

Signature Date

Harry D. Frisch, Esq.
Non-Public Arbitrator

Signature Date

April 13, 2006

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Daniel P. Lund, Esq.	-	Public Arbitrator, Presiding Chairperson
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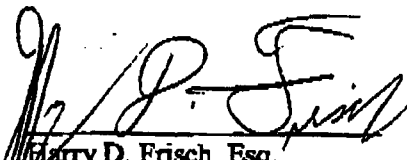
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Public Arbitrator, Presiding Chairperson

Signature Date

Stephen A. Weiner, Esq.
Public Arbitrator

Signature Date



Harry D. Frisch, Esq.
Non-Public Arbitrator

April 12, 2006
Signature Date

April 13, 2006

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