
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
John A. Zwack

Case Number: 06-00862

Names of the Respondents
SunTrust Capital Markets, Inc.
David Eidson
Philip Marshall

Hearing Site: Atlanta, Georgia

Nature of the Dispute: Customer vs. Member and Associated Person.

REPRESENTATION OF PARTIES

For John A. Zwack, hereinafter referred to as "Claimant": William S. Myers, Esq., Duluth, Georgia.

For SunTrust Capital Markets, Inc. ("SunTrust"), David Eidson ("Eidson") and Philip Marshall ("Marshall") hereinafter referred to as "Respondents": William H. Major, III, Esq., Hawkins & Parnell, LLP., Atlanta, Georgia.

CASE INFORMATION

Statement of Claim filed on or about: February 17, 2006.

Claimant signed the Uniform Submission Agreement: February 17, 2006.

Statement of Answer, Motion to Dismiss and Counterclaim filed by Respondents on or about: April 14, 2006.

Respondents signed the Uniform Submission Agreement: April 14, 2006.

Reply to Counterclaim filed by Claimant on or about: May 3, 2006.

Request for Leave to File Amended Statement of Claim filed by Claimant on or about: July 28, 2006.

Memorandum in Support of Amended Statement of Claim filed by Claimant on or about: August 1, 2006.

Supplement to Memorandum in Support of Amended Statement of Claim filed by Claimant on or about: August 1, 2006.

Response to Claimant's Request for Leave to File Amended Statement of Claim and Reply Brief in Support of the Motion to Dismiss filed by Respondents on or about: August 7, 2006.

CASE SUMMARY

Claimant asserted the following causes of action: 1) breach of contract; 2) violation of 18 U.S.C. Section 1962(b), (c) and (d) of the federal RICO Act; 3) violation of Georgia RICO Act; and, 4) violation of statutory and common law. The causes of action relate to the termination of Claimant's employment and Respondents' subsequent refusal to pay monies due to Claimant.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses. Respondents asserted a Counterclaim alleging the following causes of action: 1) breach of contract; and, 2) defamation and libel.

Unless specifically admitted in his Answer to the Counterclaim, Claimant denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$6,210,000.00, punitive damages in the amount of \$1,000,000.00, treble damages, injunctive relief under the federal and Georgia RICO Act, attorney's fees, costs and such other relief.

Respondents requested that the Statement of Claim be dismissed in its entirety and that a judgment be entered in their favor, plus an award of costs, attorneys' fees and such other and further relief as the Panel deemed just and proper. In their Counterclaim, Respondents requested compensatory damages in the amount of \$230,556.00 and an award of attorneys' fees and costs.

OTHER ISSUES CONSIDERED AND DECIDED

On August 4, 2006, a telephonic hearing was held with the parties and the full Panel. Pursuant to that hearing, on August 8, 2006, the Panel issued an Order granting Respondents' Motion to Dismiss.

Claimant's Request for Leave to Amend the Statement of Claim was deemed moot by the Panel due to the dismissal of this matter.

The parties have agreed that the Award in this matter may be entered in counterpart copies or that a signed handwritten Award may be entered.

AWARD

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

Respondents' Motion to Dismiss the Statement of Claim urges two bases for dismissal of this action. Claimant's representative, in his oral presentation during the hearing on August 4, 2006, also responded to the motion and disputed Respondents' Motion to Dismiss. After review of the filings and the position of the parties presented during the hearing and, after deliberation by the Panel and the reasons set forth below, the Panel determines that Respondents' Motion to Dismiss is granted and, therefore the Motion to Amend is moot.

In their Statement of Answer, Respondents urge that Claimant's claims against Respondents are barred by the Doctrine of Release and the present arbitration should be dismissed (Respondents' Answer, p. 11). In support of their position Respondents site that certain agreement entitled Transition Benefits, Nonsolicitation, Waiver and Release Agreement ("TBNWRA"), (Respondents' Answer,

Exhibit B). It is undisputed that the TBNWRA is dated and signed by Claimant on April 18, 2002 and signed by representatives of SunTrust Banks, Inc. on April 25, 2002.

Paragraph 1 of the TBNWRA provides in pertinent part: "the last day of my employment with SunTrust will be February 21, 2002."

Paragraph 4 of the TBNWRA provides in pertinent part: "I agree to forever release SunTrust, including its officers, directors, employees, agents, affiliates and successors from any and all claims, charges, actions, arbitrations, demands, damages or expenses (collectively "Claims") – past or present – I may have that arise or arose out of my employment with SunTrust or the conclusion of my employment, whether I know of any of these Claims now or learn of them at a later date...I am specifically releasing and agreeing not to bring any action...or any arbitration with the NASD or any other regulatory agency, any of which is related to any Claim against SunTrust...(emphasis supplied)

Paragraph 7 of the TBNWRA provides in pertinent part: "(a) I agree that any claim arising out of or relating to this Agreement or a breach of this Agreement shall be settled by arbitration *in accordance with the commercial arbitration rules of the American Arbitration Association...* (emphasis supplied)...

(e) By signing this Agreement, I acknowledge that I have read and understand its terms and that I have been advised to consult with an attorney about the Agreement and its binding effect on my rights. I also acknowledge that I am satisfied with the terms of this Agreement, that its terms are binding on me, my agents, personal representatives, successors and assigns and that I am signing this Agreement on a *knowing and voluntary basis...* (emphasis supplied)

(f) I understand that I am entitled to consider the terms of the Agreement for twenty-one (21) days after receiving it. I understand that I may sign it anytime within that twenty-one (21) day period. If I do not sign and return the Agreement on or before the twenty-first (21st) day after receiving it, I understand that I will not receive any Transition Benefits... If I am forty (40) years of age or older on the date I receive the Agreement, I understand that I may revoke it within seven (7) days after signing it, (ii) it cannot become effective and enforceable until after the revocation period expires and (iii) I cannot receive my Transition Benefits if I revoke it within the seven (7) day period.

The TBNWRA states Claimant was born on June 8, 1961. It is undisputed that Claimant was paid the Transition Benefits. It is undisputed that Claimant consulted with a lawyer on the TBNWRA.

The Panel finds that the TBNWRA controls this matter and therefore, Respondents' Motion to Dismiss *the Statement of Claim* is GRANTED. Having ruled that the TBNWRA is controlling, this Panel finds that the Panel and NASD have no further jurisdiction to hear any further matters related to the Statement of Claim or to decide Respondents' Counterclaim. Accordingly, Respondents' Counterclaim is dismissed.

Any and all claims for relief not specifically addressed herein, including Claimant's requests for punitive/treble damages and relief pursuant to the Georgia and federal RICO Acts and the parties' requests for attorneys' fees, are denied.

FEES

Pursuant to the NASD Code of Arbitration Procedure (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	= \$ 600.00
Counterclaim filing fee	= \$1,000.00

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. Accordingly, Respondent SunTrust is a party to this dispute and was a member of NASD at the time the following fees were assessed:

Member surcharge	= \$ 3,750.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 5,500.00</u>
Total Member Fees	= \$ 10,000.00

Adjournment Fees

No requests for adjournments were filed in this matter.

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:

No cancellation fees were assessed in this matter.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

No injunctive relief fees were incurred during this proceeding.

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:

Two (2) Pre-hearing sessions with the Panel @ \$1,200.00	= \$2,400.00
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Pre-hearing conferences:	June 30, 2006	1 session
	August 4, 2006	1 session
Total Forum Fees		= \$2,400.00

The Panel has assessed \$1,200.00 of the forum fees to Claimant.

The Panel has assessed \$1,200.00 of the forum fees jointly and severally to Respondents.

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.

No administrative costs were incurred during this proceeding.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 1,200.00
Total Fees	= \$ 1,800.00
Less payments	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent SunTrust is solely liable for:

Member Fees	= \$ 10,000.00
Total Fees	= \$ 10,000.00
Less payments	= \$ 10,000.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 1,000.00
Forum Fees	= \$ 1,200.00
Total Fees	= \$ 2,200.00
Less payments	= \$ 2,200.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

ARBITRATION PANEL

John F. Allgood, Esq.	-	Public Arbitrator, Presiding Chairperson
Jerome Jack Shure	-	Public Arbitrator
M. Bruce Adelberg	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/
John F. Allgood, Esq.
Public Arbitrator, Presiding Chairperson

08/10/06
Signature Date

/s/
Jerome Jack Shure
Public Arbitrator

08/09/06
Signature Date


/s/
M. Bruce Adelberg
Non-Public Arbitrator

08/10/06
Signature Date

08/10/06
Date of Service (For NASD Dispute Resolution office use only)

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