

**IN ARBITRATION
UNDER CHAPTER XVIII OF THE RULES
OF THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED**

IN THE MATTER OF)	
)	
)	
Dan Cooley, Huukhanh Le,)	
John Shiflett)	
)	
Claimants/Counter-Claim)	
Respondents,)	
)	
v.)	File No. 08M001
)	
VDM Capital Markets, LLC,)	
)	
Respondent/Counter-Claimant.)	
)	

Representation

For Claimants:	Stephen J. O'Neil, Molly McGinley (K&L Gates LLP)
For Respondent:	Marvin Pickholz, Suzan Jo (Duane Morris LLP)

Pleadings

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| ▪ Dan Cooley, Huukhanh Le and John Shiflett Statement of Claim and Uniform Submission Agreement, filed on or about: | May 9, 2008 |
| ▪ VDM Capital Markets, LLC Answer and Counterclaims, and Uniform Submission Agreement, filed on or about: | June 30, 2008 |
| ▪ Dan Cooley, Huukhanh Le and John Shiflett Reply to Respondent's Answer, Counterclaims and Affirmative Defenses, filed on or about: | July 22, 2008 |

Hearing

The named parties appeared at the hearing sessions specified below, and had full opportunity to present arguments and evidence.

<u>Date(s)</u>	<u>No. of Sessions</u>	<u>Location</u>
March 16, 2009	2	Chicago, Illinois
March 17, 2009	2	Chicago, Illinois
March 18, 2009	1	Chicago, Illinois
March 19, 2009	2	Chicago, Illinois
March 20, 2009	2	Chicago, Illinois

Summary of Issues

On or about May 9, 2008, Dan Cooley (“Cooley”), Huukhanh Le (“Le”) and John Shiflett (“Shiflett”) (collectively referred to as “Claimants”), filed a Statement of Claim (“Statement of Claim”) against VDM Capital Markets, LLC (“Respondent”).

Claimants’ Statement of Claim alleged that Respondent intentionally and wrongfully deprived Claimants of their own, independently created intellectual property and that Respondent failed to pay Claimants their earned and accrued compensation in the amount of \$1,050,143. Specifically, Claimants’ allegations included the following: (i) Respondent was in violation of New York Labor Law by withholding compensation and/or making unilateral decisions that certain amounts should be offset or deducted following the termination of Claimants; (ii) Respondent breached its contractual obligations arising from an employment agreement by, among other things, refusing to pay the Claimants’ accrued bonus for 2007 and the first quarter of 2008; (iii) Respondent had no rights to the trading algorithms and corresponding intellectual property rights developed by Claimants; (iv) Respondent made fraudulent representations in an effort to gain access to Claimants’ source code; (v) Claimants, to their detriment, relied on Respondent’s promise to pay Claimants’ accrued bonus if Claimants delivered the source code; (vi) Respondent was unjustly enriched by Respondent’s retention of the unpaid bonus payments, Respondent’s misappropriation of the of Claimants’ trading system, Claimants’ technical assistance in support of the launch of the CBOE Stock Exchange, LLC (“CBSX”) and the liquidity provided to CBSX; and (vii) Respondent has failed to return Le’s algorithms and corresponding source code.

Therefore, Claimants in their Statement of Claim have requested: (i) damages in the amount of \$1,050,143, or an amount to be proven at the hearing on this matter for their accrued but unpaid bonuses for the end of 2007 and first quarter of 2008; (ii) attorneys’ fees; (iii) liquidated damages equal to twenty-five percent of Claimants’ unpaid bonuses; (iv) declaratory judgment that Respondent has no rights to the algorithms and the intellectual property rights; (v) declaratory judgment that Claimants are the owner of the algorithms and the intellectual property rights in the algorithms; (vi) injunctive relief prohibiting Respondent from using the algorithms and ordering Respondent to immediately return Le’s algorithms; (vii) an order that Respondent must immediately return the algorithms; (viii) punitive damages; (ix) \$1,050,143 in restitution based on revenues and profits earned by Respondent without compensation to Claimants; (x) an amount to be determined at hearing based on Respondent’s unlawful retention of property to which it is not entitled and has not provided consideration or compensation to obtain; (xi) an amount to be determined at hearing based on Respondent’s retention, without compensation, of benefits supplied by its work on CBSX and the volume of trades placed on that exchange; and (xii) any further relief the Panel deems just.

On or about June 30, 2008, Respondent submitted an Answer in which Respondent contended that Claimants forfeited their bonus when Claimants allegedly failed to act with loyalty and in good faith toward Respondent. Respondent asserts that it retains all rights in the software as Claimants developed the software while employed by Respondent. Respondent also contends that the Claimants’ request for declaratory judgment based on Respondent’s alleged conversion and unjust enrichment is pre-empted by the Copyright Act. In addition, Respondent argues that even if Claimants’ claims for declaratory judgment, conversion and unjust enrichment may be considered as copyright infringement, Claimants cannot prove that copyright infringement occurred. Respondent asserts that because Respondent maintains a lawful copy of the trading program, it is entitled to use such lawful copy in accordance with Section 117 of the Copyright Act. Respondent further contends that even if Claimants have an ownership interest in the algorithms, by their conduct, Claimants have granted a non-exclusive right to Respondent to use the trading program. Respondent also argues that the algorithms and infrastructure Claimants

allege to have created prior to their employment by Respondent are utilitarian articles that lack original expression and are, therefore, not copyrightable.

Respondent has also asserted several counterclaims against Claimants. Respondents asserted that: (i) Claimants have forfeited their compensation during the period of disloyalty; (ii) Claimants have breached their duty of loyalty to Respondent; (iii) Respondent is and always has been the owner of the trading system at issue; (iv) Respondent will be irreparably harmed if Claimants are not enjoined from using or disclosing the trading system to third parties by losing its competitive and market advantage and goodwill; (v) Claimants have breached the employment agreement by failing to properly document the trading system and by failing to make such documentation available to Respondent; (vi) Claimants have breached the employment agreement by failing to acknowledge and agree that Respondent is the sole owner of all right, title and interest in the trading system; and (vii) Claimants have breached the employment agreement by failing to adhere to managements' direction to send trading volume to CBSX.

Respondent has requested that the Panel dismiss Claimants' claim in its entirety. In addition, Respondent seeks the following: (i) a finding that Claimants' actions in secretly encrypting the trading system, failing to provide Respondent with encryption keys until after their termination, and diverting trading volume away from CBSX were acts of disloyalty; a finding that Claimants have forfeited their compensation during such period of disloyalty; and a further finding that because of such forfeiture stemming from Claimants' disloyalty, Respondent is not required to pay any portion of any bonus alleged by Claimants; (ii) a finding that each Claimant breached his duty of loyalty to Respondent by encrypting the trading system and refusing to provide Respondent with the encryption keys upon demand, diverting the trading volume from CBSX to other exchanges that were less favorable to Respondent but more favorable to Claimants; an award of damages equal to the salary and other compensation paid by Respondent to each Claimant during their period of disloyalty in an amount to be determined at hearing but not less than \$359,460; and an award of damages resulting from Claimants diversion of trading volume away from CBSX in an amount to be determined at the hearing; (iii) declaratory judgment that Respondent is the sole owner of the trading system and that the Claimants have no ownership interest in the trading system, and may not use any part of the trading system; (iv) injunctive relief prohibiting Claimants from using all or any part of the trading system, disclosing the source code or any other part of the trading system to any third party, and a direction to Claimants to return to Respondent all copies or portions of the trading system; (v) a finding that Claimants have breached their employment agreements, and are therefore liable to Respondent for damages equal to the costs Respondent will incur in documenting the trading system for use going forward, in an amount to be determined at the hearing on this matter; (vi) a finding that Claimants have breached their employment agreements, and are therefore liable to Respondent for damages Respondent will incur in defending Claimants' allegations of ownership of the trading system, including attorneys fees, value of management time, expert witness fees, consultant fees, and all other expenditures in connection with defending Claimants' ownership claim, in an amount to be determined at the hearing of this matter but not less than \$350,000 dollars; and (vii) a finding that Claimants have breached their employment agreements, and are therefore liable to Respondent for damages representing the diminution in the value of its investment in CBSX, in an amount to be determined at the hearing of this matter.

Award^{*}

After due deliberation and in consideration of the hearing testimony, documentary evidence, and other submissions made by the parties, the undersigned arbitrators, in full and final resolution of all issues in controversy, award as follows:

1. Claimants' request for actual damages is granted, in part, in the amount of \$190,000.
2. Claimants' request for attorneys' fees and costs is denied.
3. Claimants' request for liquidated damages is denied.
4. Claimants' request for punitive damages is denied.
5. Claimants' requests for declaratory and injunctive relief are denied.
6. Claimants' request for restitution is denied.
7. Respondent's request for damages, including, but not limited to, attorneys' fees, expert witness fees and consultant fees is denied.
8. Respondent's requests for declaratory and injunctive relief are denied.
9. Claimants and Respondent shall pay all filing and forum fees as detailed below.

Forum Fees

Pursuant to Exchange Rule 18.33, the Arbitrators assess the following filing and forum fees:

Initial Filing Fee – Claim	\$1,500
Initial Filing Fee – Counterclaim	\$1,500
Pre-hearing session Fees (1)	\$500
Hearing session Fees (9 x \$1,500)	<u>\$13,500</u>
Total	\$17,000

1. The Exchange shall retain the non-refundable filing fees and the hearing session deposits, as previously submitted by Claimants and Respondent. Claimants initially submitted \$1,500 for the filing fee and \$1,500 for the hearing deposit. Respondent initially submitted \$1,500 for the filing fee and \$1,500 for the hearing deposit.
2. Responsibility for the forum fees, totaling \$14,000, shall be assessed as follows: Claimants shall be responsible for \$7,000 and Respondent shall be responsible for \$7,000.
3. Claimants shall submit \$5,500 to the Chicago Board Options Exchange, Incorporated.
4. Respondent shall submit \$5,500 to the Chicago Board Options Exchange, Incorporated.

^{*} Pursuant to CBOE Rule 18.31, all monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction.

/s/ Thomas Beehler
Thomas Beehler, Chairman and Industry Arbitrator

May 12, 2009
Date

/s/ Douglas Edelman
Douglas Edelman, Industry Arbitrator

May 14, 2009
Date

/s/ Craig Luce
Craig Luce, Industry Arbitrator

May 13, 2009
Date