

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Sterne, Agee & Leach, Inc.

Case No. 99-02859

Names of Respondents

David S. Patrick
William M. Harris
Fred B. Bear, Jr.
First Union Capital Markets Corp.

REPRESENTATION OF PARTIES

For Sterne, Agee & Leach, Inc. ("Sterne Agee"), hereinafter referred to as "Claimant": G. Wayne Hillis, Jr., Esq. and Erika C. Birg, Esq. of the law firm of Parker, Hudson, Rainer & Dobbs, LLP, Atlanta, Georgia until their withdrawal of counsel on or about December 21, 1999. Thereafter, Claimant was represented by Drea Somerville, Esq., Trish Diak, Esq. and Thomas L. Krebs, Esq. of the law firm of Ritchie & Rediker, L.L.P., Birmingham, Alabama.

For Respondents First Union Capital Markets Corp. ("First Union"), David S. Patrick ("Patrick"), William M. Harris ("Harris") and Fred B. Bear, Jr. ("Bear"), hereinafter collectively referred to as "Respondents": Stephen P. Gannon, Esq. and Mark C. Shuford, Esq. of the law firm of LeClair Ryan, P.C., Richmond, Virginia.

CASE INFORMATION

Statement of Claim filed on or about: June 22, 1999.
Claimant signed the Uniform Submission Agreement: June 21, 1999.
Statement of Answer filed by Respondents on or about: November 1, 1999.
Respondent First Union signed the Uniform Submission Agreement: October 29, 1999.
Respondent Patrick signed the Uniform Submission Agreement: October 29, 1999.
Respondent Harris signed the Uniform Submission Agreement: October 29, 1999.
Respondent Bear signed the Uniform Submission Agreement: October 29, 1999.

CASE SUMMARY

Claimant alleged the following: Claimant's action arose out of Respondent First Union's unlawful raid upon Claimant's Montgomery, Alabama office and the cooperation and complicity provided by the individual Respondents. The claims asserted included breach of

fiduciary duty, fraud, conspiracy to defraud, unfair competition, unlawful misappropriation of existing business, conversion, misappropriation of trade secrets, and interference with business relations and contractual relationships. Respondents, pursuant to a plan to establish a producing branch office in Montgomery, Alabama, successfully recruited Claimant's branch manager (who was also a managing director of Sterne Agee, a salaried employee, and who had a fiduciary duty to oversee and protect the sanctity of the Montgomery branch office for Claimant). In concert with the branch manager who violated his fiduciary duty, Respondent First Union recruited four of Claimant's employees, including two of its brokers and key administrative personnel in completion of the planned raid. One of the brokers recruited was Senior Vice President of the firm.

Respondents' scheme to raid Claimant's Montgomery office involved the misappropriation of Claimant's confidential and trade secret customer information in violation of the Alabama Trade Secret Act. Over a period of time, and while employed by Claimant, Respondents planned their departure to First Union. Claimant's customer lists and the monthly statements of customers were copied by the individual Respondents and provided to Respondent First Union. Respondent Patrick, the branch manager, and Respondent Bear, as Senior Vice President, actively participated and conspired with First Union in clear breach of their fiduciary duties to Claimant to perfect the raid. Respondent First Union, knowing that the success of its to be opened Montgomery branch office would require the individual Respondents to appropriate Claimant's trade secrets and, of necessity, involve the breach of fiduciary duties owed by them to Claimant, encouraged and required these thefts. Respondents' conduct and actions constitute a breach of Rule 2110 of the NASD's Conduct Rules, which provides that: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

Respondents alleged the following: None of the Respondents "conspired" to leave Claimant for Respondent First Union, and Respondent Patrick did not "recruit" any of the other Sterne Agee employees who departed simultaneously with or subsequent to his resignation. Rather, the individual Respondents were open, honest and candid with Claimant with regard to their disenchantment with the management and operation of the firm. Further, these brokers were employees-at-will, and under no limitations with respect to their right or ability to compete for business, solicit accounts they serviced, or employ available information to assist them in their efforts to retain their relationships with customers.

At no time did Claimant advise Respondents Patrick, Bear or Harris that they were not free to take copies of customers records if they elected to leave, nor were they ever warned that Claimant viewed the accounts that they serviced as exclusive property of the firm. Claimant had no policy that prohibited or precluded brokers from making use of customer records if they chose to do so. It also had no contractual agreement or understanding with any of these brokers that if they chose to leave they could not compete for the accounts they serviced or solicit those accounts to join them at their new place of employment. Thus, the Claimant did not treat the customer data at issue as trade secrets, that, in any event, the information was developed by the individual Respondents, not Claimant. Therefore, Claimant cannot satisfy the elements of the Alabama Trade Secret Act.

RELIEF REQUESTED

Claimant requested that an Award be issued in favor of Claimant and against Respondents granting Claimant compensatory damages in an amount not less than \$2.5 million; prejudgment interest; Claimant's attorneys' fees and any other allocable expenses of this proceeding; punitive and exemplary damages; and, such other and further relief as is just, proper and equitable.

Respondents requested that the panel dismiss all claims asserted against them and award Respondents such amounts as may be appropriate to reimburse them for the time, cost, fees and expenses incurred by them in defending against this case and to compensate the individual Respondents for the misappropriation of their proprietary customer information by Claimant.

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, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

The Panel finds that all individual broker Respondents breached industry standards by the following actions:

- 1.) Providing copies of account statements to the corporate Respondent prior to their resignations from Claimant;
- 2.) Providing to and/or benefitting from the production of Claimant's 1998 production data for the Montgomery office to the corporate Respondent; and,
- 3.) Providing to and/or benefitting from the production of Claimant's data identified as for "Internal Use Only" to the corporate Respondent.

The Panel further finds that the corporate Respondent breached industry standards by receiving and using the above-referenced documentation in competition with the Claimant.

The Claimant, however, failed to meet its burden of proof on the issue of damages resulting from the above-referenced conduct. Claimant failed to carry its burden of proof on the remaining claims asserted by Claimant. Therefore, Claimant is awarded no damages. Further, Claimant's requests for punitive and exemplary damages are denied.

Respondents' requests for relief, including Respondents' request for attorneys' fees, are denied.

Each party shall bear their respective costs, including attorneys' fees.

All other requests for relief not specifically addressed herein are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$2,000.00
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Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$600.00
Hearing process fee	= \$4,500.00

Adjournment Fees

Adjournments requested during these proceedings:

There were no adjournments requested during these proceedings.

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 arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One Pre-hearing session with Panel x \$1,200.00	= \$1,200.00
Pre-hearing conference: February 29, 2000	1 session

Eight Hearing sessions x \$1,200.00	= \$9,600.00
Hearing Dates: September 25, 2000	2 sessions
September 26, 2000	2 sessions
September 27, 2000	2 sessions
<u>September 28, 2000</u>	<u>2 sessions</u>

Total Forum Fees	= \$10,800.00
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The Panel has assessed the total forum fees of \$10,800.00 jointly and severally to Respondents.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

Fee Summary

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$2,000.00
Member Fees	= \$7,600.00
Total Fees	= \$9,600.00
<u>Less payments</u>	<u>= \$9,600.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$0.00

Respondent First Union be and hereby is solely liable for:

Member Fees	= \$7,600.00
Total Fees	= \$7,600.00
<u>Less payments</u>	<u>= \$7,600.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$0.00

Respondents Patrick, Harris, Bear and First Union be and hereby are jointly and severally liable for:

Forum Fees	= \$10,800.00
Total Fees	= \$10,800.00
<u>Less payments</u>	<u>= \$0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$10,800.00

All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

_____/s/_____
Susan Kerr Lee, J.D.
Public Arbitrator, Presiding Chair

Signature Date

_____/s/_____
Steven J. Gold, Esq.
Public Arbitrator

Signature Date

_____/s/_____
Linda A. Allen
Industry Arbitrator

Signature Date

October 11, 2000
Date of Service (For NASD-DR office use only)

Administrative Costs

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Concurring Arbitrators' Signatures



Susan Kerr Lee, J.D.
Public Arbitrator, Presiding Chair

10/4/00
Signature Date

Steven J. Gold, Esq.
Public Arbitrator

Signature Date

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All balances are due and payable to NASD Dispute Resolution, Inc.

Concurring Arbitrators' Signatures

Susan Kerr Lee, J.D.
Public Arbitrator, Presiding Chair

Signature Date

Steven J. Gold, Esq.
Public Arbitrator

10/04/00

Signature Date

NASD Dispute Resolution, Inc.
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Linda A. Allen
Industry Arbitrator

Date of Service (For NASD-1IR office use only)

10-3-00
Signature Date