

**Award**  
**NASD Dispute Resolution, Inc.**

---

In the Matter of the Arbitration Between:

Joseph Calise, (Claimant) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Respondent)

and

Merrill Lynch, Pierce, Fenner & Smith (Claimant) vs. Joseph Calise and Salomon Smith Barney, Inc. (Respondents)

Case Number: 01-00784 (Consolidated w/01-00846)

Hearing Site: New York, New York

---

**REPRESENTATION OF PARTIES**

Claimant, Joseph Calise, hereinafter referred to as "Claimant" or "Calise": David A. Stein, Esq., Luboja & Thau, LLP, New York, NY.

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill"): David F. McComb, Esq., Rubin & Associates, P.C., Paoli, PA.

Respondent, Salomon Smith Barney, Inc. ("Salomon"): Molly Tateman, Esq., Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: February 16, 2001.

Claimant signed the Uniform Submission Agreement: February 15, 2001.

Memorandum in Opposition to Claimant's Request for Immediate Injunctive Relief filed by Merrill on or about: February 21, 2001.

Statement of Claim filed by Merrill on or about: February 20, 2001.

Amended Statement of Claim filed by Merrill on or about: March 12, 2001.

Merrill signed the Uniform Submission Agreement: February 27, 2001.

Salomon did not file a Statement of Answer.

Salomon signed the Uniform Submission Agreement: March 22, 2001.

### **CASE SUMMARY**

Claimant asserted the following causes of action: Claimant should be allowed to compete fairly on the merits for the business of the clients that he has developed; the right of the public customer to transfer his/her account from one brokerage firm to another is embodied in the rules of the NASD and NYSE, and Merrill should not be allowed to deprive Claimant's clients of said right; and Merrill has no legitimate business purpose in seeking to prevent Claimant from continuing his business relationships with his clients.

Unless specifically admitted in its Opposition Memorandum, Merrill denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant executed an employment agreement with Merrill wherein he agreed not to solicit any of the clients he serviced or whose name became known to him while in Merrill's employ for a one year period following the termination of his employment; Claimant's employment agreement with Merrill is fully enforceable under New York law; Claimant has not made any showing that he is likely to succeed on the merits of his attempt to invalidate his employment agreement; and no "client" of a registered broker-dealer is ever a client of the registered representative, the client is always a client of the member firm.

In its Statement of Claim and Amended Statement of Claim, Merrill asserted the following causes of action: breach of contract; misappropriation and conversion of trade secrets and business property; breach of fiduciary duty; unfair competition; intentional interference with fiduciary duty, contractual and business relations; conspiracy; and unjust enrichment.

### **RELIEF REQUESTED**

Claimant requested:

1. An Immediate Injunctive Order:
  - a. Directing Merrill to comply with Rule 11870 of the NASD Uniform Practice Code and Rule 412 of the NYSE, which require member firms to expeditiously honor a customer's written request to transfer his/her account to another securities firm;
  - b. Directing Merrill to refrain from misleading Claimant's clients regarding their rights to have accounts transferred; and
  - c. Directing Merrill to refrain - in any manner - from interfering with those clients with whom Claimant had a relationship which preexisted his employment tenure at Merrill, or which relationships he subsequently developed through his own efforts and expense;
2. That a full arbitration panel be convened to hear this matter on its merits in accordance with Rule 10335(d)(1) of the NASD Code of Arbitration Procedure; and

3. That the Panel declare any restrictive covenant contract signed by Claimant, for the benefit of Merrill, which interferes with his customer's choice of broker, or account transfer instructions, be declared void and unenforceable, and that the Panel grant such other relief as it deems just and proper.

In its Opposition Memorandum, Merrill requested that Claimant's request for immediate injunctive relief be denied.

In its Statement of Claim, Merrill requested:

1. A Permanent Injunction enjoining Calise, directly or indirectly, and whether alone or in concert with others, from:
  - a. Soliciting any business from any client of Merrill whom Calise served or whose name became known to him while in the employ of Merrill and, further, from accepting any business or account transfers from any of said clients whom Calise, or anyone acting on his behalf or in concert with him, has solicited at any time in the past for the purpose of doing business with Calise's new employer, Salomon (excluding members of Calise's immediate family);
  - b. Using, disclosing, or transmitting for any purpose, including soliciting or contacting said clients, the information contained in the records of Merrill, including, but not limited to, the names and addresses, and financial information of clients Calise serviced at Merrill, and that all original records and copies and/or other reproductions thereof, in whatever form, be returned to Merrill immediately; and
  - c. Any and all other such acts as this Panel deems appropriate for injunctive relief;
2. Compensatory damages against Calise and Salomon; and
3. Other relief to be specified at the hearing.

In its Amended Statement of Claim, Merrill requested that the Panel issue an Award:

1. Granting permanent injunctive relief;
2. Granting Merrill compensatory and punitive damages in an amount to be determined at the arbitration hearing;
3. Granting Merrill its costs; and
4. Granting Merrill any other relief the Panel deems just and equitable under the circumstances.

### **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. The provisions of the injunctive order dated February 23, 2001, issued by Justice Leo F. McGinny of the Supreme Court of the State of New York, shall remain in place until February 16, 2002.
2. Merrill Lynch is hereby liable and shall pay the \$1,000.00 forum fee for the April 25, 2001 hearing which has been incorporated into the schedule of fees listed below.
3. All other requests for relief are hereby 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 (01-00784)	= \$ 250.00
Initial claim filing fee (01-00846)	= \$ 500.00
Injunctive Relief fee (01-00784)	= \$ 2,500.00
Injunctive Relief fee (01-00846)	= \$ 2,500.00

#### **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, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Salomon Smith Barney, Inc. are parties.

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Member surcharge (01-00784)	= \$ 1,200.00
Member surcharge (01-00846)	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,000.00

Salomon Smith Barney, Inc.

Member surcharge	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,000.00

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:

Three (3) Pre-hearing sessions with a single arbitrator x \$450.00 = \$ 1,350.00

Pre-hearing conferences:	February 23, 2001	1 session
	March 26, 2001	1 session
	March 27, 2001	1 session

Nine (9) Hearing sessions x \$1,000.00 = \$ 9,000.00

Hearing Dates:	March 28, 2001	2 sessions
	April 25, 2001	2 sessions
	April 26, 2001	2 sessions
	April 27, 2001	1 session
	May 16, 2001	2 sessions

---

Total Forum Fees = \$10,350.00

1. The Panel has assessed \$3,116.66 of the forum fees against Claimant.
2. The Panel has assessed \$4,116.66 of the forum fees against Merrill.
3. The Panel has assessed \$3,116.66 of the forum fees against Salomon.

Fee Summary

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 250.00
Injunctive Relief Fee	= \$ 2,500.00
<u>Forum Fees</u>	<u>= \$ 3,116.66</u>
Total Fees	= \$ 5,866.66
<u>Less payments</u>	<u>= \$ 3,750.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 2,116.66

2. Merrill be and hereby is solely liable for:

Initial Filing Fee (01-00846)	= \$ 500.00
Injunctive Relief Fee (01-00846)	= \$ 2,500.00
Member Fees	= \$ 5,000.00
<u>Forum Fees</u>	<u>= \$ 4,116.66</u>
Total Fees	= \$12,116.66
<u>Less payments</u>	<u>= \$ 6,400.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 5,716.66

3. Salomon be and hereby is solely liable for:

Member Fees	= \$ 3,800.00
<u>Forum Fees</u>	<u>= \$ 3,116.66</u>
Total Fees	= \$ 6,916.66
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 6,916.66

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

NASD Dispute Resolution, Inc.  
Arbitration No. 01-00784  
Award Page 7

---

ARBITRATION PANEL

Madelon M. Rosenfeld, Esq.	-	Public Arbitrator, Presiding Chair
Carol M. Stoner, Esq.	-	Public Arbitrator
Joseph N. Morena	-	Industry 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.



Madelon M. Rosenfeld, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Carol M. Stoner Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Joseph N. Morena  
Industry Arbitrator

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

June 1, 2001

\_\_\_\_\_  
Date of Service (For NASD office use only)

## NASD REGULATION

008/010

NASD Dispute Resolution, Inc.  
Arbitration No. 01-00784  
Award Page 7

---

**ARBITRATION PANEL**

Madelon M. Rosenfeld, Esq.	-	Public Arbitrator, Presiding Chair
Carol M. Stoner, Esq.	-	Public Arbitrator
Joseph N. Morena	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 1507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

---

Madelon M. Rosenfeld, Esq.  
Public Arbitrator, Presiding Chair

---

Signature Date


---

Carol M. Stoner, Esq.  
Public Arbitrator

---

Signature Date

---

  
Joseph N. Morena  
Industry Arbitrator

---

Signature Date

June 1, 2001

Date of Service (For NASD office use only)



NASD Dispute Resolution, Inc.  
Arbitration No. 01-00784  
Award Page 8

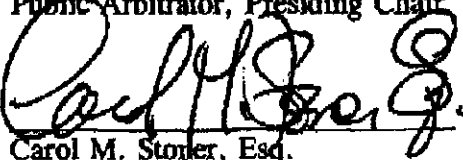
---

**ARBITRATION PANEL**

Madelon M. Rosenfeld, Esq.	-	Public Arbitrator, Presiding Chair
Carol M. Stoner, Esq.	-	Public Arbitrator
Joseph N. Morena	-	Industry 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.

\_\_\_\_\_  
Madelon M. Rosenfeld, Esq.  
Public Arbitrator, Presiding Chair  
  
\_\_\_\_\_  
Carol M. Stoner, Esq.  
Public Arbitrator

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

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

\_\_\_\_\_  
Joseph N. Morena  
Industry Arbitrator

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

\_\_\_\_\_  
June 1, 2001  
Date of Service (For NASD office use only)