
**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimant/Counter-Respondent
Merrill Lynch Pierce Fenner & Smith, Inc.

Case Number: 04-05170

Name of the Respondents/Counter-Claimant
Raymond, James & Associates, Inc. and
Jay C. Gagne

Hearing Site: Indianapolis, Indiana

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

REPRESENTATION OF PARTIES

Claimant/Counter-Respondent, Merrill Lynch Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Claimant": David F. McComb, Esq. and Imogene Hughes, Esq. of the law firm Rubin, Fortunato, Harbison & Dougherty, P.C., located in Paoli, Pennsylvania.

Respondents/Counter-Claimant, Raymond, James & Associates, Inc. ("Raymond James") and Jay C. Gagne ("Gagne"), hereinafter collectively referred to as "Respondents": David W. Erb, Esq. of the law firm Saul Ewing, LLP, located in Baltimore, Maryland.

CASE INFORMATION

Statement of Claim and request for Injunctive Relief filed on July 19, 2004
Merrill Lynch submitted an undated signed Uniform Submission Agreement.
Statement of Answer filed by Respondents, Raymond James and Gagne, on August 4, 2004.
Respondents Raymond James and Gagne did not submit a signed Uniform Submission Agreement.
Counterclaim filed by Respondent Gagne on August 26, 2004.
Claimant's Response to Gagne's Counterclaim filed on September 24, 2004.

On September 8, 2004, Merrill Lynch filed a Motion to Modify the Panel's Injunctive Relief Order of August 13, 2004. Respondents Opposition to Motion to Modify was filed on September 13, 2004. Merrill Lynch filed a Reply on September 16, 2004.

Gagne filed a Motion in Limine on March 29, 2005. Merrill Lynch filed a response on April 6, 2005.

CASE SUMMARY

Claimant asserted the following causes of action: breach of contract, breach of fiduciary duty, misappropriation and conversion of business property; tortuous interference with contractual

and prospective relations; unjust enrichment and unfair competition. Claimant asserted that Gagne and Raymond James engaged in misappropriating Merrill Lynch documents and information containing confidential business records, specifically names, addresses, phone numbers and other confidential financial information of Merrill Lynch customers; that Gagne and Raymond James solicited Merrill Lynch customers to terminate their relationship with Merrill Lynch and transfer their accounts to Raymond James; and that Gagne and Raymond James' conduct was in furtherance of a scheme to obtain and convert to their personal use the confidential records and information, procedures and systems and customer base of Merrill Lynch for their gain and benefit.

Unless specifically admitted in their Answer, Respondents Raymond James and Gagne denied the allegations made in the Statement of Claim and asserted the following defenses:

1. No restrictive covenants were triggered because Gagne was terminated without cause;
2. Merrill Lynch's bad faith and unclean hands vitiate any entitlement to Injunctive Relief;
3. Injunctive relief harms customers and violated public policy;
4. Merrill Lynch has no trade secret or propriety claims to Gagne's clients or information regarding Gagne's clients;
5. Merrill Lynch will not suffer irreparable harm; and
6. The allegations against Raymond James are unsupportable by law.

In his Counterclaim, Gagne asserted that Merrill Lynch terminated him without cause; made false statements regarding his termination, which damaged Gagne's reputation with his clients; and that Merrill Lynch made false representations on Gagne's Form U-5 regarding the basis for his termination.

Unless specifically admitted in its Answer, Merrill Lynch denied the allegations made in Gagne's Counterclaim and asserted the following defenses:

1. The Counterclaim fails in whole or in part to state a claim upon which relief can be granted;
2. Gagne's claims are barred by the applicable statute of limitations;
3. Gagne's claims are barred by the employment at-will doctrine;
4. Gagne's claims are barred, in whole or in part, by the statute of frauds;
5. Without conceding that Merrill Lynch has the burden of proof on this issue, Gagne's defamation claim is barred, in the whole or in part, because any alleged defamatory statements are true;
6. Without conceding that Merrill Lynch has the burden of proof on this issue, Gagne's defamation claim is barred, in whole or in part, because the alleged defamatory statements constitute non-actionable opinion;
7. Without conceding that Merrill Lynch has the burden of proof on this issue, Gagne's defamation claim is barred, in whole or in part, by the doctrines of absolute privilege and qualified privilege;
8. Gagne's claims for tortious interference with business relationships is barred because Merrill Lynch acted in justification;
9. Merrill Lynch's actions with respect to Gagne were taken in good faith and for proper business reasons;

10. Gagne's claims are barred, in whole or in part, by the doctrine of waiver and estoppel;
11. Gagne's claims are barred by the doctrine of laches;
12. Without conceding that Merrill Lynch has the burden of proof on this issue, Gagne's claims are barred in whole or in part because any losses he has sustained or will sustain are due to his own failures and omissions and/or his own conduct or negligence;
13. Without conceding that Merrill Lynch has the burden of proof on this issue, and expressly denying that Gagne suffered actionable damages, Merrill Lynch avers that, through use of diligent efforts, Gagne could have mitigated his alleged loss of earnings and other damages, if any, and, upon information and belief, failed to do so;
14. Gagne precluded from any recovery because the damages he seeks are necessarily speculative and not recoverable as a matter of law;
15. Without conceding that Merrill Lynch has the burden or proof on this issue, the allegations of the Counterclaim are insufficient to entitle Counterclaimant to an award of punitive damages. Moreover, the actions of Merrill Lynch do not rise to the level of egregious conduct necessary to warrant the imposition of punitive damages;
16. An award of punitive damages would be an unconstitutional denial of Merrill Lynch's right to due process and/or equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and under the Constitution of the State of Indiana;
17. Gagne's claims for attorney's fees are barred in whole or in part because he fails to assert any cause of action warranting an award of attorney's fees; and
18. Merrill Lynch reserves the right to raise any and all other affirmative defenses that may become evident during discovery and during any other proceedings in this matter.

RELIEF REQUESTED

Merrill Lynch requested permanent injunction enjoining Gagne, directly or indirectly, and all those acting in aid or concert with him, including Raymond James, from: (a) soliciting or otherwise initiating any further contact or communication with any client of Merrill Lynch for the purpose of advising said client of Gagne's new affiliation or for the purpose of inviting, encouraging or requesting the transfer of any accounts; (b) soliciting or initiating contact with any client whose records or information Gagne used in violation of paragraph 1 of his Employment Agreement; (c) using, disclosing or transmitting for any purpose, information contained in the records of Merrill Lynch or concerning its customers, for purposes of soliciting business or account transfers from any former customers at Merrill Lynch; and (d) any and all other such acts as this Panel deems appropriate for injunctive relief. Merrill Lynch also requested compensatory damages in an unspecified amount and other relief to be determined by the Panel.

Respondents Raymond James and Gagne requested denial and dismissal of Merrill Lynch's claims in their entirety; costs and reasonable attorney's fees; deny Merrill Lynch's request for permanent injunction; and for such other and further relief as this Panel deems just and appropriate.

In his Counterclaim, Gagne requested total compensatory damages in the amount of \$1,300,000.00; unspecified punitive damages; attorney's fees; costs; and for such other and further relief as the Panel deems just and proper.

In its response to Gagne's Counterclaim, Merrill Lynch requested that Gagne's claims be denied and dismissed in their entirety; all costs be assessed to Gagne; and for other relief the Panel deems reasonable and appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents, Raymond James and Gagne, did not file with NASD Dispute Resolution, a properly executed submission to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The Panel entered an Injunctive Order dated August 13, 2004 denying Merrill Lynch's request for permanent injunction. The Panel also ordered that Gagne's personnel file and Form U-5 be changed to reflect that his discharge was without cause.

Pursuant to Merrill Lynch's Motion to Modify the Panel's Order of August 13, 2004, the Panel granted the motion in an Order dated September 28, 2004. The Panel modified the language regarding his termination on Gagne's Form U-5.

On November 10, 2004, the parties notified the NASD that Merrill Lynch settled its damages against Raymond James and Gagne. The arbitration proceeded on Gagne's Counterclaim against Merrill Lynch.

Pursuant to Gagne's Motion in Limine and Merrill Lynch's response, a pre-hearing conference was held on April 20, 2005. After reviewing the pleadings and hearing the parties' arguments, the Panel denied Gagne's Motion.

The parties 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. Claimant/Counter-Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., is solely liable for and shall pay to Respondent/Counter-Claimant, Jay C. Gagne, the sum of \$542,663.00 as compensatory damages.
2. Pursuant to the Panel's Injunctive Order of August 13, 2004, Respondent/Counter-Claimant, Jay C. Gagne, notified the Panel at hearing that his Form U-5 was amended to reflect new language regarding his termination. The language, "termination for cause" was replaced with, "discharged as a result of differences of opinion with management as to the interpretation of an internal rule."
3. The Panel recommends the expungement of all reference to the language,

"termination for cause" contained in Gagne's registration records maintained by the NASD Central Registration Depository ("CRD"), as this information was clearly erroneous. Pursuant to NASD Notices to Members 99-90 and 99-54, Respondent Jay C. Gagne must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

4. Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees.
5. 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	= \$ 500.00
Counter claim/Cross claim/Third Party Claim filing fee	= \$ 375.00

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. Accordingly, Raymond James and Merrill Lynch are parties and are assessed the following:

Member surcharge	= \$ 1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,200.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

April 18-22, 2005 hearing adjournment	= \$ 1,200.00 (waived by NASD)
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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.

1. Member firm, Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed:

Injunctive relief surcharge	= \$ 2,500.00
Additional arbitrator honorarium	= \$ 516.66
2. Member firm, Raymond, James & Associates, Inc. is assessed:

Injunctive relief surcharge	= \$ 2,500.00
Additional arbitrator honorarium	= \$ 516.66

3. Associated person, Jay C. Gagne, is assessed:

Additional arbitrator honorarium

= \$ 516.66

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 a single arbitrator @ \$450.00 = \$ 1,350.00

Pre-hearing conference: October 5, 2004 1 session
 October 28, 2004 1 session
 March 18, 2005 1 session

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

Pre-hearing conferences: November 11, 2004 1 session
 April 15, 2005 1 session
 April 20, 2005 1 session

Thirteen (13) Hearing sessions @ \$15,600.00 = \$15,600.00

Hearing Dates: August 10, 2004 2 sessions
 August 12, 2004 2 sessions
 August 13, 2004 2 sessions
 July 11, 2005 2 sessions
 July 12, 2005 2 sessions
 July 13, 2005 2 sessions
 July 14, 2005 2 sessions

Total Forum Fees = \$20,550.00

1. The Panel assessed 50% of the total forum fees in the amount of \$10,275.00 solely to Merrill Lynch, Pierce, Fenner & Smith, Inc.
2. The Panel assessed 50% of the total forum fees in the amount of \$10,275.00 solely to Jay C. Gagne.

FFF SUMMARY

1. Claimant/Counter-Respondent, Merrill Lynch, Pierce, Fenner & Smith, is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 4,450.00
Injunctive Relief Fees	= \$ 2,500.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
<u>Forum Fees</u>	<u>= \$10,275.00</u>
Total Fees	= \$18,241.66
<u>Less payments</u>	<u>= \$ 8,450.00</u>
Balance Due NASD Dispute Resolution	= \$ 9,791.66

2. Respondent, Raymond, James & Associates, Inc. is solely liable for:

Member Fees	= \$ 4,450.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Total Fees	= \$ 4,966.00
Less payments	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 516.66

3. Respondent/Counter-Claimant, Jay C. Gagne, is solely liable for:

Counterclaim Filing Fee	= \$ 375.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Forum Fees	= \$10,275.00
Total Fees	= \$11,166.66
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 9,591.66

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

ARBITRATION PANEL

Stephen C. Cline, Esq.	-	Public Arbitrator, Presiding Chairperson
Donald G. Russell	-	Public Arbitrator
Judy Estabrook Sheppard	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

/s/ Stephen C. Cline, Esq.
Stephen C. Cline, Esq.
Public Arbitrator, Presiding Chairperson

7/21/05
Signature Date

/s/ Donald G. Russell
Donald G. Russell
Public Arbitrator

7/25/05
Signature Date

/s/ Judy Estabrook Sheppard
Judy Estabrook Sheppard
Non-Public Arbitrator

7/22/05
Signature Date

7/22/05
Date of Service (For NASD Dispute Resolution office use only)

2. Respondent, Raymond, James & Associates, Inc. is solely liable for:

Member Fees	= \$ 4,450.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 518.66
Total Fees	= \$ 4,968.66
Less payments	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 518.66

3. Respondent/Counter-Claimant, Jay C. Gagne, is solely liable for:

Counterclaim Filing Fee	= \$ 375.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 518.66
Forum Fees	= \$10,275.00
Total Fees	= \$11,168.66
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 9,593.66

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

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Stephen C. Cline, Esq.	-	Public Arbitrator, Presiding Chairperson
Donald G. Russell	-	Public Arbitrator
Judy Estabrook Sheppard	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Stephen C. Cline, Esq.
Public Arbitrator, Presiding Chairperson

7/21/05
Signature Date

Donald G. Russell
Public Arbitrator

Signature Date

Judy Estabrook Sheppard
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

Arbitration No. 04-05170

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2. Respondent, Raymond, James & Associates, Inc. is solely liable for:

Member Fee	= \$ 4,450.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Total Fees	= \$ 4,966.66
Less payments	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 516.66

3. Respondent/Counter-Claimant, Jay C. Gagne, is solely liable for:

Counterclaim Filing Fee	= \$ 375.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Forum Fees	= \$10,275.00
Total Fees	= \$11,166.66
Less payments	= \$ 1,875.00
Balance Due NASD Dispute Resolution	= \$ 9,291.66

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

ARBITRATION PANEL

Stephen C. Cline, Esq.

Donald G. Russell

Judy Estabrook Sheppard

- Public Arbitrator, Presiding Chairperson
- Public Arbitrator
- Non-Public Arbitrator

Concurring Arbitrators' Signatures

Stephen C. Cline, Esq.

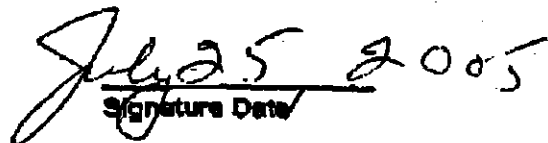
Public Arbitrator, Presiding Chairperson



Donald G. Russell

Public Arbitrator

Signature Date



Signature Date

Judy Estabrook Sheppard

Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution

Arbitration No. 04-05170

Award Page 7 of 7

2. Respondent, Raymond, James & Associates, Inc. is solely liable for:

Member Fee	= \$ 4,450.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Total Fees	= \$ 4,966.00
Less payments	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 516.66

3. Respondent/Counter-Claimant, Jay C. Gagne, is solely liable for:

Counterclaim Filing Fee	= \$ 375.00
Arbitrator Honorarium (Injunctive Hearing)	= \$ 516.66
Forum Fees	= \$10,275.00
Total Fees	= \$11,166.66
Less payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$ 9,591.66

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

ARBITRATION PANEL

Stephen C. Cline, Esq.

Donald G. Russell

Judy Estabrook Sheppard

- Public Arbitrator, Presiding Chairperson
- Public Arbitrator
- Non-Public Arbitrator

Concurring Arbitrators' Signatures

Stephen C. Cline, Esq.

Public Arbitrator, Presiding Chairperson

Signature Date

Donald G. Russell

Public Arbitrator

Signature Date

Judy Estabrook Sheppard

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Signature Date

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