

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Name of Respondent

Brian Anthony Kirk

In the Matter of the Arbitration Between

92-01699
(consolidated
with 93-03095)

Name of Claimant

Brian Anthony Kirk

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.;
Irving Silver; and Randall Gibbs

REPRESENTATION

For Claimant/Respondents: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Irving Silver ("Silver") and Randall Gibbs ("Gibbs") were represented by Edwin L. Noel, Esq. and Michael Skinner, Esq. of Armstrong, Teasdale, Schlafly & Davis, located in St. Louis, Missouri.

For Respondent/Claimant: Brian Anthony Kirk ("Kirk") was represented by Thomas P. Rosenfeld, Esq. of Stone, Leyton & Gershman, located in St. Louis, Missouri.

CASE INFORMATION

NASD Arbitration No. 92-01699

Claimant Merrill Lynch's Statement of Claim filed: May 20, 1992.

Claimant's Submission Agreement signed on: May 8, 1992 by Thomas W. Smith.

Statement of Answer filed by Respondent on: October 13, 1992.
Respondent's Submission Agreement signed on: October 13, 1992.

NASD Arbitration No. 93-03095

Claimant Kirk's Statement of Claim filed: August 9, 1993
Claimant's Submission Agreement signed on: July 26, 1993

Respondent Merrill Lynch's Statement of Answer filed: December 7, 1993.

Claimant Kirk's Motion to Amend the Statement of Claim filed: April 18, 1994.
Respondent Merrill Lynch's Response to the Motion to Amend filed: July 26, 1994.
Claimant Kirk's Amended Statement of Claim filed: August 10, 1994.
Respondents Merrill Lynch, Silver and Gibbs' Answer to the Amended Statement of Claim filed:
August 22, 1994.
Respondents Merrill Lynch, Silver and Gibbs did not file an executed submission agreement.

Respondent Merrill Lynch's Motion to Consolidate filed on: September 28, 1993.
Claimant Kirk's Consent to Consolidation filed: October 7, 1993.

HEARING INFORMATION

Pre-Hearing Conference: None Held.
Hearing Dates/Sessions: November 9, 1994 for Two (2) sessions;
November 10, 1994 for Two (2) sessions;
November 11, 1994 for One (1) session.

Hearing Location: St. Louis, Missouri.

CASE SUMMARY

Claimant Merrill Lynch alleged that Respondent Kirk had failed to pay the balance due on a promissory note executed as part of his employment with Merrill Lynch. The Claim specifically alleged that:

1. Kirk was hired by Merrill Lynch on or about October 22, 1990. Kirk and Merrill Lynch executed an employment agreement, pursuant to which Merrill Lynch was to make a loan to Kirk of \$140,000.00 and Kirk was to execute a

promissory note. The Loan was made and Kirk executed the Note;

2. Under the terms of the agreement, if Kirk's employment was terminated for any reason, the full amount of the unpaid portion of the Note became immediately due and payable;
3. On March 31, 1992, Kirk was terminated for cause for seeking employment outside the firm and using proprietary information for purposes outside Merrill Lynch and contrary to Merrill Lynch policy;
4. Immediately after termination, Kirk commenced employment with Kemper Securities. In fact, Kirk had been recruited by Kemper and planned to "defect" prior to his termination;
5. Pursuant to the terms of the agreement, Kirk owed Merrill Lynch the sum of \$96,000.00 remaining on the Note, plus interest.

Respondent Kirk denied the material allegations of the Statement of Claim, alleging that:

1. Merrill Lynch violated its representations and agreements with Kirk by terminating his employment without cause; and
2. The Merrill Lynch guidelines were presented to Kirk after he commenced employment.

In addition, Kirk asserted several affirmative defenses, including the following:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. The claim fails due to a failure of consideration;
3. The claim is barred by Merrill Lynch's negligent misrepresentation and/or omissions;
4. The claim is barred by the doctrines of estoppel, laches, and set-off, and because of Merrill Lynch's breach of its duty of good faith and fair dealing;
5. The claim is barred because of Merrill Lynch's breach of the Employment Agreement and the CMA/Payroll Deduction Authorization Form executed by Kirk;

6. Merrill Lynch has waived its rights under the promissory note;
7. Kirk has been discharged and released from the promissory note alleged in the claim; and
8. Merrill Lynch's breach of the employment agreement and CMA/Payroll Deduction Authorization Form rendered Kirk's performance of the terms of the Note impossible.

Kirk's claim against Merrill Lynch, Silver and Gibbs alleged that he was wrongfully terminated and that Respondents interfered with and attempted to appropriate Kirk's clients. The claim specifically alleged that:

1. At the time Kirk negotiated his employment with Merrill Lynch in 1990, Merrill Lynch requested that he provide them with information regarding Kirk's unique book of business, including the food and beverage group, comprised of 300 sophisticated investors whom Kirk had developed and cultivated as customers over the preceding fifteen years. Silver and Merrill Lynch were aware that in order to service this group's needs, Kirk would have to be registered in each of the 28 states in which Kirk transacted business with the Food and Beverage Group;
2. Kirk also advised Silver that he was concerned with Merrill Lynch's reputation for compelling brokers to sell Merrill Lynch's in-house products and positions which may not be in the best interests of Kirk's customers. Silver represented that Merrill Lynch no longer engaged in that practice and he would not be required to sell Merrill Lynch's in-house products and positions which Kirk did not believe served the best interests of his clients. Silver further represented that if Kirk moved his book to Merrill Lynch, it would pay him the up front bonus of \$144,000 and give him a contract of employment for 3 years, with salary, commission schedule and bonuses;
3. Kirk executed the employment agreement in October of 1990 and began to fulfill his duties under the contract. In December 1990, Merrill Lynch, through Silver, began pressuring Kirk to convert his Food and Beverage Group to fee-based Cash Management Accounts ("CMA"), the sole purpose of which were to generate service fees through credit cards, checking account and similar services. Kirk advised Silver that pressuring his clients to open CMAs were not in the best interests of his clients and was contrary to Silver's prior representations concerning his employment with Merrill Lynch;

4. Through 1991, Merrill Lynch increased pressure on its brokers, including Kirk, to convert the customers' accounts to CMAs, offering trips to the brokers who opened the most and threatening termination for those brokers who did not convert a sufficient amount of their customers' accounts. In December 1991, Silver threatened Kirk that Merrill Lynch would not renew his annual multi-state registration unless Kirk began a major push to transfer his accounts to CMAs;

5. In addition, Silver had another broker, Gibbs, begin to contact Kirk's customers regarding CMAs without Kirk's knowledge or consent. After his customers complained, Kirk confronted Gibbs and told him not to send CMA materials to Kirk's clients without his permission. In response, Silver and Gibbs met with other Merrill Lynch representatives in March of 1992 and discussed the possibility of terminating Kirk and transferring control of his clientele to Gibbs;

6. On March 19, 1992, Kirk's assistant returned from vacation and discovered that Kirk's customer records, files and posting books had been tampered with;

7. On April 1, 1992, Silver terminated the employment of Kirk and his assistant, instructing them to return that afternoon to pick up their books, records and personal items. When they returned, they discovered that Merrill Lynch had broken into the assistants desk and appropriated customer records and computer materials containing the names and addresses of all Kirk's customers. From April 1, 1992, Merrill Lynch, through Silver and Gibbs, communicated directly with and attempted to appropriate Kirk's customers and investors, eventually retaining control over approximately \$7,613,903.93 of Kirk's client assets.

Based upon the above allegations, Kirk asserted claims for breach of contract; wrongful discharge; tortious interference with business expectancies; and unjust enrichment.

Respondents Merrill Lynch, Silver and Gibbs denied the material allegations of the Claim, asserting that:

1. The claim is a weak attempt to avoid repaying the sum Merrill Lynch is due according to the promissory note;
2. Kirk was an at-will employee and Merrill Lynch had the right to terminate his employment, with or without cause, at any time. The agreement was only a service agreement setting forth the proposed method of payment to Kirk during his employment with Merrill Lynch;

3. Kirk was properly terminated for cause because Merrill Lynch discovered that he was planning to leave Merrill Lynch to join Kemper and had already given Kemper certain confidential property which was the property of Merrill Lynch; and

4. Prior to becoming employed by Merrill Lynch, Kirk ,was made aware that Merrill Lynch's policy was that all accounts were the property of Merrill Lynch and that Merrill Lynch had the right to and would attempt to maintain as Merrill Lynch accounts all customers of its brokers who attempted to leave Merrill Lynch.

Respondents Merrill Lynch, Silver and Gibbs asserted several affirmative defenses, including the following:

1. The Statement of Claim fails to state a claim upon which relief can be granted;
2. Kirk has, by his own conduct and breach of Merrill Lynch policy, waived any and all claims for breach of contract;
3. Kirk is estopped by his conduct from asserting any and all claims; and
4. Kirk did not rely on and had no right to rely on any representations made by Merrill Lynch, or its officers, agents or employees.

RELIEF REQUESTED

Claimant/Respondent Merrill Lynch requested entry of an award against Kirk for \$96,000.00 in actual damages for the balance due on the Note plus interest at the rate of 9.5% per annum from November 1, 1991 to November 11, 1994, attorneys' fees and costs. Respondents Merrill Lynch, Silver and Gibbs requested that the claims asserted in Kirk's Statement of Claim and Amended Statement of Claim be dismissed.

Kirk requested that the Panel dismiss Merrill Lynch's Statement of Claim with prejudice and award Kirk his costs and reasonable attorneys incurred, together with such other relief that the Panel deemed just. In addition, Respondent/Claimant Kirk requested entry of an award against Merrill Lynch, silver and Gibbs for actual damages in the sum of \$319,000.00; punitive damages in the sum of \$957,000.00; and attorneys' fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

While N.A.S.D. Arbitration No.92-01699 was still pending, Kirk filed N.A.S.D. Arbitration No.

93-03095. On September 28, 1993, Merrill Lynch filed a Motion to Consolidate the two cases. By letter dated October 7, 1993, Kirk consented to the consolidation and the arbitrations were consolidated for hearing.

On April 18, 1994, Kirk filed a Motion for Leave to File an Amended Statement of Claim. Merrill Lynch responded on July 26, 1994. The Panel granted the Motion on August 10, 1994 and Respondents Silver and Gibbs were added as party Respondents to N.A.S.D. Arbitration No. 93-03095.

Respondents Merrill Lynch, Silver and Gibbs did not file an executed submission agreement in N.A.S.D. Arbitration No. 93-03095, but filed an answer, appeared and testified at the hearing and are required to submit to arbitration pursuant to Section 8 of the NASD Code of Arbitration Procedure.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleading, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent/Claimant Brian Anthony Kirk is liable for and shall pay to Claimant/Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. the sum of \$74,580.00 as the principal due on the note, plus interest in the sum of \$21,449.41;
2. In addition, Respondent/Claimant Brian Anthony Kirk is liable for and shall pay to Claimant/Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$35,310.82 as attorneys' fees. In deciding to award attorneys' fees to Merrill Lynch, the Panel considered the arguments of the parties, as well as the promissory note executed by Kirk, and determined that authority existed for an award of attorneys' fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.;
3. Respondent/Claimant Brian Anthony Kirk's claims for damages against Merrill Lynch, Pierce, Fenner & Smith, Inc., Irving Silver and Randall Gibbs, including the claims for punitive damages and attorneys' fees, are hereby dismissed with prejudice and denied in their entirety;

4. All remaining costs of arbitration shall be borne by the party incurring the cost, except for those specifically enumerated herein; and
5. Any relief request not specifically granted is hereby denied.

OTHER COSTS

The NASD shall retain the \$300.00 postponement fee paid by Claimant/Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Five (5) hearing sessions x \$1,000.00 per session = \$5,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and refund the \$600.00 hearing session deposit previously deposited by the Claimant/Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. In addition, the NASD shall retain the \$500.00 claim filing fee and the \$1,000.00 hearing session deposit previously filed by the Respondent/Claimant Brian Anthony Kirk. Respondent/Claimant Brian Anthony Kirk is liable for and shall pay to the NASD forum fees in the sum of \$4,000.00. Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures
Name

Date

/s/ Dale W. Roth
Dale W. Roth
Industry Arbitrator
Chairperson

May 31, 1995

/s/ Walter A. Beckers
Walter A. Beckers
Industry Arbitrator

May 30, 1995

/s/ Sigmund E. Freund
Sigmund E. Freund
Industry Arbitrator

May 30, 1995

For NASD Use Only
Date of Service of Award: June 5, 1995