

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

John Murphy

93-04885

Name of Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

Name of Third-Party Respondent

Kidder, Peabody & Co., Incorporated

REPRESENTATION

For Claimant John Murphy ("Murphy"): Thomas Campbell, Esq. of the law firm of Smith, Campbell & Paduano.

For Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): Thomas Loder, Esq. of the law firm of Rubin & Associates.

For Third-Party Respondent Kidder, Peabody & Co., Inc. ("Kidder Peabody"): Thomas Campbell, Esq. of the law firm of Smith, Campbell & Paduano.

CASE INFORMATION

Statement of Claim filed: November 26, 1993.

Claimant's Submission Agreement signed on: November 26, 1993.

Statement of Answer, Counterclaim and Third-Party Claim filed by Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. on: November 30, 1993.

Respondent, Merrill Lynch, did not execute a Submission Agreement.

Statement of Answer to Third-Party Claim and Counterclaim filed by Third-Party

Respondent, Kidder Peabody, and Claimant John Murphy on: December 3, 1993.

Third-Party Respondent, Kidder Peabody, did not execute a Submission Agreement.

HEARING INFORMATION

Hearing Dates/Sessions:	December 9, 1993	-	Two Sessions
	December 10, 1993	-	Two Sessions

Hearing Location: National Association of Securities Dealers, Inc. offices located at 33 Whitehall Street, New York City, New York.

CASE SUMMARY

Claimant alleged that Respondent Merrill Lynch was about to commence an action in state or federal court alleging claims against the claimant arising out of the voluntary termination of his employment with Respondent Merrill Lynch and his current employment with Third-Party Respondent Kidder Peabody.

Respondent Merrill Lynch maintained that the confiscation of confidential records by Kidder Peabody and Murphy and their diversion of Merrill Lynch clients constitutes unfair competition, breach of fiduciary duty, a conversion of Merrill Lynch's trade secret property and is expressly prohibited by the terms of the employment agreement claimant signed as a condition of his employment.

Respondent Merrill Lynch maintained that claimant and third-party respondent, Kidder Peabody, conspired to misappropriate from Merrill Lynch over 425 Merrill Lynch accounts, over \$410,000 in annual commission revenues, and over \$74.2 million in assets under Merrill Lynch management. Respondent Merrill Lynch further maintained that claimant and third-party respondent conspired to wrongfully divert these accounts, commission revenues and assets under the management of Merrill Lynch to Kidder Peabody.

Respondent Merrill Lynch further maintained that the misappropriation of Merrill Lynch's clients and commission revenues by Kidder Peabody and Murphy is in violation of Merrill Lynch's clear contractual and trade secret rights.

Respondent Merrill Lynch further maintained that on November 24, 1993, claimant resigned from Merrill Lynch without notice, and immediately joined the Kidder Peabody office in Florham Park, New Jersey. Respondent Merrill Lynch further maintained that they believed claimant was paid an upfront payment in addition to a special enhanced commission payout as an incentive to violate the employment agreement with Merrill Lynch.

Respondent further maintained that in exchange for these financial incentives,

Merrill Lynch has obtained a Temporary Restraining Order in District Court enjoining claimant and third-party respondent from soliciting claimant's clients and precluding such clients from voluntarily transferring their accounts to third-party respondent. The Federal Court in granting the Temporary Restraining Order referred the matter to be heard by this panel of arbitrators to determine after a full hearing on the merits, whether to lift the injunction or to extend it.

RELIEF REQUESTED

Claimant requested (a) the panel declare that claimant is not liable to Merrill Lynch in any respect as a result of his employment or termination of employment; (b) the panel grant claimant such other and further relief as it deems just and proper; and (c) dismissal of the counterclaim.

Respondent requested the following damages against Claimant and Third-Party Respondent: (a) Continuation of the injunctive relief ordered by the U.S. District Court for the District of New Jersey against Kidder Peabody and Murphy through November 28, 1994; (b) Compensatory money damages in favor of Merrill Lynch on its claim against Kidder Peabody and Murphy in an amount not less than \$350,000.00; and (c) Costs, attorneys' fees, and pre-judgment interest.

Third-Party respondent requested that the third-party claim be dismissed.

OTHER ISSUES CONSIDERED & 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. 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 pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The request for continuance of the injunction entered by the U.S. District Court for the District of New Jersey against Kidder Peabody and Murphy is denied and the injunction is lifted effective immediately.
2. Claimant, John Murphy, and Third-Party Respondent, Kidder Peabody, be and hereby are jointly and severally liable, and shall pay to the respondent Merrill Lynch the sum of \$197,471.44,

claimant secretly confiscated proprietary records and information containing the names, addresses and financial holdings of over 425 Merrill Lynch clients that claimant serviced.

Respondent maintained that on the same day claimant submitted his resignation, claimant and Kidder Peabody began an aggressive campaign to solicit Merrill Lynch customers by sending through expedited means pre-prepared transfer forms.

Respondent asserted as its counterclaim and third-party claim that the conduct of Murphy and Kidder Peabody constitutes breach of contract and conversion of Merrill Lynch's trade secret customer lists, tortious and intentional interference with the fiduciary and contractual relationship between Merrill Lynch and Murphy, tortious and intentional interference by Kidder Peabody with the fiduciary and confidential relationships that Merrill Lynch has with its customers, unjust enrichment, and conspiracy.

In response, the Claimant and Third-Party Respondent Kidder Peabody denied all allegations of wrongdoing contained in Merrill Lynch's counterclaim and third-party claim and stated that Merrill Lynch is not entitled to recover the extraordinary relief requested.

Claimant maintained that approximately eighteen months after becoming licensed, he was offered the opportunity to join two other Merrill Lynch brokers in a partnership, which he did. Claimant further maintained that following the break-up of the partnership, claimant felt that he could not service his business as effectively as he could previously. Claimant maintained that after considering many opportunities, he agreed to accept a position with Kidder Peabody.

Claimant and Third-Party Respondent further maintained that the "employment agreement" claimant signed upon commencing employment with Merrill Lynch was a contract of adhesion, lacked consideration and contained a restrictive covenant void as against public policy. Claimant further maintained that the first time Merrill Lynch gave the claimant a copy of the employee agreement was after claimant resigned.

Claimant maintained that no original records, were removed and only copies of his own clients records were retained. Claimant further maintained that he prepared to and did solicit his clients upon leaving Merrill Lynch. Claimant maintained that his actions were not illegal and that he did not breach any obligation to Merrill Lynch by accepting employment with Kidder Peabody.

Claimant and Third-Party Respondent maintained that the employment agreement at issue herein is unenforceable and that Murphy and Kidder Peabody are not liable to Merrill Lynch for breach thereof or for any alleged tortious conduct relating to the alleged employment agreement or the hiring of Murphy.

plus interest at the rate of 9% annually from the date of the award only.

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

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

STATE OF: NEW YORK
COUNTY OF: NEW YORK

On this 16th day of December, 1993, before me personally appeared Richard Peskin, Esq. known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

[Signature]

STATE OF: NEW YORK
COUNTY OF: NEW YORK

MARK O. GLUT
Notary Public, State of New York
No. 4005193
Qualified in Queens County
Commission Expires April 22, 1994

On this 16th day of December, 1993, before me personally appeared Joan Stearns-Johnsen, Esq. known to me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that he executed the same.

[Signature]

MARK O. GLUT
Notary Public, State of New York
No. 4005193
Qualified in Queens County
Commission Expires April 22, 1994

STATE OF: NEW YORK
COUNTY OF: NEW YORK

On this 16th day of December, 1993, before me personally appeared Jerome Levy, known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

[Signature]

MARK O. GLUT
Notary Public, State of New York
No. 4005193
Qualified in Queens County
Commission Expires April 22, 1994

Non - Refundable Claim filing fee: \$ 500.00
Non- Refundable Counterclaim filing fee: \$ 500.00
Expedited Hearing fees: \$ 5000.00
Hearing Session fees: \$ 3000.00 (\$750 per hearing session
x 4 sessions)

TOTAL FEES \$9000.00

1. Claimant Murphy and Third-Party Respondent Kidder Peabody are assessed \$4,500.00 jointly and severally. Claimant previously deposited \$3600.00 and owes a balance of \$900.00.
2. Merrill Lynch is assessed \$4,500.00. Merrill Lynch previously deposited \$2500.00 and owes a balance of \$2000.00.

Fees are payable to the National Association of Securities Dealers, Inc.

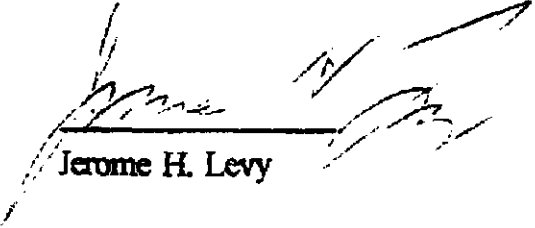
ARBITRATION PANEL

Richard S. Peskin, Esq.	-	Chairperson - Industry
Joan Stearns-Johnsen, Esq.	-	Industry Panelist
Jerome H. Levy	-	Industry Panelist

Concurring Arbitrators' Signatures
Name


Richard S. Peskin, Esq.


Joan Stearns-Johnsen, Esq.


Jerome H. Levy

Date of Decision: December 16, 1993

STATE OF Connecticut ss.: STAMFORD

COUNTY OF Fairfield

On this 21st day of June 1996, before me personally appeared ^{Neil J. Carey} to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Alger L. D'Amico

Clerk of the Court
My Comm. Expires 6/30/98