

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Merrill Lynch Pierce Fenner & Smith Inc

95-00176

Name of Respondent(s)

Smith Barney Shearson, Inc.  
Alan Arno

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REPRESENTATION

For Claimant: Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill"), Thomas Loder, Esq. of Rubin and Associates, Paoli, PA.

For Respondents: Smith Barney Shearson, Inc. ("Smith Barney") and Alan Arno ("Arno"): Sara Soto, Esq. and Ronald Shindler, Esq. of Fowler, White, Burnett, et al., Miami, FL.

CASE INFORMATION

Statement of Claim filed by Smith Barney on January 12, 1995. Smith Barney and Arno filed a Submission Agreement on January 11, 1995.

Pursuant to the Agreement of the parties as referenced in the Order Entering Preliminary Injunction dated February 6, 1995, the parties agreed that Merrill would be the Claimant in this arbitration proceeding. Consequently, Merrill filed a Statement of Claim on February 4, 1995. Claimant, Merrill filed a Submission Agreement, signed by Thomas Loder on behalf of Merrill, on February 20, 1995.

Statement of Answer and Counterclaim filed by Respondents, Smith Barney and Arno on: February 14, 1995. Respondents, Smith Barney and Arno's Submission Agreements signed on: January 11, 1995. Smith Barney's Submission Agreement signed by Eugene Clark on behalf of Smith Barney.

### HEARING INFORMATION

On February 15, 16, 17 and 18, 1995 hearings lasting 7 sessions were conducted in Ft. Lauderdale, Florida.

### CASE SUMMARY

Claimant, Merrill maintained that the confiscation of confidential records by Smith Barney and Arno, and their diversion of Merrill's clients, constitutes unfair competition, breach of fiduciary duty, a conversion of Merrill's trade secret property and is expressly prohibited by the terms of the employment agreement Arno signed as a condition of his employment.

Merrill maintained that Arno and Smith Barney conspired to misappropriate from Merrill over 400 Merrill accounts, over \$410,000 in annual commission revenues, and over \$74 million in assets under Merrill management. Merrill further maintained that Arno and Smith Barney conspired to wrongfully divert these accounts, commission revenues and assets to Smith Barney. Merrill further maintained that the misappropriation of Merrill's clients and commission revenues by Smith Barney and Arno is in violation of Merrill's clear contractual and trade secret rights.

Merrill alleged that: Arno resigned from Merrill and immediately joined the Smith Barney office in the same location; Arno was paid an up front payment in addition to a special enhanced commission payout as an incentive to violate the employment agreement with Merrill; in exchange for these financial incentives, Arno secretly confiscated proprietary records and information for over 400 Merrill clients which Arno serviced; on the same day Arno resigned, Smith Barney began an aggressive campaign to solicit Merrill customers by sending pre-prepared transfer forms.

Merrill alleged that: the conduct of Arno and Smith Barney constitutes breach of contract; conversion of trade secrets; tortious and intentional interference with the fiduciary and contractual relationship between Merrill and Arno; tortious and intentional interference by Smith Barney with the fiduciary and confidential relationships Merrill has with its customers; unjust enrichment; and, conspiracy.

Merrill obtained a Temporary Restraining Order in District Court on January 17, 1995 which was subsequently converted into a Preliminary Injunction by the District Court for the Southern District of Florida on February 6, 1995. Said injunction ordered that Merrill participate in an expedited arbitration hearing on February 15, 1995 or the injunction would be dissolved.

Respondent, Arno maintained that he had been recruited and hired by Claimant without discussion of the "Account Executive Trainee Agreement," which had been submitted to him for signature only after he reported for work. Respondent further maintained that the agreement had

been represented to him as a training agreement intended to protect Claimant's investment in training him if he left Claimant's employment in less than two years.

Respondent Arno further maintained that he remained in Claimant's employ for fourteen years and then joined Respondent, Smith Barney, after considering other opportunities, due to certain differences with his branch manager.

Arno and Smith Barney further maintained that: the Trainee Agreement contains restrictions which are void, unenforceable, unreasonable and in violation of public policy; enforcement of the Trainee Agreement under these facts and circumstances is contrary to industry custom and practice; Arno's retention of copies of his customers' records after departing Claimant's employ is in accord with industry custom and practice, which Claimant itself also follows when it recruits brokers from its competitors, and does not constitute removal of confidential or proprietary information under the circumstances.

Respondents therefore denied any wrongdoing or liability to Claimant. Respondents counterclaimed to recover the damages suffered as a result of Claimant's seeking and obtaining the Preliminary Injunction from the District Court temporarily prohibiting them from soliciting or accepting any business from any clients served by Arno at any time while in Claimant's employ.

### **RELIEF REQUESTED**

Claimant requested that the panel: enter an injunction for a period of one year against Arno and Smith Barney according to the terms of the Preliminary Injunction entered by the District Court; award compensatory damages against Smith Barney and Arno in an amount that is consistent with the evidence presented in the arbitration; and, award such other and further relief as this panel deems just and proper under the circumstances, including costs, attorney's fees, and pre-judgment interest according to law.

Respondents requested dismissal of the claim and counterclaimed against Merrill requesting that the panel enter an award providing that: (a) any trainee agreement or other instrument signed by Arno in favor of Merrill that purports to preclude him from retaining copies of client records or from soliciting his customers be declared invalid and unenforceable; (b) Merrill be enjoined from interfering with the relationship between Arno and his clients or the relationship between Arno and Smith Barney; (c) Merrill be required to compensate Arno and Smith Barney for any damage they suffer from the preliminary injunction obtained by Merrill pending arbitration; (d) Merrill be required to pay costs and attorney's fees incurred in this proceeding, as well as in the court proceeding, as a sanction for violation of NASD rules; (e) Merrill be enjoined for a period of one year from bringing any court proceedings against any brokers now employed by Merrill who subsequently become employed by Smith Barney; and, (f) Merrill be enjoined from

soliciting any of Arno's customers for the same period of time that it obtained a preliminary injunction preventing Arno and Smith Barney from soliciting those customers.

### **OTHER ISSUES CONSIDERED & DECIDED**

1. 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.
2. At the hearing on February 15, 1995, this panel granted Merrill's Motion to Strike paragraph (e) of Arno and Smith Barney's Counterclaim Relief Request which requested that Merrill be enjoined for a period of one year from bringing any court proceedings against any brokers now employed by Merrill who subsequently become employed by Smith Barney. At the same time the panel denied Merrill's Motion to Strike paragraph (d) of Arno and Smith Barney's Counterclaim Relief Request which requested that Merrill be required to pay costs and attorney's fees incurred in this proceeding as well as in the court proceeding as a sanction for violation of NASD rules.
3. At the conclusion of the hearing on February 18, 1995, the panel entered a preliminary order removing the Preliminary Injunction issued by the District Court on January 17, 1995 (sic) pending final determination of this case. By this Award, said preliminary order is hereby superseded.

### **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. Claimant, Merrill's request that the panel enter an injunction for a period of one year against Smith Barney is hereby denied.
2. The Preliminary Injunction entered by the District Court on February 6, 1995 is hereby permanently lifted effective as of February 18, 1995.
3. Claimant, Merrill's request for an award of compensatory damages against Smith Barney and Arno is hereby denied.
4. Claimant, Merrill's request for costs, attorney's fees, and interest is denied.

5. Respondents/Counterclaimants' request that any trainee agreement or other instrument signed by Arno in favor of Merrill that purports to preclude him from retaining copies of client records or from soliciting his customers be declared invalid and unenforceable is hereby granted.
6. Respondent/Counterclaimants' request for an injunction against Merrill from interfering with the relationship between Arno and his clients or the relationship between Arno and Smith Barney is denied.
7. Respondents/Counterclaimants' request that Merrill be required to compensate Arno and Smith Barney for any damages they suffered from the preliminary injunction obtained by Merrill is denied.
8. Respondent/Counterclaimants' request that Merrill be required to pay costs and attorney's fees incurred as a sanction for violation of NASD rules is denied.
9. Respondent/Counterclaimants' request that Merrill be enjoined from soliciting any of Arno's customers for the same period of time that it obtained an injunction preventing Arno and Smith Barney from soliciting those customers is denied.

#### **OTHER COSTS**

With the exception of the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

#### **FORUM FEES**

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the panel has assessed Forum Fees in the amount of \$4,200.00 (\$600.00 per session x 7 sessions).

1. Claimant, Merrill is hereby assessed \$2,200.00.
2. Respondent, Smith Barney is hereby assessed \$2,200.00 for which the NASD shall retain the \$600.00 previously deposited by Smith Barney in partial satisfaction thereof, leaving a balance due the NASD of \$1,600.00.
3. Pursuant to Section 43(h) of the Code of Arbitration Procedure, Claimant, Merrill is hereby assessed the \$2,500.00 surcharge for the expedited arbitration to be paid directly to Smith Barney as a partial refund of the \$5,000.00 paid by them.
4. Pursuant to Section 45 of the Code of Arbitration Procedure, Claimant, Merrill is hereby

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assessed the non-refundable member surcharge of \$350.00 payable to the NASD.

5. Pursuant to Section 45 of the Code of Arbitration Procedure, Respondent, Smith Barney is hereby assessed the non-refundable member surcharge of \$350.00 payable to the NASD.

6. Claimant is hereby assessed the \$250.00 non-refundable filing fee to be paid directly to Smith Barney as a refund of the \$250.00 filing fee previously paid by them.

7. The NASD shall retain the \$250.00 non-refundable filing fee previously paid by Smith Barney.

Unless otherwise indicated above, fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Public/Industry

15/  
Beverly S. Gordon

Industry/Chairperson

15/  
George Davis

Industry

15/  
Richard Longacre

Industry

Date of Decision:

2-27-95

## **NASD AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Name of Claimant

Nick Fera

and

95-00177

Name of Respondent

Milton Manolis

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### **REPRESENTATION OF PARTIES**

Nick Fera ("**Claimant**") was represented by Peter J. Berman, Esq., Peter J. Berman, Ltd, Chicago, Illinois.

Milton Manolis ("**Respondent**") appeared *pro se*.

### **CASE INFORMATION**

The Statement of Claim was filed on or about January 12, 1995. Submission Agreement of Claimant Nick Fera was signed on January 10, 1995.

Statement of Answer was filed by Respondent Milton Manolis on or about March 17, 1995. Submission Agreement of Respondent Milton Manolis was signed on March 17, 1995.

### **HEARING INFORMATION**

The hearing was held on Tuesday, September 19, 1995 for two (2) sessions and Wednesday, September 20, 1995 for two (2) sessions in Chicago, Illinois for a total of four (4) sessions.

### **CASE SUMMARY**

Claimant alleged that Respondent Manolis intentionally advised him that Tamaron Investments, Inc. had the very best people in the securities business when he knew that its principal officers and directors had been censured, fined and suspended for charging excessive mark-ups and mark-downs and other illegal practices; misrepresented the risks of the investments that he recommended and engaged in churning.

Respondent Manolis denied the allegations set forth in the Statement of Claim. Respondent Manolis specifically stated that at no time was the Claimant unaware of the risks involved in his investments. It was also stated that prior to the opening of the accounts, Respondent Manolis clearly expressed his area of expertise as being aggressive growth situations involving a high degree of risk. Respondent Manolis also stated that during the relationship, the Claimant did not express any dissatisfaction until he lost money, the account was coded speculation and the margin account was coded trading profits.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$99,983 with interest at the rate of 5% per annum from May 18, 1993 until the date this award is entered with punitive damages in the amount of \$200,000, attorneys' fees, related expenses and the costs of this proceeding.

Respondent Manolis requested that the claims asserted against him be denied.

### **OTHER ISSUES CONSIDERED & DECIDED**

Prior to the commencement of the hearing of this matter, Claimant settled all claims previously asserted against Tamaron Investments, Inc.

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 original(s) 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. Respondent Milton Manolis shall be and hereby is liable for and shall pay to the Claimant Nick Fera, the sum of **Twenty five thousand dollars (\$25,000)**.
2. Interest at the rate of 5% per annum is awarded on the above stated sum from and inclusive of January 25, 1994 through and inclusive of the date this award is paid in full.
3. Respondent Milton Manolis shall be and hereby is liable for and shall pay to the Claimant Nick Fera the sum of **Ten thousand dollars (\$10,000)** for attorneys' fees.
4. The request for punitive damages is hereby denied.



5. Each party shall bear its' own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were four (4) sessions x \$750 = \$3,000 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimant Nick Fera. Claimant Nick Fera shall be and hereby is liable for and shall pay to the NASD the sum of \$750 and Respondent Milton Manolis shall be and hereby is liable for and shall pay to the NASD the sum of \$1,500 as the balance due for forum fees.

Pursuant to §45 of the NASD Code of Arbitration Procedure, the NASD shall **assess** the non-refundable member surcharge in the amount of \$350 to Tamaron Investments, Inc.

The NASD shall retain postponement fees in the amount of \$750 previously deposited with the NASD by Tamaron Investments, Inc. **Fees are payable to the National Association of Securities Dealers, Inc.**

Dated:

/s/ Alton B. Harris, Esq.

Alton B. Harris, Esq.  
Public Arbitrator, Presiding Chair

October 15, 1995

/s/ John K. Notz, Jr., Esq.

John K. Notz, Jr., Esq.  
Public Arbitrator

October 20, 1995

/s/ Robert Biondi

Robert Biondi  
Industry Arbitrator

October 16, 1995