

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimants**

Smith Barney Shearson, Inc.  
Eric Fishman  
Frank M. Calabrese  
Alan Gunzal  
Roman Leniw  
Richard Flora

95-01340

**Name of Respondents**

Merrill Lynch, Pierce, Fenner & Smith Inc.

**Name of Third-Party Respondents**

Peter DePasquale  
Edward Rodrick

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**REPRESENTATION**

For Claimants Eric Fishman, Frank Calabrese, Alan Guenzel, Roman Leniw, Richard Flora, (hereinafter collectively referred to as "Claimants"), Smith Barney Shearson, Inc. ("Smith Barney") and Third-Party Respondents Edward Rodrick and Peter DePasquale (hereinafter collectively referred to as "Third-Party Respondents") appeared Anthony Paduano, Esq. of the law firm Smith, Campbell & Paduano located in New York City, New York.

For Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") appeared Thomas T. Loder, Esq. of the law firm Rubin & Associates located in Paoli, Pennsylvania.

**CASE INFORMATION**

The Statement of Claim was filed on March 17, 1995. Claimants' and Smith Barney's Submission Agreements were executed on March 20, 1995.

The Statement of Answer, Counterclaim and Reply filed by Respondent Merrill Lynch was filed on April 19, 1995

### HEARING INFORMATION

Hearing Dates/Sessions:	May 15, 1995	-	3 sessions
	May 16, 1995	-	3 sessions
	May 22, 1995	-	3 sessions
	July 17, 1995	-	2 sessions
	July 18, 1995	-	2 sessions
	September 6, 1995	-	2 sessions
	September 7, 1995	-	3 sessions

The hearings took place at the National Association of Securities Dealers, Inc.'s offices located in New York City, New York.

### CASE SUMMARY

Claimants alleged that Respondent Merrill Lynch, on information and belief, was about to commence an action in court asserting claims against Claimants and/or Smith Barney arising out of the termination of the individual Claimants employment with Merrill Lynch, and their subsequent employment with Smith Barney. Claimants alleged that relief would be sought which would adversely affect Claimants and the public customers of each individual Claimant who wish to continue doing business with the individual Claimants. Claimants sought a declaration that any agreement purporting to preclude claimants from retaining copies of client records or from soliciting their customers is invalid and unenforceable and further declaring that Merrill Lynch is not entitled to refuse to accept properly executed broker-to-broker transfer forms. Additionally, Claimants sought a declaration that they are not liable to Merrill Lynch in law or in equity in any respect as a result of the termination or subsequent employment with Smith Barney of the individual claimants.

Respondent Merrill Lynch maintained that Claimants' claim arose out of a conspiracy between Smith Barney and seven of Merrill Lynch's former employees to "raid" the Merrill Lynch branch office located in Wayne, New Jersey, of over 3,100 Merrill Lynch accounts, representing over \$232 million in assets and generating in excess of \$1.7 million in annual commissions. Merrill Lynch also maintained that claimant's intended to divert these accounts, commission revenues and assets from Merrill Lynch to Smith Barney. Further, Merrill Lynch maintained that the group recruitment, timed departure and misappropriation of client records, data and information relative to Merrill Lynch clients violated well-established industry standards against raiding and unfair competition. Specifically, Merrill Lynch counterclaimed that Smith Barney conspired with and paid the individual claimants approximately \$1 million in up-front cash, in addition to other bonus incentives, to resign without notice and confiscate thousands of confidential Merrill Lynch client records, thereby constituting a raid of the branch office.

Further, Merrill Lynch asserted that its former employees sent letters to Merrill Lynch clients serviced by the individual claimants while employed by Merrill Lynch in which they communicated to these clients that Merrill Lynch's administrative fees were unreasonable; that the costs associated with Merrill Lynch's service was too high; and that it was not in the clients' interest to remain with Merrill Lynch, in addition to other defamatory comments. Merrill Lynch

asserted that at least one of the claimants/Third-Party respondents further disparaged Merrill Lynch products and other investments recommended by Merrill Lynch to its customers while claimants were still in the employ of Merrill Lynch. Merrill Lynch maintained that these representations were made through unauthorized and unapproved correspondence. Merrill Lynch contended that such conduct constitutes defamation, libel, slander and corporate disparagement.

For its Counterclaim, Merrill Lynch asserted that the Claimants owed a fiduciary duty to Merrill Lynch not to confiscate Merrill Lynch records, divert the business of Merrill Lynch clients or otherwise engage in acts of unfair competition in return for Merrill Lynch's providing numerous benefits and advantages during their employment at Merrill Lynch. Merrill Lynch further asserted that the employees also expressly agreed in writing not to confiscate Merrill Lynch's records or to divert Merrill Lynch's clients to a competitor firm and that the individual Claimants and Smith Barney conspired to breach this fiduciary duty owed by the individual claimants which constituted unfair competition and breach of Merrill Lynch's contractual rights.

Merrill Lynch maintained that the names, addresses and all other confidential information regarding Merrill Lynch's clients constitutes the proprietary and confidential business property and trade secrets of Merrill Lynch. Merrill Lynch further maintained that Smith Barney wrongfully acquired this information by inducing the Claimants to confiscate client records and to divert thousands of clients to Smith Barney; that use of this valuable trade secret information is a violation of the standards against unfair competition even in the absence of a written agreement which existed in this instance; and that this information has been wrongfully converted by Smith Barney.

In reply to the counterclaims asserted by Merrill Lynch, Claimants maintained that their actions did not constitute unfair competition or raid. Specifically, Claimants maintained they were entirely justified in considering alternative employment opportunities and making copies of documents which brokers customarily make when changing firms and making other legitimate preparations to compete with Merrill Lynch once they joined Smith Barney. Claimants also maintained that Merrill Lynch engages in exactly the type of conduct that it complains of here and should not be permitted to recover in this proceeding based upon such conduct. Claimant Smith Barney denied any liability on the basis that it tortiously interfered with Merrill Lynch's contractual relationships with the other parties herein; that the individual claimants were at-will employees; that the claimants did not breach any duty owed to Merrill Lynch; and that Smith Barney did not act with the intent of harming Merrill Lynch which is necessary for recovery under a tortious interference theory. Claimants alleged that three of the individual claimants did not enter into restrictive covenants or other contracts with Merrill Lynch; that the restrictive covenant agreements signed by the other parties are neither valid nor enforceable; and that it is customary for transferring account executives to retain copies of their clients' trade records. Claimants also maintained that Merrill Lynch took few steps to protect the confidentiality of client records in this particular office; that if the information is in any way confidential, it is confidential to the customers and not Merrill Lynch; and that the way in which brokers develop a client base in the brokerage business makes trade secret protection inappropriate.

Claimants contended that in the event the panel were to find in favor of Respondent, Respondent

would, at most, only be entitled to lost profits that it could prove to an economic certainty. Claimants asserted that actual damages at most would be approximately 8.4% of the gross commissions on business that could have been done at Merrill Lynch as represented by Merrill Lynch's profit to gross revenue ratio.

Claimants further asserted that Merrill Lynch violated section 6 of the NASD code of Arbitration procedure prohibiting court litigation of issues which are the subject of a pending arbitration by obtaining a Temporary Restraining Order and Preliminary Injunction from the United States District Court for the District of New Jersey; that Merrill Lynch has engaged in unfair competition in its attempts to convince the brokers clients to remain at Merrill Lynch; and that Merrill Lynch has not yet paid commissions earned and due to the individual claimants for March, 1995.

In reply to Claimants' additional claims, Merrill Lynch maintained that Section 6 of the Code of Arbitration Procedure does not prohibit members from going to court to seek injunctive relief pending arbitration and the United States District Court for the District of New Jersey had rejected Claimants' argument that Merrill Lynch had violated Section 6 of the Code of Arbitration Procedure. In response to claims of unpaid commissions, Merrill Lynch asserts it is conducting an accounting and that any amount Claimants have earned will be paid in due course.

### **RELIEF REQUESTED**

Claimants requested that the panel declare that any agreement precluding them from retaining copies of client records or from soliciting their customers is invalid or unenforceable; that Merrill Lynch is not entitled to refuse to accept broker-to-broker transfer forms or otherwise comply with section 65 of the NASD Uniform Practice Code; that Claimants are not liable to Merrill Lynch in any respect in law or equity as a result of the termination of the individual claimants' employment with Merrill Lynch or their subsequent employment by Smith Barney; that Claimants be awarded damages as a result of the improper conduct of Merrill Lynch in misleading and attempting to alienate the Claimants'; that Claimants be awarded the full amount of earned and unpaid commissions for March, 1995; and such other and further relief as the panel deems just and proper.

Respondent Merrill Lynch requested injunctive relief in accordance with the terms of the Court's Order and compensatory damages in excess of \$3.4 million against each individual claimant and Smith Barney, jointly and severally.

### **AWARD**

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

1. All claims by Merrill Lynch against Third-Party Respondents Depasquale and Roderick be and hereby are dismissed in their entirety.

2. All claims for declaratory and/or injunctive relief by any party be and hereby are denied except as previously granted or reaffirmed. In this regard, the panel hereby incorporates by reference, and reaffirms its interim order dated May 22, 1995 and hereby defines the term "conclusion of hearings" referenced in the interim order as as the date of decision of the Final Award.
3. A majority of the panel holds, in full and complete settlement of all of Merrill Lynch's claims against all claimants, that Smith Barney be and hereby is liable and shall pay to Merrill Lynch \$500,000.00. Arbitrator Wolff concurs in the decision of liability, however, he dissents as to the monetary amount awarded and would have assessed liability at \$250,000.00.
4. All claims for attorneys fees and punitive damages be and hereby are denied.

#### **FORUM FEES**

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fee(s) have been assessed:

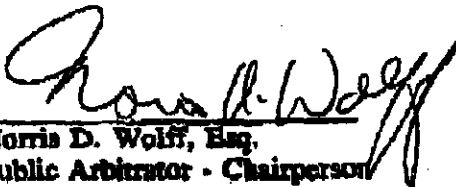
Non-refundable filing fee=	\$	500.00
Non-refundable counterclaim filing fee=	\$	500.00
Non-refundable expedited fee=	\$	5000.00
18 Hearing sessions X \$1000.00 per session =	\$	18000.00
		<hr/>
	\$	24,000.00

The Claimants previously deposited filing fees in the sum of \$3,600.00, which shall be credited towards the forum fees assessed. Respondent previously deposited forum fees in the sum of \$1,200.00 which shall be applied towards the forum fees assessed. Therefore, the total sum of outstanding forum fees is \$4,800.00. Claimants be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$19,200.00.

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FROM NASD ARBITRATION

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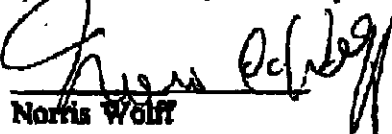
**Concurring Arbitrators' Signatures**  
**Name**

  
Norris D. Wolff, Esq.  
Public Arbitrator - Chairperson

\_\_\_\_\_  
Paul Rosenthal  
Industry Arbitrator

\_\_\_\_\_  
Howard Mandell, Esq.  
Public Arbitrator

I, Norris Wolff, do hereby affirm that this is my decision in the above-captioned matter.

  
Norris Wolff

Date of Decision: October 10, 1995

10-10-95 12:00PM FROM NASD ARBITRATION

TO

P008

**Concurring Arbitrators' Signatures**  
**Name**

Norris D. Wolff, Esq.  
Public Arbitrator - Chairperson

  
Paul Rosenthal  
Industry Arbitrator

Howard Mandell, Esq.  
Public Arbitrator

I, Paul Rosenthal, do hereby affirm that this is my decision in the above-captioned matter.

  
Paul Rosenthal

Executed on:

Date of Decision:

10/10/95

Date of Decision: October 10, 1995

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10-10-95 12:11PM FROM NASD ARBITRATION

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**Concurring Arbitrators' Signatures**  
**Name**

Norris D. Wolff, Esq.  
Public Arbitrator - Chairperson

Paul Rosenthal  
Industry Arbitrator

Howard Mandell  
Howard Mandell, Esq.  
Public Arbitrator

I, Howard Mandell, do hereby affirm that this is my decision in the above-captioned matter.

Howard Mandell  
Howard Mandell

Date of Decision: October 10, 1995