

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Kevin L. Doss

Name of Respondent

95-02079

Merrill Lynch, Pierce, Fenner & Smith, Inc

Name of Third Party Respondent

Dean Witter Reynolds Inc.

REPRESENTATION

For Claimant Kevin L. Doss ("Claimant") and Third Party Respondent Dean Witter Reynolds Inc. ("Dean Witter") appeared Kenneth A. Bravo, Esq. from the law firm of Ulmer & Berne located in Cleveland, Ohio.

For Respondent Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") appeared Joshua Cohen, Esq. from the law firm of Kohrman Jackson & Krantz located in Cleveland, Ohio.

CASE INFORMATION

Statement of Claim filed: April 28, 1995.

Claimant's Submission Agreement signed on: April 28, 1995.

Statement of Answer filed by Respondent Merrill Lynch on: May 8, 1995.

Respondent Merrill Lynch's Submission Agreement signed on: May 9, 1995.

Respondent Merrill Lynch's Amended Answer and Counterclaims filed: May 12, 1995.

Joint Answer of Claimant and Third Party Respondent Dean Witter to the Counterclaims filed: May 17, 1995.

HEARING INFORMATION

Hearing Date/Sessions:

May 18, 1995

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Two Sessions

The hearing was held at the offices of the National Association of Securities Dealers, Inc. located in Cleveland, Ohio.

CASE SUMMARY

Claimant was employed as a registered representative with Merrill Lynch until April 28, 1995, at which time he resigned his position to work for Dean Witter. Claimant sought a declaration from the arbitration panel that he was not liable to Merrill Lynch as a result of the termination of his employment.

Merrill Lynch alleged that, upon leaving his employment at Merrill Lynch, Claimant misappropriated Merrill Lynch's proprietary customer lists for purposes of luring business to his new employer, Dean Witter, and that Claimant's conduct constituted a breach of the Financial Consultant Trainee Agreement (the "agreement") that Claimant signed when he joined Merrill Lynch. Merrill Lynch maintained that the agreement forbid Claimant from retaining customer information and from soliciting Merrill Lynch's clientele for a period of one year after leaving the firm.

Merrill Lynch asserted that it was entitled to enforcement of the provisions of the agreement and alleged that Claimant and Dean Witter violated the Ohio trade secrets statute by confiscating customer lists. Merrill Lynch further alleged that Dean Witter committed an unlawful interference with its contractual rights by conniving with Claimant to deprive Merrill Lynch of the protection embodied in the agreement.

In response to the counterclaim and third party claim, Claimant and Dean Witter maintained that Claimant's immediate supervisor at Merrill Lynch derided him in the presence of his peers and on one occasion physically assaulted him. Claimant further maintained he was told to look for another job and, therefore, he reasonably believed he would be fired by Merrill Lynch.

Claimant and Dean Witter maintained that the post-employment restrictive covenant contained in Merrill Lynch's agreement was unenforceable because Merrill Lynch compelled Claimant's resignation; that the restrictive covenant was unenforceable under Ohio law because it was not required to protect a legitimate business interest of Merrill Lynch; that Merrill Lynch's assault and wrongful termination of Claimant, as well as its prior recruitment of other brokerage firm's brokers was an absolute bar to Merrill Lynch being granted equitable relief. Claimant and Dean Witter also maintained that the restrictive covenant threatened serious harm to Claimant and was contrary to the public interest.

RELIEF REQUESTED

Claimant and Dean Witter requested that the panel order that Claimant is not liable to Merrill Lynch in any respect; that Claimant is not bound by the post-employment restrictive covenant contained in his employment agreement because he was compelled to resign from Merrill Lynch; that Merrill Lynch's employment agreement is void and unenforceable under Ohio law because it fails to protect any legitimate business of Merrill Lynch; that Claimant complied with all applicable industry standards concerning the use of confidential information; that Dean Witter

did not interfere with any of Merrill Lynch's contractual rights and that Merrill Lynch's claim for punitive damages, attorney fees and any other relief be denied.

Merrill Lynch requested the dismissal of all claims alleged by Claimant; an order requiring Claimant to relinquish any Merrill Lynch customer information in his possession; an order requiring Claimant to fulfill the obligations created un Paragraph 2 of his Employment agreement; an order prohibiting Dean Witter from accepting any business from Merrill Lynch customers solicited by Claimant in violation of his Employment Agreement; an award of punitive damages in the amount of \$300,000.00; attorney's fees and any other relief that the panel deems just and equitable.

OTHER ISSUES CONSIDERED & DECIDED

The panel made the following rulings as to Dean Witter, who filed an answer in this arbitration, but failed to file a properly executed submission agreement:

1. Pursuant to Section 1 of the Code of Arbitration Procedure, the panel found proper subject matter jurisdiction over this entire controversy and, specifically, as it related to Dean Witter.
2. The panel found that Dean Witter was a member of the NASD at the time the controversy arose. Consequently, the panel found personal jurisdiction over Dean Witter, pursuant to Section 8(a) of the Code of Arbitration Procedure.
3. In view of (2) above, the panel found that Dean Witter was required to file with the NASD an executed submission agreement, pursuant to Section 25(b) of the Code of Arbitration Procedure.

The parties agreed to expedite the arbitration and, for that purpose, waived Sections 21, 22, and 25 of the 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 pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of all claims asserted by Claimant and the counterclaims and third party claims asserted by Merrill Lynch as follows:

The panel finds for Claimant and Third Party Respondent Dean Witter and accordingly makes the following rulings:

1. Merrill Lynch's request for an order obligating Claimant and Dean Witter to return any customer lists or other business records belonging to Merrill Lynch is

hereby denied.

2. Merrill Lynch's request for an order, remaining in effect until April 28, 1996, barring Claimant from soliciting or accepting business from any Merrill Lynch customer whom he formerly served or whose identity became known to him during the course of his employment with Merrill Lynch and who reside within 100 miles of Cleveland, Ohio is hereby denied.
3. Merrill Lynch's request for an order requiring Claimant to fulfill the obligations created under Paragraph 2 of his Employment Agreement is hereby denied.
4. Merrill Lynch's request for an order prohibiting Dean Witter from accepting any business from Merrill Lynch customers solicited by Claimant in violation of his Employment Agreement is hereby denied.
5. Merrill Lynch's request for punitive damages is hereby denied.
6. Merrill Lynch's request for attorneys fees is hereby denied.
7. All other claims be and hereby are denied.
8. Each party shall bear their respective costs.

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the arbitrators have determined that the non-refundable filing fees and surcharges shall be retained by the NASD and have assessed the following forum fees:

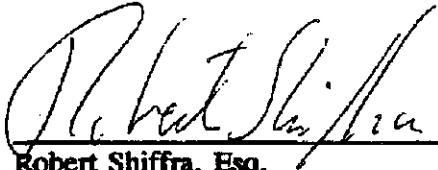
2 hearing sessions x \$750.00 = \$1,500.00

Forum fees Assessed Against:

1. Claimant be and hereby is liable for the sum of \$750.00 representing one half of the forum fees assessed. Claimant previously deposited the sum of \$600.00 with the NASD, which shall be applied toward the forum fees assessed. Therefore, Claimant is liable and shall pay to the NASD the sum of \$150.00.
2. Respondent Merrill Lynch be and hereby is liable for the sum of \$750.00 representing one-half of the forum fees assessed. Merrill Lynch previously deposited the sum of \$750.00 with the NASD, which shall be applied towards the forum fees assessed. Therefore, nothing is owed the NASD by Merrill Lynch.

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

ARBITRATORS' SIGNATURES



Robert Shiffra, Esq.
Industry Chairperson

Leslie J. Filson
Industry Arbitrator

Charles H. Joseph, Jr.
Industry Arbitrator

Date of Decision: May 23, 1995

ARBITRATORS' SIGNATURES

Robert Shiffra, Esq.
Industry Chairperson



Leslie J. Filson
Industry Arbitrator

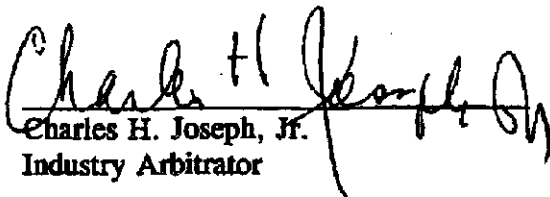
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