

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Rick R. Malizia

Name of Respondent

95-02230

Merrill Lynch Pierce Fenner & Smith, Inc.

Name of Third Party Respondent

Dean Witter Reynolds Inc.

REPRESENTATION

For Claimant Rick Malizia ("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 R. Cohen, Esq. from the law firm of Kohrman Jackson & Krantz located in Cleveland, Ohio.

CASE INFORMATION

Statement of Claim filed: May 5, 1995.

Claimant's Submission Agreement signed on: May 5, 1995.

Statement of Answer and Counterclaims filed by Respondent Merrill Lynch: May 24, 1995.

Respondent Merrill Lynch's Submission Agreement signed on: June 13, 1995.

Statement of Answer filed by Third Party Respondent Dean Witter: June 7, 1995.

Respondent Dean Witter's Submission Agreement signed on: June 14, 1995.

Claimant's Amended Statement of Claim and Answer to Counterclaims filed: June 6, 1995.

Respondent Merrill Lynch's Amended Statement of Answer and Counterclaims filed: June 8, 1995.

Claimant's Supplemental Answer to the Counterclaims filed: June 15, 1995.

HEARING INFORMATION

Hearing Dates/Sessions:	June 28, 1995	-	Three sessions
	June 29, 1995	-	One session

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

CASE SUMMARY

Claimant alleged that he was employed by Merrill Lynch until May 5, 1995. Claimant further alleged that he resigned from his position at Merrill Lynch to work for Dean Witter. Claimant sought a declaration from the panel that he was not liable to Respondent Merrill Lynch in law or in equity as a result of the termination of his employment.

In its Statement of Answer and Counterclaim, Merrill Lynch maintained that Claimant misappropriated Merrill Lynch's confidential list of customers and that Claimant breached his employment agreement. Merrill Lynch further maintained that Dean Witter engineered a scheme to "pirate away clients" from Merrill Lynch and counseled Claimant on the most effective means of avoiding his contractual obligations.

Merrill Lynch maintained that Claimant signed a Financial Consultant Trainee Agreement, under which he agreed to preserve the confidentiality of the names and addresses of Merrill Lynch clients and to refrain from removing records from Merrill Lynch's offices. Merrill Lynch further maintained that Claimant agreed to refrain from soliciting any clients he served or whose names became known to him while in the employ of Merrill Lynch and who reside within one hundred miles of the office in which he was employed.

In his Amended Statement of Claim and Answer to the Counterclaim, Claimant alleged that, during a meeting with his supervisor, on April 29, 1995, he was informed that he would not have an opportunity to become a non-producing manager and that he should pursue other employment opportunities which would enable him to achieve that goal. Claimant also alleged that his supervisor told him that he could copy his account statements before he left the firm.

Claimant alleged that, several days later, a high ranking Merrill Lynch official threatened to fire and sue him. Claimant further alleged that he copied his clients' monthly account statements, prepared a list of his customers and then resigned. Claimant maintained that because the Merrill Lynch official threatened to sue him, he filed a claim for arbitration and a lawsuit to prevent Merrill Lynch from obtaining a restraining order in violation of Section 6 of the Code of Arbitration Procedure. Claimant further alleged that Respondent Merrill Lynch filed a cross-motion for injunctive relief. and that, after an initial denial of both requests, the court enjoined

Claimant from soliciting business from clients he serviced while at Merrill Lynch and directed him to return Merrill Lynch records in his possession or any records created on the basis of confidential customer information belonging to Merrill Lynch.

Claimant maintained that the Financial Consultant Trainee Agreement was unenforceable because it operates only during the training period; Claimant was compelled to resign; the post-employment restrictive covenant was contrary to Ohio law; Merrill Lynch is barred from enforcing a covenant that it itself has breached and the restraint threatened serious harm to Claimant and was contrary to the public interest. Claimant further maintained that, because his supervisor told him to copy his customers' account information and he did not remove or destroy any original documents belonging to Merrill Lynch, he did not misuse any confidential customer information. Claimant also maintained that it is a well recognized industry practice for an account executive to retain copies of his customers records upon leaving the employ of a brokerage house.

Respondent Dean Witter maintained that the claims against it are without merit because Claimant is not bound by the restrictive covenant contained in the Trainee Agreement and the restrictive covenant would deny customers the opportunity to transact business with the broker and brokerage firm of their choice.

In its Amended Statement of Answer and Counterclaims, Respondent Merrill Lynch alleged that Claimant engaged in malicious prosecution by filing a lawsuit in state court to prevent Merrill Lynch from obtaining injunctive relief. Respondent Merrill Lynch further alleged that Claimant defrauded the court by disingenuously denying conduct that would have resulted in the court's intervention.

In his Supplemental Answer, Claimant maintained that Respondent Merrill Lynch's counterclaim for malicious prosecution is frivolous and that he was completely justified in filing his court action.

RELIEF REQUESTED

Claimant requested that the panel order that the Order of the Cuyahoga County Court of Common Pleas be permanently lifted and that Merrill Lynch return to Claimant all of his client documents; that Claimant is not bound by the Financial Consultant Trainee Agreement; 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 interest of Merrill Lynch; and that Claimant complied with all industry standards concerning the use of confidential information. In addition, Claimant requested \$300,000.00 in compensatory and punitive damages as a result of Merrill Lynch's deliberate refusal to abide by Section 6 of the Code of Arbitration Procedure and that Merrill Lynch's claim for damages, attorneys fees and injunctive relief be denied.

Respondent Merrill Lynch requested that the claims against it be dismissed. Merrill Lynch further requested an order requiring Claimant to relinquish any Merrill Lynch customer

information in his possession; an order requiring Claimant to fulfill the obligations created under Paragraph 2 of his Employment Agreement; an order prohibiting Dean Witter from accepting any business from Merrill Lynch customers solicited by Malizia in violation of his Employment Agreement; an award of compensatory damages in the amount of \$300,000.00 and any other relief that the panel considers just and equitable.

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. Merrill Lynch's request for an order requiring Claimant and Dean Witter to return any customer lists or other business records belonging to Merrill Lynch is denied, except insofar as these lists and records relate to those accounts, testified to at the hearing, which were not assigned to Claimant when he was employed at Merrill Lynch. Any such lists and records relating to these accounts shall be immediately returned by Claimant and Dean Witter to Merrill Lynch;
2. Merrill Lynch's request for an order 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 resides within one hundred miles of the Merrill Lynch office in which Claimant was employed is denied;
3. 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 denied;
4. Merrill Lynch's request for monetary compensation and/or damages from either Claimant or Dean Witter is denied;
5. Claimant's request that the Order of the Cuyahoga County Court of Common Pleas be permanently lifted is granted;
6. Claimant's request for an Order ruling that he is not bound by the Merrill Lynch Financial Consultant Trainee Agreement is granted; no position is taken as to whether Claimant was compelled to resign from Merrill Lynch;
7. Claimant's request for compensatory, punitive or monetary damages is denied;

8. Each party shall bear their own costs, including attorneys' fees; and
9. All other claims are hereby denied.

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:

$$4 \text{ sessions} \times \$750.00 = \$3,000.00$$

Forum fees Assessed Against:

1. Claimant be and hereby is liable for the sum of \$1,500.00 representing one-half of the forum fees assessed. Claimant previously deposited the sum of \$750.00 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 \$750.00.
2. Respondent Merrill Lynch be and hereby is liable for the sum of \$1,500.00 representing one-half of the forum fees assessed. Merrill Lynch previously deposited the sum of \$750.00 with the NASD, which shall be applied toward the forum fees assessed. Therefore, Merrill Lynch is liable and shall pay to the NASD the sum of \$750.00.

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

ARBITRATORS' SIGNATURES

Concurring Arbitrators' Signatures:

A handwritten signature in cursive script, appearing to read "Matthew J. Tolan", written over a horizontal line.

Matthew J. Tolan
Industry Arbitrator

C. Anthony Bell
Industry Arbitrator

Dissenting Arbitrator's Signature:

Noah D. Sorkin, Esq.
Industry Chairperson

Date of Decision: July 10, 1995

ARBITRATORS' SIGNATURES

Concurring Arbitrators' Signatures:

Matthew J. Tolan
Industry Arbitrator

C. A. Bell
C. Anthony Bell
Industry Arbitrator

Dissenting Arbitrator's Signature:

Noah D. Sorkin, Esq.
Industry Chairperson

Date of Decision: July 10, 1995


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Concurring Arbitrators' Signatures:

Matthew J. Tolan
Industry Arbitrator

C. Anthony Bell
Industry Arbitrator

Dissenting Arbitrator's Signature:



Noah D. Sorokin, Esq.
Industry Chairperson

Date of Decision: July 10, 1995