

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Merrill Lynch Pierce Fenner & Smith, Inc.

vs.

99-02130

Name of Respondents

Dean Witter Reynolds, Inc.
Jeffrey W. Bass

REPRESENTATION

For Merrill Lynch, Pierce, Fenner & Smith Inc. ("Claimant") appeared Christopher P. Stief, Esq. and Timothy S. Cole, Esq., Rubin & Associates, P.C., Paoli, Pennsylvania.

For Jeffrey Bass ("Bass") appeared John H. West III, Esq. and Thomas Costello, Esq., The Law Offices of John H. West III, Baltimore, Maryland.

For Dean Witter Reynolds, Inc. ("DWR") appeared K. Stewart Evans, Esq., Pepper Hamilton LLP, Washington, D.C.

CASE INFORMATION

Claimant filed the Statement of Claim on or about May 10, 1999.
Claimant filed the Uniform Submission Agreement May 10, 1999.

Respondent Bass filed a Statement of Answer on or about June 8, 1999.
Respondent Bass filed the Uniform Submission Agreement on or about June 14, 1999.

Respondent Dean Witter filed a Statement of Answer on or about June 8, 1999.
Respondent Dean Witter filed the Uniform Submission Agreement on or about June 14, 1999.

HEARING INFORMATION

Prehearing Conference Date: June 11, 1999/One Session

Hearing Dates/Sessions: June 14, 1999/Two Sessions
June 23, 1999/Two Sessions
June 28, 1999/Two Sessions

Hearing Location: Doubletree Hotel, Baltimore, Maryland

CASE SUMMARY

Claimant alleged that Bass, a former registered representative and Merrill Lynch Financial Consultant in its Columbia, Maryland office resigned May 7, 1999 to join DWR's Ellicott City, Maryland office. Claimant further alleged that Bass (a) violated his Account Executive Trainee Agreement with Claimant (the "Agreement") which prohibits removal or use of Claimant's records and customer information and prohibits, for one year following termination of his employment, solicitation of customers Bass serviced or whose names he learned while employed with Claimant and who reside within 100 miles of Claimant's Columbia office, (b) misappropriated and misused Claimant's trade secret customer list and customer information in violation of the Maryland Trade Secrets Act, Md. Code Ann., Comm. Law, Sec. 11-1201 to 1209, (c) converted Claimant's confidential business information, (d) violated his duty of loyalty to Claimant by disclosing Claimant's customer information to a competitor while Bass was still working for Claimant, and (e) engaged in unfair competition. Claimant asserted that DWR (a) tortiously interfered with Claimant's contract with Bass, (b) misappropriated and misused Claimant's trade secret customer list and customer information, and (c) engaged in unfair competition. Claimant also claimed that Bass was the fourth registered representative whom DWR hired in the preceding four months from Claimant's Columbia office to work in DWR's Ellicott City office and to whom DWR provided financial inducements to remove Claimant records or customer information and solicit Claimant customers in violation of similar Claimant agreements, thereby causing greater damage and disruption to Claimant's Columbia office than would have otherwise arisen from Bass' breach of his Agreement.

Respondent Bass denied the allegations of Claimant and contends that, at all times, his actions have been proper. Bass maintained that he has not "solicited any customer to transfer his/her account to DWR. Likewise, Bass contended that he has not misappropriated any trade secrets and has not breached any fiduciary duty. Indeed, Bass maintained that all actions taken by him in his resignation from Claimant and his employment with DWR fully comported with the laws of Maryland which applied to the training agreement signed by Respondent in 1984.

Moreover, Bass asserted that he acted in accordance with the accepted custom and practice in the industry and entirely consistent with the practices engaged in by Claimant and the brokers recruited by Claimant from other firms. Bass maintained that he did not breach his contract with

Claimant and the claims against him should be dismissed and the injunction issued against him on May 20, 1999 should be dissolved.

DWR contended that it did nothing more than engage in legitimate competition with Claimant by hiring Bass, and DWR has complied with its obligations under the NASD rules and the NYSE rules to facilitate the transfer of accounts at the request of former clients of Claimant. DWR maintained Claimant's claim against DWR should be dismissed with prejudice.

DWR contended that Bass had become unhappy with Claimant's compensation package and with the manager of Claimant's Columbia, Maryland office. DWR maintained that Bass, an at-will employee, had a right to leave Claimant and go to work for DWR any time he desired and that Bass called DWR seeking employment. DWR asserted that it believed that Bass' two year Trainee Agreement was null and void. DWR stated that while Bass had possession of copies of basic customer information from Claimant's files, the information was not seen or used by DWR, and DWR instructed Bass not to use it. Therefore, as a matter of law, the information could not have been misappropriated by DWR.

DWR maintained Bass called some of his former clients using his personal Rolodex, which Bass kept on a yellow pad and that Bass had both a right and a duty to use his personal Rolodex to call his former clients to inform them that he left Claimant, joined DWR and to provide them with his new address and telephone number. DWR contended that Bass did not request customers to transfer their accounts to DWR and that the evidence shows only that Bass contacted his former clients. As a matter of law, DWR contended it did not solicit customers nor did Bass, and by contacting former clients to advise them of his new employment, as he was obliged to do by NASD and NYSE rules and his fiduciary obligation, Bass did not solicit the clients. DWR asserted that to hold as Claimant's suggest would be to rule that brokers must violate their obligations to customers in order to satisfy Claimant's contract requirements. As evidenced by NASD Uniform Practice Code 11870 and NYSE Rule 412, public policy does not permit a brokerage company to prevent its clients from learning of the whereabouts of their broker. Yet this is exactly the position advocated by Claimant. Because Claimant has not and cannot show that any of Claimant's confidential information was used by DWR to solicit any of Bass' former clients, this matter must be dismissed with prejudice.

RELIEF REQUESTED

Claimant requested an Injunction, enjoining Respondents, directly or indirectly, and whether alone or in concern with others, from:

- (a) Soliciting any business from any client of Claimant whom Bass served or whose name became known to him while in the employ of Claimant and further, from accepting any business or account transfers from any of said clients whom Bass, or anyone acting on his behalf or in concern with him, has solicited at any time in the past for the purpose of doing business with Bass and/or DWR (excluding

Bass' immediate family and any clients residing more than 100 miles from Claimant's Columbia, Maryland office); and

- (b) Using, disclosing, or transmitting for any purpose, including solicitation of said clients, the information contained in the records of Claimant, including, but not limited to, the names, addresses and confidential financial information of the clients served or learned of by Bass through his employment with Claimant; and that all original records and copies or other reproductions thereof, in whatever form, be returned to Claimant immediately; and
- (c) Compensatory damages from Bass and DWR; and
- (d) Any and all other such relief as the panel deems appropriate for injunctive relief.

Respondent DWR requested that Claimant's requested relief be denied in its entirety.

Respondent Bass requested that the Injunction issued on May 20, 1999 in the United States District Court for the District of Maryland be lifted, that the claim for damages be denied and that the case 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.

The panel considered Claimant's Motion in Limine to exclude evidence of Claimant's hiring practices, and Respondents' Response, and granted the motion.

The panel considered Respondents' Motion to Dissolve Injunction issued on May 20, 1999 in the United States District Court for the District of Maryland, and Claimant's Response, and denied the Motion to dissolve the Injunction.

AWARD

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

1. Respondents are hereby enjoined until May 7, 2000, from soliciting, directly or indirectly, any client of Claimant served by Bass, or other clients whose name became known to Bass, while he was in the employ of Claimant, excluding clients who reside more than 100 miles from Columbia, Maryland; and
2. This injunction does not prohibit Respondents from accepting an account transfer form (ACAT) from Bass's former clients if:
 - a. the account transfer was not solicited by Respondents; and
 - b. Bass fully discloses to the client(s) the compensation, incentives, bonuses, etc. paid or promised to Bass by DWR; and
3. All client accounts already transferred to DWR may be retained by Respondents; and
4. Claimant's demand for compensatory damages is denied; and
5. The parties shall bear their respective costs, including attorneys' fees, with the exception of forum fees or other costs as specified below; and
6. All other claims or requests for relief are denied.

OTHER COSTS

Pursuant to Rule 10205(h) of the Code of Arbitration Procedure ("Code"), Claimant was assessed an expedited hearing surcharge of \$2,500.00, which has been paid.

Pursuant to Rule 10333 of the Code, Claimant and Respondent DWR were each assessed a member surcharge of \$1,200.00, a prehearing processing fee of \$600.00 and a hearing processing fee of \$2,000.00. Claimant and Respondent DWR paid these fees.

Pursuant to Rule 10332 of the Code, the panel determined that telephone access charges of \$75.00 are assessed to Respondent DWR.

FORUM FEES

Pursuant to Rule 10205(c) of the Code, the following forum fees are assessed:

1 prehearing session x \$300.00 =	\$ 300.00
6 hearing sessions x \$1,000.00 =	<u>\$6,000.00</u>
Total Forum Fees =	\$6,300.00

Forum Fees are assessed to Respondent DWR. Therefore, DWR has a net forum fee assessment of \$6,300.00 as well as the additional cost for telephone access of \$75.00, for net fees due from DWR of \$6,375.00.

The NASD shall refund the hearing session deposit of \$1,000.00 previously submitted by Claimant.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

DATE

July 23, 1999

CONCURRING ARBITRATORS' SIGNATURES

Nelson I. Fishman

Nelson I. Fishman, Chairman

Charles P. King
Industry Arbitrator

DATE

THE UNDERSIGNED ARBITRATOR
DISSENTS FROM PARAGRAPH 2 OF THE
AWARD SECTION OF THIS DOCUMENT

Cynthia Turner
Public Arbitrator

Date Decision Served by NASD Regulation:

August 5, 1999

DATE

CONCURRING ARBITRATORS' SIGNATURES

8/4/99

Nelson I. Fishman, Chairman

Charles P. King
Industry Arbitrator

DATE

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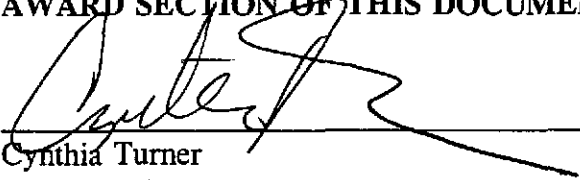
Nelson I. Fishman, Chairman

Charles P. King
Industry Arbitrator

DATE

THE UNDERSIGNED ARBITRATOR
DISSENTS FROM PARAGRAPH 2 OF THE
AWARD SECTION OF THIS DOCUMENT

7/23/99



Cynthia Turner
Public Arbitrator

Date Decision Served by NASD Regulation: August 5, 1999