

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Joseph A. Blissit, Jr.

99-02919

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Consolidated with
99-2943

Names of Respondents

Joseph A. Blissit, Jr.
Wheat First Union

REPRESENTATION

For Joseph A. Blissit, Jr. ("Blissit") and Wheat First Union ("Wheat First"): Jonathan M. Harris, Esq., Stephen T. Gannon, Esq. and Adriaen M. Morse, Jr., Esq. of the law firm of LeClair Ryan, P.C., Richmond, Virginia.

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"): Thomas J. Momjian, Esq. of the law firm of Rubin & Associates, P.C., Paoli, Pennsylvania.

CASE INFORMATION

Blissit's Request for Expedited Arbitration and Emergency Motion for Immediate Injunction filed in NASD Arbitration # 99-2919 on June 25, 1999.

Merrill Lynch's Statement of Claim filed in NASD Arbitration # 99-2943 on June 28, 1999.

Merrill Lynch's Supplemental Statement of Claim filed on August 19, 1999.

Blissit and Wheat First's Answer filed on August 19, 1999.

Blissit and Wheat First's Supplemental Answer filed on August 28, 1999.

Statement of Answer filed by Merrill Lynch on June 30, 1999.

Blissit's Submission Agreement signed on June 25, 1999.

Merrill Lynch's Submission Agreement signed on June 28, 1999.

Wheat First did not file an executed Submission Agreement.

HEARING INFORMATION

An injunctive relief hearing was conducted with the Chairperson on July 1, 1999. A telephonic pre-hearing conference was conducted with the arbitration panel on July 19, 1999. The evidentiary hearing which lasted five sessions was conducted on August 31, September 1 and 2, 1999 in Atlanta, Georgia.

CASE SUMMARY

Blissit and Wheat First alleged the following: This dispute arose as a consequence of Blissit's resignation from employment with Merrill Lynch and his acceptance of employment with Wheat First in its Augusta, Georgia branch office. Blissit was at liberty to cease employment with Merrill Lynch at any time, to accept employment with any other brokerage firm, including but not limited to Wheat First, and to compete for brokerage business without interference. To the extent Blissit entered into an enforceable agreement with Merrill Lynch upon his employment with that firm in 1985, he has satisfied all of its terms and conditions. Blissit engaged in no impropriety or violation of any agreement in connection with his termination of employment with Merrill Lynch. The accounts serviced by Blissit were developed by him and through his own efforts and labor, and there was no impediment to his servicing accounts that elected to join him at his new place of employment. Blissit's notification of a change in employment did not constitute a solicitation of business in violation of any earlier contractual agreements with Merrill Lynch and was in accordance with and permissible under the laws of Georgia. Wheat First's hiring of Blissit was neither improper nor wrongful, and its conduct and activities relevant to his employment conformed to standard industry practices. The initiation of proceedings by Merrill Lynch was vexatious, and the allegations against Blissit and Wheat First were neither proper nor meritorious nor brought in good faith.

Merrill Lynch alleged the following: In connection with his resignation of employment with Merrill Lynch on June 25, 1999, Blissit violated the terms and conditions of the non-solicitation and non-disclosure provisions contained in his Account Executive Trainee Agreement and related confidentiality and non-disclosure agreements. Blissit signed the Account Executive Trainee Agreement and related confidentiality and non-disclosure agreements at the outset of and as a condition of his employment with Merrill Lynch in 1985 and/or thereafter in connection with Merrill Lynch policy. Merrill Lynch further alleged that Blissit misappropriated and converted Merrill Lynch trade secret customer information and engaged in unfair competition and breached his fiduciary duty to Merrill Lynch. In addition, Merrill Lynch alleged that Blissit's new

employer, Wheat First, intentionally interfered with Merrill Lynch's contractual rights, misappropriated Merrill Lynch trade secret customer information, and engaged in unfair competition.

RELIEF REQUESTED

Blissit and Wheat First requested a dismissal of all claims asserted against them by Merrill Lynch plus an award against Merrill Lynch of their fees, costs and expenses incurred by them in defense of the instant claim and related court actions. Further, Blissit and Wheat First requested that the Panel issue an order providing for the following:

1. The accounts serviced by Blissit were developed by him and through his own efforts and labor, and there was no impediment to his servicing accounts that elected to join him at his new place of employment;
2. Blissit's notification of a change in employment did not constitute a solicitation of business in violation of any earlier contractual agreements with Merrill Lynch and was in accordance with and permissible under the laws of Georgia;
3. Blissit was at liberty to cease employment with Merrill Lynch at any time, to accept employment with any other brokerage firm, including but not limited to Wheat First, and to compete for brokerage business without interference;
4. To the extent Blissit entered into an enforceable agreement with Merrill Lynch upon his employment with that firm in 1985, he has satisfied all of its terms and conditions;
5. Blissit engaged in no impropriety or violation of any agreement in connection with his termination of employment with Merrill Lynch.
6. Wheat First's hiring of Blissit was neither improper nor wrongful, and its conduct and activities relevant to his employment conformed to standard industry practices; and,
7. The initiation of proceedings by Merrill Lynch was vexatious, and the allegations against Blissit and Wheat First were neither proper nor meritorious nor brought in good faith.

Merrill Lynch requested the following: A dismissal of all claims asserted against it by Blissit; compensatory damages for Blissit's breaches of his Account Executive Trainee Agreement, his related confidentiality and non-disclosure agreements, for misappropriation and conversion of trade secret customer information, and for breach of fiduciary duty and unfair compensation; compensatory damages against Wheat First Union for its intentional interference with Merrill Lynch's contractual rights, conversion and misappropriation of Merrill Lynch's trade secrets and unfair competition; and, a continuation of the injunction entered by the Chairperson for a period of one year.

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 original(s) remain on file with NASD Regulation, Inc.

Wheat First did not file with the NASD Regulation, Inc., Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

On June 28, 1999, Merrill Lynch moved for temporary injunctive relief in the United States District Court for the Southern District of Georgia. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Joseph A. Blissit, Jr., No. 199-121 (S.D. Ga.). The court denied Merrill Lynch's motion on the grounds that Merrill Lynch could seek temporary injunctive relief in arbitration. On July 2, 1999, the Chairperson, Robert N. Leitch, issued an injunction prohibiting Blissit and Wheat First Union from soliciting any business from any customer Blissit served during his employment at Merrill Lynch. The Chairperson also ordered Blissit and Wheat First to return to Merrill Lynch any and all Merrill Lynch customer information and records, including "personal" records maintained by Blissit containing any such information and requiring Blissit and Wheat First to purge from their possession any such information. Blissit and Wheat First were also ordered to keep a log of all customer contacts. The Chairperson's Order of July 2, 1999 was further clarified in an Order of July 28, 1999.

FINDINGS

Except as provided below, the Arbitrators dismiss the alleged causes of action enumerated in Merrill Lynch's initial and Amended Statements of Claim. The Arbitrators dismiss the alleged causes of action enumerated in Wheat First's and Mr. Blissit's Statement of Claim.

The Arbitrators specifically find, as it pertains to this case only, based on the particular facts and circumstances of this case, after considering applicable law, that the confidentiality clause in Mr. Blissit's employment contract with Merrill Lynch is void and unenforceable as a matter of law.

The Arbitrators also find, as it pertains to this case only, based on the particular facts and circumstances of this case, after considering applicable law, that the non-solicitation clause in Mr. Blissit's employment contract with Merrill Lynch is enforceable as a matter of law and that Mr. Blissit did not comply with that clause. While Respondents attempted to modify their customer solicitation effort so as to have it not found to be a solicitation in the legal proceedings they anticipated, when both the letter to customers and their other actions are viewed as a totality, it is clear that a solicitation effort in violation of the non-solicitation clause did take place.

Next, as it pertains to this case only, based on the particular facts and circumstances of this case, after considering applicable law, the Arbitrators find that the Georgia Trade Secrets Act was

violated by Mr. Blissit and Wheat First. The customer list was created by Wheat First from information derived directly from Mr. Blissit's holding pages which are a trade secret of Merrill Lynch. The Arbitrators find the holding pages contain information which was not generally known to and not readily ascertainable by proper means to a competitor and the holding pages were subject to a reasonable system to maintain their security. While the record discloses that the holding pages and other written or computerized memorializations of information on the holding pages have been returned to Merrill Lynch, this factor goes only to the relief to be granted, not to the issue of whether the Trade Secrets Act was violated. As such, damages are appropriate.

Finally, as it pertains to this case only, based on the particular facts and circumstances of this case, after considering applicable law, the Arbitrators find that Respondent Wheat First tortiously interfered with the business relationships between Merrill Lynch and its customers. As such, damages are appropriate.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

For the period from June 25, 1999 through the date of this Decision, Wheat First and Mr. Blissit shall, jointly and severally, pay damages to Merrill Lynch in the amount of \$7,043.00. In addition, with regard to customers who had accounts serviced by Mr. Blissit while he was at Merrill Lynch which have not transferred to Wheat First, the temporary injunction against soliciting such customers entered on July 2, 1999, is made permanent through and including June 24, 2000.

All of the accounts Mr. Blissit serviced while at Merrill Lynch which have transferred to Wheat First or are pending to be processed through the ACATS system to Wheat First, may, for the period of time from the date of this Decision through and including June 24, 2000, be received and serviced by Wheat First and Mr. Blissit, but 60% of all gross commissions earned thereon (except for the accounts of Mr. Blissit and his relatives) during that period of time (as defined by trade date) shall be promptly (i.e. within 30 calendar days of each transaction) remitted by Wheat First to Merrill Lynch. For purposes of this Award, "the accounts of Mr. Blissit and his relatives" includes the following customers:

<u>Customer initials</u>	<u>Presently known account number or other ID</u>
JAB	1601-0089
JB	1500-3532
LRJ	4581-8412
ADB	Page 19 of Respondents' Exhibit 13

All account transfer applications shall be processed promptly as provided by applicable NASD rules and all Parties shall cooperate in that process. Further, Wheat First shall provide Merrill Lynch with a duplicate confirmation of each transaction at the same time it is provided the customer. After June 24, 2000, all parties may freely solicit business and retain commissions as they would in the normal course of business, except for any continuing obligation of Wheat

First to transmit to Merrill Lynch gross commissions generated on or before June 24, 2000.

Pre-judgment interest on the above-stated amounts is specifically excluded. Post-judgment interest shall accrue pursuant to Rule 10330 of the Code at the rate of 12% per annum.

Wheat First and Blissit are liable, jointly and severally, and shall pay to Merrill Lynch the sum of \$500.00 representing reimbursement of the claim filing fee previously paid by Merrill Lynch to NASD Regulation, Inc.

Each party shall pay its own attorneys' fees and costs of litigation.

FORUM FEES

Pursuant to Rule 10205c of the Code of Arbitration Procedure, forum fees in the sum of \$6,450.00 (injunctive relief hearing-Chairperson \$450.00 plus pre-hearing conference-panel \$1,000.00 plus five sessions x \$1,000.00) are assessed as follows:

Wheat First and Blissit are assessed, jointly and severally, the sum of \$6,450.00 for which NASD Regulation, Inc. shall retain the \$2,650.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$3,800.00.

OTHER FEES

Pursuant to Rule 10205 of the Code of Arbitration Procedure, Blissit has paid to NASD Regulation, Inc. the \$250.00 claim filing fee. Pursuant to Rule 10205 of the Code of Arbitration Procedure, Merrill Lynch has paid to NASD Regulation, Inc. the \$500.00 claim filing fee.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Merrill Lynch has paid to NASD Regulation, Inc. the \$1,200.00 member surcharges for NASD Arbitration Numbers 99-2943 and 99-2919, previously invoiced.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Wheat First has paid to NASD Regulation, Inc. the \$1,200.00 member surcharge, previously invoiced.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Merrill Lynch has paid to NASD Regulation, Inc. the \$600.00 pre-hearing process fee and the \$2,000.00 hearing process fee, previously invoiced.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Wheat First has paid to NASD Regulation, Inc. the \$600.00 pre-hearing process fee and the \$2,000.00 hearing process fee, previously invoiced.

Pursuant to Rule 10205 of the Code of Arbitration Procedure, Blissit and Merrill Lynch have each paid to NASD Regulation, Inc. the \$2,500.00 non-refundable surcharge for expedited proceedings.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

_____/s/_____
Robert N. Leitch, Esq.

Public

_____/s/_____
Jule B. Greene, Esq.

Public

_____/s/_____
Marshall H. Lichtenstein, Esq.

Industry

Date of Decision: October 6, 1999

Concurring Arbitrators' Signatures

Name

Robert N. Leitch
Robert N. Leitch, Esq.

Public/Industry

Public

Jule B. Greene
Jule B. Greene, Esq.

Public

Marshall H. Lichtenstein
Marshall H. Lichtenstein, Esq.

Industry

Date of Decision:

10/6/99

Concurring Arbitrators' Signatures
Name

Public/Industry

Robert N. Leitch, Esq.

Public


Jule B. Greene, Esq.

Public

Marshall H. Lichtenstein, Esq.

Industry

Date of Decision: _____

Concurring Arbitrators' Signatures
Name

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Robert N. Leitch, Esq.

Public

Julie B. Greene, Esq.

Public

Marshall H. Lichtenstein
Marshall H. Lichtenstein, Esq.

Industry

Date of Decision: _____