

**AWARD**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between

Name of Claimant

B.C. Ziegler and Company

and

99-04153  
Denver, Colorado

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.  
Joel M. Block  
William Epping  
Larry D. Martin  
Annette K. Forney

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**REPRESENTATION OF PARTIES**

B.C. Ziegler and Company ("**Claimant**") was represented by Michael R. Wherry, Esq., Davis & Kuelthau, S.C., Milwaukee, Wisconsin.

Merrill Lynch Pierce Fenner & Smith, Inc. ("**Respondent Merrill**") was represented by Richard G. Sander, Esq., Bostrom, Sands & Sander, P.C., Denver, Colorado.

Joel M. Block ("**Respondent Block**"), William Epping ("**Respondent Epping**"), Larry D. Martin ("**Respondent Martin**"), and Annette K. Forney ("**Respondent Forney**") (collectively as "**Respondent Brokers**") were represented by Thomas E. J. Hazard, Esq., Dufford & Brown, P.C., Denver, Colorado.

**CASE INFORMATION**

Statement of Claim Seeking Permanent Injunctive Relief and Seeking Other Relief was filed on or about September 10, 1999. Claimant B.C. Ziegler and Company's Reply to Counterclaims of Respondents Joel M. Block, William Epping, Larry D. Martin and Annette K. Forney was filed on or about October 25, 1999. Submission Agreement of Claimant B.C. Ziegler and Company was signed on September 8, 1999 by Charles O'Meara.

Statement of Answer was filed by Respondent Merrill Lynch Pierce Fenner & Smith, Inc. on or about October 13, 1999. Submission Agreement of Respondent Merrill Lynch Pierce Fenner & Smith, Inc. was signed on December 15, 1999 by Forrest D. Smith.

Respondent Brokers' Answer with Counterclaims to Claimant's Statement of Claim was filed by Respondents Joel M. Block, William Epping, Larry D. Martin and Annette K. Forney on or about October 14, 1999. Submission Agreement of Respondent Joel M. Block was signed on December 15, 1999. Submission Agreement of Respondent William Epping was signed on December 15, 1999. Submission Agreement of Respondent Larry D. Martin was signed on December 15, 1999. Submission Agreement of Respondent Annette K. Forney was signed on December 15, 1999.

### **CASE SUMMARY**

The parties submitted the following summaries:

#### **Ziegler's Allegations and Arbitration Claims**

Ziegler alleges that the Brokers, with the aid of Merrill Lynch, improperly contacted and solicited customers in violation of certain non-compete, non-disclosure and non-solicitation covenants contained in employment agreements executed between the Brokers and Ziegler. Ziegler further maintains that prior to their resignation, the Brokers misappropriated – and Merrill Lynch wrongfully acquired and converted – client information in order to assist the Brokers with their solicitation of customers after they resigned from Ziegler. Ziegler alleges this information – which consists of monthly statements and annual mutual fund statements that include the names, telephone numbers, addresses, and holdings of the Brokers' customers – constitutes proprietary and confidential business information and "trade secrets" of Ziegler within the meaning of Wisconsin's Uniform Trade Secrets Act. Finally, Ziegler asserts that the Brokers and Merrill Lynch intentionally and improperly interfered with Ziegler's prospective and continuing contractual relationships with, what Ziegler describes as, "its customers."

For its claims, Ziegler asserts the following causes of action: (1) injunctive relief permanently enjoining the Brokers from disclosing business information and "trade secrets" of Ziegler and enjoining for a period of six months the Brokers and Merrill Lynch from soliciting or accepting business from any customer whom the Brokers serviced or whose name became known to the Brokers while employed by Ziegler; (2) breach of the employment agreements and fiduciary relationships against the Brokers; (3) tortious interference with the Brokers' employment agreements against Merrill Lynch; (4) breach of confidential and fiduciary relationships with Ziegler by the Brokers; (5) conspiracy to convert against the Brokers and Merrill Lynch; (6) misappropriation of trade secrets against the Brokers; and (7) tortious interference with prospective contractual relationships against the Brokers and Merrill Lynch. Ziegler seeks compensatory and punitive damages against all Respondents, as well as costs and attorneys' fees.

#### **Brokers' Responses, Defenses and Counterclaims**

The Brokers and Merrill Lynch deny all liability to Ziegler on its asserted claims. The Brokers assert that as "at will" employees, they were free to leave Ziegler whenever they wanted and that their

departure from Ziegler was prompted, among other reasons, by the limited range of services which Ziegler could provide their customers. The Brokers assert they were privileged to plan and prepare for their move to Merrill Lynch during the course of their employment with Ziegler, and that while employed with Ziegler none of their conduct constituted any breach of duty owed by the Brokers to Ziegler. As to the allegations that they removed client information in the form of monthly customer statements, the Brokers deny that these materials are confidential information of Ziegler's, much less "trade secrets" under Wisconsin's Uniform Trade Secrets Act. If the information contained in those statements is in any way confidential, it is confidential to the customers, not Ziegler. Moreover, under Wisconsin securities regulations, Ziegler was required to produce the same information to the Brokers upon their resignation and – at least with respect to Wisconsin customers – Ziegler has produced the same information to the Brokers in response to the Brokers' request in their resignation letter.

With respect to the non-compete, non-disclosure and non-solicitation covenants contained in employment agreements, those covenants are unenforceable under Wisconsin law. The restraints are overly broad, not reasonably limited to protecting legitimate business interests of Ziegler, and unreasonable in terms of time limitations. Most importantly, the restraints are contrary to the express public policies of Wisconsin.

As to Ziegler's claim for tortious interference with a prospective contractual relations with customers, the Brokers assert that Ziegler never had a "near permanent relationship" with its clients that is legally protectable. A customers' account is not the property of Ziegler, and other brokers and brokerage firms are always privileged to solicit customers with accounts at Ziegler and encourage those customers to transfer their accounts to the soliciting broker or firm.

During the District Court hearings on the temporary restraining order, Ziegler described all of the accounts serviced by the Brokers while employed with Ziegler as "house accounts." This mischaracterization of the Brokers' accounts, as well as misleading statements by counsel that the Brokers somehow cajoled customers to transfer their accounts from Ziegler, resulted in the entry of the Temporary Restraining Order. As a result of the Temporary Restraining Order, and subsequent statements made by Ziegler employees and agents to the Brokers' customers, the Brokers have had their personal and professional reputations damaged and have lost production. The Brokers therefore have asserted counterclaims against Ziegler for wrongful enjoinder, lost production and damage to reputation. The Brokers seek damages for wrongful enjoinder in an amount equal to the \$100,000 bond posted by Ziegler for the Temporary Restraining Order, as well as attorneys' fees and costs. As for damages for lost production and injury to their reputations, the Brokers seek back pay equal to their lost production during the period they were wrongfully enjoined, as well as punitive damages.

**RELIEF REQUESTED**

In its Statement of Claim, Claimant demanded judgment in its favor and against Epping, Martin, Block, Forney and Merrill Lynch Pierce & Smith, Inc. for actual compensatory and consequential damages and punitive damages in an amount not less than \$1,000,000.00 nor more than \$5,000,000.00, together with actual attorneys' fees and costs of this proceeding.

In the Reply to Counterclaim, Claimant respectfully requested:

- a. That an award be entered dismissing the counterclaim of the Respondents Joel M. Block, William Epping, Larry D. Martin and Annette K. Forney in their entirety with prejudice.
- b. That an order be entered awarding Claimant its attorneys' fees and costs in responding to and defending those counterclaims.
- c. That an order be entered awarding monetary sanctions against each of the broker respondents for the assertion of frivolous claims in this proceeding in an amount to be determined by the arbitration panel.

At the hearing, Claimant requested an award of compensatory damages in the amount of \$2,000,000.00 and punitive damages in the amount of \$3,000,000.00, together with actual attorneys' fees and costs of this proceeding.

Respondent Merrill respectfully moved this Arbitration Panel to enter an award in its favor and deny the relief requested by Claimant, as well as grant it an award of attorneys' fees, costs, and such other relief as the Arbitration Panel deems just and proper.

Respondent Brokers respectfully requested that an award be entered in their favor and against Claimant for the following relief:

- a. An order denying Claimant's claims in their entirety;
- b. An order immediately dissolving the Temporary Restraining Order;
- c. An order enjoining Claimant from taking any further steps to prohibit customers who were serviced by the Brokers from contacting or doing business with the Brokers or their new employer, Merrill Lynch;
- d. An order enjoining Claimant from interfering with the Brokers' relationship with their customers;
- e. An order enjoining Claimant from making any disparaging comments about the Brokers to customers;
- f. An order enjoining Claimant from in any way prohibiting the processing of account transfer forms or prohibiting the Brokers or Merrill Lynch from accepting business from customers who have or will submit transfer forms;
- g. Damages for the wrongful enjoinder of the Brokers in an amount equal to the bond posted by the Claimant for the Temporary Restraining Order;

- h. Damages in the form of back pay, plus interest and costs;
- i. Damages suffered as a result of lost production;
- j. Damages suffered as a result of loss of reputation;
- k. Punitive damages; and
- l. Attorneys' fees, costs and any other relief as the Arbitration Panel deems just.

### **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 the NASD Regulation, Inc. Office of Dispute Resolution (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. The Temporary Restraining Order currently in effect shall be and hereby is dissolved effective 5:00 p.m. MST, Tuesday, February 1, 2000.
- 2. Respondents Joel M. Block, William Epping, Larry D. Martin, and Annette K. Forney shall be and hereby are released from compliance with the employment agreements entered into with B.C. Ziegler and Company effective 5:00 p.m. MST, Tuesday, February 1, 2000.
- 3. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and William Epping shall be and hereby are jointly and severally liable for and shall pay to Claimant B.C. Ziegler and Company the sum of \$266,000.00 (**Two Hundred Sixty Six Thousand Dollars**) as compensatory damages.
- 4. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Larry D. Martin shall be and hereby are jointly and severally liable for and shall pay to Claimant B.C. Ziegler and Company the sum of \$266,000.00 (**Two Hundred Sixty Six Thousand Dollars**) as compensatory damages.
- 5. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Joel M. Block shall be and hereby are jointly and severally liable for and shall pay to Claimant B.C. Ziegler and Company the sum of \$84,000.00 (**Eighty Four Thousand Dollars**) as compensatory damages.

6. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Annette K. Forney shall be and hereby are jointly and severally liable for and shall pay to Claimant B.C. Ziegler and Company the sum of \$84,000.00 (**Eighty Four Thousand Dollars**) as compensatory damages.
7. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. shall be and hereby is liable for and shall pay to Claimant B.C. Ziegler and Company the sum of \$1,000,000.00 (**One Million Dollars**) as punitive damages.
8. The counterclaims asserted in this matter shall be and hereby are denied in their entirety.
9. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
10. Other than the Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$2,000.00
Counter claim filing fee	= \$ 250.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms are B.C. Ziegler and Company and Merrill Lynch Pierce Fenner & Smith, Inc.

Member surcharge from each member	= \$2,500.00
Pre-hearing process fee from each member	= \$ 600.00
Hearing process fee from each member	= \$4,500.00

## Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) Pre-hearing session(s) with Panel x \$1,200.00 = \$3,600.00

Pre-hearing conference(s):	December 1, 1999	1 session
	October 6, 1999	1 session
	September 28, 1999	1 session

Sixteen (16) Hearing sessions x \$1,200.00 = \$19,200.00

Hearing Date(s):	January 27, 2000	3 sessions
	January 26, 2000	2 sessions
	January 25, 2000	3 sessions
	January 24, 2000	2 sessions
	December 9, 1999	2 sessions
	December 8, 1999	2 sessions
	December 7, 1999	2 sessions

**Total Forum Fees** = \$22,800.00

The Arbitration Panel has assessed \$22,800.00 of the forum fees to Merrill Lynch Pierce Fenner & Smith, Inc.

### Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

The parties agreed to pay a total of \$1,500.00 to the NASD to cover the travel expenses incurred by arbitrator, David M. Seidner as follows:

B.C. Ziegler and Company	\$500.00
Merrill Lynch Pierce Fenner & Smith, Inc.	\$500.00
Joel M. Block, William Epping, Larry D. Martin, and Annette K. Forney	\$500.00

### Fee Summary

Claimant, B.C. Ziegler and Company, shall be and hereby is liable for:

**Initial Filing Fee** = \$ 2,000.00

Member Fees	= \$ 7,600.00
Injunctive Relief Fee	= \$2,500.00
<u>Administrative Costs</u>	= \$ 500.00
Total Fees	= \$12,600.00
<u>Less payments</u>	= \$13,800.00
Balance Due NASD Regulation, Inc.	= (\$1,200.00)

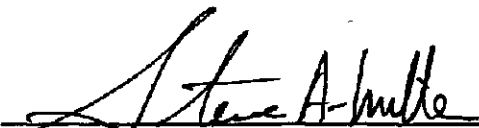
Respondent, Merrill Lynch Pierce Fenner & Smith, Inc., shall be and hereby is liable for:

Member Fees	= \$ 7,600.00
Forum Fees	= \$22,800.00
<u>Administrative Costs</u>	= \$ 500.00
Total Fees	= \$30,900.00
<u>Less payments</u>	= \$ 7,050.00
Balance Due NASD Regulation, Inc.	= \$23,850.00

Respondents, Joel M. Block, William Epping, Larry D. Martin, and Annette K. Forney shall be and hereby are jointly and severally liable for:

Counter claim Filing Fee	= \$ 250.00
<u>Administrative Costs</u>	= \$ 500.00
Total Fees	= \$ 750.00
<u>Less payments</u>	= \$2,300.00
Balance Due NASD Regulation, Inc.	= (\$1,550.00)

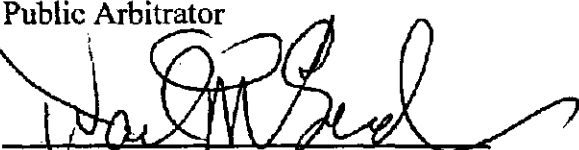
All balances are due to NASD Regulation, Inc.

  
Steve A. Miller, Esq.  
Public Arbitrator, Presiding Chair

Dated:

1/28/00

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Steven M. Feder  
Public Arbitrator

  
David M. Seidner  
Industry Arbitrator

01/27/00



NASD Regulation, Inc. Office of Dispute Resolution  
Arbitration No. 99-04153  
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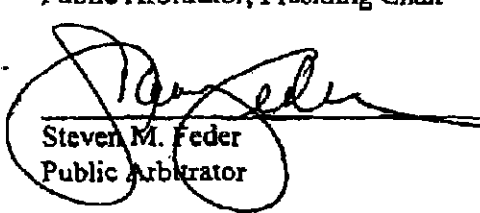
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Dated:

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Steve A. Miller, Esq.  
Public Arbitrator, Presiding Chair

  
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Steven M. Feder  
Public Arbitrator

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David M. Seidner  
Industry Arbitrator

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1-27-00  
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