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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,	*	3-00-CV-90220
Plaintiff,	*	
v.	*	
JAMES R. EVANS, ROBERT J. ARTH, AND MARK J. COOPMAN,	*	
Defendants.	*	ORDER

On December 13, 2000, the Plaintiff filed a motion styled "Motion for Immediate Hearing and Preliminary Injunction Hearing Date." In it, Plaintiff urges the Court to clarify its Order of December 11, 2000 barring Defendants from, among other things, soliciting former clients and accepting account transfers "through use of Merrill Lynch's customer lists." Order of 12/11/00 at 12.

The Plaintiff contends that Defendants, in violation of the Court's injunction, are still using Merrill Lynch customer lists to contact former Merrill Lynch clients and process the transfer of these customer accounts over to Dean Witter, the Defendants' new employer. Merrill Lynch's office manager, Arthur Rozema, claims that notwithstanding forfeiture by Defendants to Merrill Lynch of customer lists, computer data, and other Merrill Lynch property, the Defendants are nevertheless "secretly" utilizing Merrill Lynch customer lists to the detriment of Merrill Lynch. *See* Affidavit of Arthur Rozema filed 12/13/00.

All three of the Defendants concede that they have signed up former customers (most of whom they claim are long-time friends, business acquaintances, or relatives of Defendants) on a

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limited basis, though they assert they have done so in compliance with the injunction: by processing account transfers from customers who *independently* contact Defendants and request such a transfer; and by constructing new customer lists (with addresses and phone numbers) utilizing the Defendants' own memory, commercially available computer software, and the Internet.

The Court has read the papers filed by the parties and has carefully considered their arguments. As to Merrill Lynch customers who, on their own initiative, contact the Defendants about the status of their accounts, the Court will allow the Defendants to continue to receive these calls, answer these questions, and, if the customers so request, to process the transfer of these accounts. Merrill Lynch customers should continue to enjoy their rights as consumers to pick and choose their money managers. Thus, so long as this injunction remains in force and, pending outcome of the arbitration on the merits, the Defendants are not barred from receiving calls and queries from their former Merrill Lynch customers, or from processing any new accounts that result from these customer-initiated contacts.

A different outcome obtains, however, with respect to customer lists generated by Defendants' memory and publicly available material. The Defendants are correct to point out that the Order of 12/11 barred use of "Merrill Lynch's customer lists." However, after rereading the employment agreements of Evans and Arth, as well as the document signed by Coopman, the Court believes that Defendants have read the Court's Order too narrowly. No one doubts that tangible, hard-copy documents belonging to Merrill Lynch are within the scope of the Court's 12/11 Order. In fact, the Plaintiff agrees that Defendants delivered to Merrill Lynch several large boxes of documents and other materials that belong to the Plaintiff. These items include Merrill Lynch customer lists, spread sheets, and computer discs containing client account information.

The Court believes, however, that the parties contemplated that not only tangible documents and records but the contents of those records, i.e., the information contained therein, would constitute proprietary, and therefore protectible, material as well:

(1) Evans agreed that "all records . . . containing customer information, including but not limited to names and addresses, are the proprietary information of Merrill Lynch;" and that he would "not disclose to any person, firm, association, partnership, corporation . . . the contents, in whole or in part, of such records and documents, except in the ordinary course of conducting business for Merrill Lynch." *See* Ex. A, "Financial Consultant Agreement" signed by Evans on 6/3/91, attached to Complaint.

(2) Arth agreed that "all information [in Merrill Lynch records] including names, addresses, phone numbers, and financial information of any account, customer, client . . . [is] confidential and [is] the sole and exclusive property of Merrill Lynch;" he further agreed "not to divulge or disclose this information to any third party and under no circumstances will I reveal or permit this information to become known by any competitor of Merrill Lynch . . ." Ex. B, "Financial Consultant Employment Agreement and Restrictive Covenants" signed by Arth on 2/27/94, attached to Complaint.

(3) Coopman agreed that he would "not, during or after my employment with Merrill Lynch, use or disclose to another any confidential information or business secrets relating to Merrill Lynch." Ex. D, "Conflict of Interest" page, signed by Koopman on 10/10/89, attached to Complaint.

Thus, it seems proper at this stage of the litigation for the Plaintiff to safeguard this proprietary "information" – customer names, addresses, phone numbers, and account data – regardless of whether that information is contained on "Merrill Lynch's customer list" or on a list

generated independently by the Defendants using their skill and memory.

Based on a cursory review of governing law in this area, such customer "information" appears to be a protectible interest in Iowa. In *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220 (Iowa 1977), a business partner in a chemical company quit to become president of a competitor company. He allegedly took with him, among other things, customer lists for use in building up a new client base. The Court held that the customer lists were worthy of protection under the common law of trade secrets. The Court also rejected the partner's argument, similar to the one now advanced by the Defendants here, that his knowledge of customers from past experience was not a protectible interest: "[A]fter the employment has ceased the employee remains subject to a duty not to use trade secrets, or *other confidential information* which he has acquired in the course of his employment, for his own benefit or that of a competitor to the detriment of his former employer." *Id.* at 230 (citations omitted and emphasis added). Here, there is evidence that Defendants are using their knowledge about former customers for their own benefit and for the benefit of a competitor, in apparent contravention of their employment agreements. *Compare Lemon v. Hendrickson*, 559 N.W.2d 278, 280-82 (Iowa 1997) (former employee who solicited old customers based on his recollections found not to be in violation of non-competition employment agreement because the solicitation occurred outside the contract's two-year limitations period and the solicitation was not done to the employer's disadvantage); *see also* Restatement (Second) of Agency § 396 (1957) ("Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to the principal not to use or to disclose to third persons, in competition with the principal or to [the principal's] injury, . . . written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use the . . . names of the customers retained in his

memory, if not acquired in violation of his duty as agent[.]").

Accordingly, the Court's injunction necessarily must extend to cover customer information contained in lists created independently by the Defendants. Information about Merrill Lynch customers, whether it be found on actual Merrill Lynch customer lists or not, appears to fall within the ambit of the parties' employment agreements. Therefore, in clarification of the Court's 12/11/00 Order, and subject, of course, to any subsequent order by this Court or the arbitration panel, the Defendants are hereby prohibited from constructing, on their own or at the Defendants' behest, customer lists for the purpose of contacting former Merrill Lynch customers and facilitating account transfers to Dean Witter. As stated in the Court's initial Order of 12/11/00, the Court has made this preliminary assessment to preserve the status quo of this contract and trade secrets dispute pending a complete arbitration on the merits; it is not meant to deprive Defendants of their livelihood.

The Court's injunction of 12/11/00, as modified by this Order, will continue in effect until further Order of this Court or the arbitration panel. The Plaintiff's request for expedited discovery is denied.

IT IS SO ORDERED.

Dated this 22nd day of December, 2000.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE