

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JUL 03 2002

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

MOPEX, INC.; and)
REALTIMEMUTUALFUNDS.COM CO.)
both Illinois corporations;)

DOCKETED

Plaintiffs,) JUL 08 2002

Civil Action No. 01 C 5976

vs.)

Judge William J. Hibbler

BARCLAYS GLOBAL INVESTORS, N.A.,)
a corporation,)

Magistrate Judge M. Ashman

Defendant.)

Jury Demanded

SECOND AMENDED COMPLAINT

Now come the Plaintiffs, Mopex, Inc. and Realtimemutualfunds.com Co., by and through their attorneys, Wallenstein and Wagner, Ltd., and for their Second Amended Complaint against the Defendant allege as follows:

INTRODUCTION

The Plaintiffs (collectively referred to in this introduction as "Mopex") are pioneering inventors of dynamic new methods of creating and trading securities in the financial markets, particularly a variety of Exchange Traded Funds (ETFs). ETFs are revolutionary financial products that, when based on a securities index, allow investors to buy or sell shares of an entire portfolio in a single security. Although Mopex is a corporation, it comprises just two individuals, Kenneth Kiron and Kevin Bander. In the early 1990s, Messrs. Kiron and Bander conceived of particular ETFs and methods in which ETFs could be traded. Under the American Stock Exchange, LLC's (Amex) written promise of confidentiality, Mopex disclosed its

proprietary information to the Amex and the Amex' then-senior vice-president, Nathan Most, expecting that the Amex would license Mopex' then-secret inventions.

However, the Amex refused to license the inventions, instead choosing to offer and trade ETF products, and to employ methods, remarkably similar -- indeed, in some cases identical -- to Mopex' inventions. Most left Amex's employ in January of 1996. But before he left, Most disclosed Mopex' confidential information to third parties, including Wells Fargo Nikko Investment Advisors and Wells Fargo Institutional Trust Company, N.A. (collectively, "Wells Fargo"), who had been working closely with the Amex to develop ETF products. Contemporaneously with Most's departure from the Amex, Barclays Bank, PLC, the indirect corporate parent of Barclays Global Investors ("BGI"), acquired Wells Fargo, including Mopex' trade secrets. Barclays Bank then eventually renamed the two Wells Fargo companies, Barclays Global Fund Advisors ("BGFA") and BGI, respectively.

BGI is liable to Mopex because at the time it learned of Mopex' confidential information, it knew (or at least had reason to know), that the information had been improperly acquired. Mopex claims that BGI's misappropriation began before Mopex' United States Patent No. 5,806,048 issued on September 8, 1998. Accordingly the relief sought herein is not duplicative of the relief sought in Mopex' separate lawsuit relating to BGI's infringement of United States Patent No. 6,088,685, which claims a priority filing date to the application that issued as the '048 patent.

THE PARTIES

1. Plaintiff, Mopex, Inc. ("MOPEX") is an Illinois corporation having its principal place of business at 111 West Maple Street, Suite 1106, Chicago, Illinois 60610.

2. Plaintiff, Realtimemutualfunds.com, Co. is an Illinois corporation having its principal place of business at 111 West Maple Street, Suite 1106, Chicago, Illinois 60610. At all times relevant to the allegations in this Second Amended Complaint, Realtimemutualfunds.com, Co. was an agent of Mopex, Inc.

3. On information and belief, Defendant, Barclays Global Investors, N.A. (“BGI”), is a California corporation, having a place of business at 333 West Wacker Drive, Suite 2020, Chicago, Illinois 60606, and through a wholly-owned subsidiary, Barclays Global Fund Advisors (“BGFA”), is a fund advisor and index selection agent for a group of exchange-traded financial products known as iShares, which also includes a subset of products formerly known as World Equity Benchmark Shares also known as “WEBS,” and which are hereinafter collectively referred to as “iShares.” Barclays Global Investors Services (“BGIS”) assists in the marketing of iShares. BGFA and BGIS are wholly-owned subsidiaries of BGI. BGI is an indirect subsidiary of Barclays Bank, PLC (“Barclays Bank”), which is a bank holding company incorporated under the laws of England and Wales.

JURISDICTION AND VENUE

4. Subject Matter Jurisdiction over all counts is conferred on this Court by 28 U.S.C. § 1332 in that there is complete diversity between the parties and the amount in controversy exceeds \$75,000.00.

5. On information and belief, personal jurisdiction over Defendant BGI is proper because it is doing business in this State and District.

6. Venue is proper in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. §§ 1391(a) and (c).

ALLEGATIONS COMMON TO ALL COUNTS

7. On information and belief, American Stock Exchange, LLC (“Amex”), is a Delaware corporation having its principal place of business at 86 Trinity Place, New York, New York 10006.

8. On information and belief, Nathan Most (“Most”) is an individual domiciled and residing in the State of California.

The First Disclosure

9. On information and belief, during at least September through November of 1992, Amex solicited ideas from members of the general public for the creation and development of new financial trading products for the securities industry, which Amex would then promote.

10. In accord with Amex’s solicitation, Plaintiffs developed in confidence new financial trading products and methods.

11. Plaintiffs and Amex agreed to meet on November 13, 1992, to discuss in confidence Plaintiffs’ new financial trading products and methods.

12. On October 15, 1992, Steven Bloom (“Bloom”), acting on behalf of Amex, wrote to MOPEX and agreed that new financial trading products and methods disclosed by MOPEX would be maintained in confidence by Amex. See Exhibit “A”.

13. Exhibit A is a confidentiality agreement (hereinafter “the confidentiality agreement”).

14. On November 13, 1992, Plaintiffs disclosed to Amex and Most in confidence, and in reliance on Exhibit A, Plaintiffs’ new financial trading products and methods (the “first disclosure”).

15. The first disclosure was subject to the confidentiality agreement.

16. The information of Plaintiffs' first disclosure constituted trade secrets.

17. At all times relevant hereto, Plaintiffs owned the trade secrets of the first disclosure.

18. On information and belief, on or about September 19, 1994, an application (the "September 19, 1994 application") was filed with the United States Securities and Exchange Commission ("SEC") for authority to create and trade financial products, and to employ methods, based in substantial part on the information Plaintiffs had disclosed to Most and the Amex as part of the first disclosure.

19. The September 19, 1994 application was filed with the SEC by Foreign Fund, Inc.

20. On information and belief, at the time the September 19, 1994 application was filed, Foreign Fund Inc. was jointly owned and/or controlled by the Amex and Morgan Stanley & Co., Inc., and possibly others.

21. The September 19, 1994 application described generally what became known, through subsequent amendments with the SEC and other changes, as the WEBS products.

22. On information and belief, sometime between approximately May 19 and December 14 of 1995, the September 19, 1994 application was amended, naming Wells Fargo Nikko Investment Advisors ("Wells Fargo Nikko") as the manager and adviser of Foreign Fund, Inc., and in turn, the WEBS products.

23. On or about March 5, 1996, the SEC approved the WEBS products for listing and trading on the Amex.

24. On or about March 18, 1996, the WEBS products were first listed and traded on the Amex.

25. The WEBS product was the first security known commonly as exchange traded funds that had, as disclosed in its initial application to the SEC, a single investment company structure, that being as an open-end management company defined by the Investment Company Act of 1940.

The Second Disclosure

26. On October 12, 1994, Plaintiffs disclosed to Amex and Most in confidence additional new financial trading products and methods, including but not limited to, a new security that could be traded in real-time and derivative options linked to the trading thereof (the “second disclosure”).

27. As part of the second disclosure, Plaintiffs also disclosed to Amex and Most in confidence, among other things:

- (a) creating options on open-end mutual funds and linked derivative securities;
- (b) hedging techniques for investments in an actively managed fund, including an actively managed exchange traded fund;
- (c) creating a hedge security that does not penalize market makers for transactions;
- (d) implementing production processes incident to the listing and/or trading of a hedge security;
- (e) reducing expense ratios for a hedge security for actively managed funds;
- (f) streamlining techniques for operational services and responsibilities of fund custodians, transfer agents, and administrators;
- (g) marketing and selling methods for the innovative products and methods;
- (h) teaching market makers accurate valuation methods for the new securities;
- (i) showing how the new securities could be traded in the secondary market; and

(j) providing lists of potential customers for the above information in subparagraphs (a)-(i).

28. The second disclosure was subject to the confidentiality agreement.

29. The information of Plaintiffs' second disclosure constituted trade secrets.

30. At all times relevant hereto, Plaintiffs owned the trade secrets of the second disclosure.

Most, Wells Fargo and BGI

31. On information and belief, in or about June of 1995, Barclays Bank agreed to acquire Wells Fargo Nikko.

32. On information and belief, in or about June of 1995, Barclays Bank agreed to acquire Wells Fargo Institutional Trust Company, N.A. ("Wells Fargo Institutional").

33. On information and belief, prior to Barclays Bank's completion of its acquisition of Wells Fargo Nikko and Wells Fargo Institutional (collectively, the "Wells Fargo entities"), Most disclosed to the Wells Fargo entities Plaintiffs' confidential information that was the subject of the first and second disclosures.

34. On information and belief, on or about December 31, 1995, Barclays Bank's completed its acquisition of Wells Fargo Nikko.

35. On information and belief, at or shortly after the time Barclays Bank acquired Wells Fargo Nikko, Barclays Bank changed the acquired company's name to BZW Barclays Global Fund Advisors, and then subsequently to BGFA.

36. On information and belief, on or about December 31, 1995, Barclays Bank's completed its acquisition of Wells Fargo Institutional.

37. On information and belief, at or shortly after the time Barclays Bank acquired, Wells Fargo Institutional, Barclays Bank changed the acquired company's name to BZW Barclays Global Investors, N.A., and then subsequently to BGI.

38. On information and belief, Most participated in the preparation of the September 19, 1994 application and the subsequent amendments thereto, up to and including until the SEC approved the WEBS for listing and trading.

39. On information and belief, Most's participation, as alleged in the above paragraph, included disclosing to the Wells Fargo entities Plaintiff's trades secrets of the first and second disclosures.

40. On information and belief, Barclays Bank's acquisition of the Wells Fargo entities included Plaintiffs' confidential information that was the subject of the first and second disclosures.

41. On information and belief, BGI, by virtue of its relationship to Barclays Bank, acquired Plaintiffs' confidential information that was the subject of the first and second disclosures.

42. On information and belief, Most left the employ of the Amex on or about January 15, 1996.

43. On information and belief, since about January 1, 1996, and continuing until present, Most has been the President and Chairman of the Board of iShares, Inc., which comprises part of the iShares securities.

44. On information and belief, BGI advises each fund within iShares, Inc., through BGFA, and controls iShares, Inc. to the extent that iShares, Inc. is its alter ego and/or mere instrumentality.

45. On information and belief, since sometime in 1999, and continuing until present, Most has been President and Chairman of the Board of The iShares Trust, which comprises part of the iShares securities.

46. On information and belief, BGI advises each fund within The iShares Trust, through BGFA, and controls The iShares Trust to the extent that The iShares Trust is its alter ego and/or mere instrumentality.

47. On information and belief, the commercial success of The iShares Trust; iShares, Inc., and the iShares securities is due in part because of the information of Plaintiffs' first and second disclosures.

COUNT I
MISAPPROPRIATION AND THEFT OF TRADE SECRETS
THE FIRST DISCLOSURE

48. Plaintiffs incorporate and re-allege Paragraphs 1-47 of this Second Amended Complaint as if set forth herein.

49. The term "trade secrets" as used in this count refers to Plaintiffs' trade secrets of the first disclosure.

50. At the time BGI acquired Plaintiffs' trade secrets, BGI knew, or should have known:

- (a) that Plaintiffs owned the trade secrets;
- (b) that Plaintiffs' trade secrets were confidential and proprietary;
- (c) that BGI acquired Plaintiffs' trade secrets upon a breach of the confidentiality agreement;
- (d) that BGI acquired Plaintiffs' trade secrets as a result of discovery by improper means; and

- (e) that BGI acquired Plaintiffs' trade secrets through Most's misappropriation of same.

51. On information and belief, BGI used and disclosed Plaintiffs' trade secrets without Plaintiffs' express or implied consent in creating, listing, causing to be listed, trading, selling, offering for sale, marketing, advertising, promoting, and/or otherwise profiting from activities related to groups of securities known as iShares that are traded on at least the Amex, the New York Stock Exchange, the Chicago Board Options Exchange, and/or that are soon to be traded on the London Stock Exchange, and Hong Kong Exchanges and Clearing Limited (a/k/a The Hong Kong Stock Exchange) (the activities of this paragraph are collectively referred to in this count as "trading activities").

52. On information and belief, BGI's trading activities embodied, in substantial part, Plaintiffs' trade secrets.

53. On information and belief, BGI's trading activities were intentional and/or in willful and wanton disregard of Plaintiffs' rights to their trade secrets.

54. On information and belief, BGI profited from its trading activities.

55. At all times material hereto, Plaintiffs made reasonable efforts to maintain the secret, confidential, and proprietary nature of their trade secrets.

56. Plaintiffs have been damaged as a result of BGI's trading activities.

WHEREFORE, Plaintiffs respectfully pray that this Court enters judgment against BGI and that this Court:

- (a) awards Plaintiffs compensatory damages in an amount of a multitude of millions of dollars to be proved at trial;
- (b) awards Plaintiffs punitive damages;

- (c) disgorges BGI of its profits and other unjust enrichment that it acquired in misappropriating Plaintiffs' trade secrets;
- (d) permanently enjoins BGI, its officers, agents, servants, employees, attorneys, successors, and assigns, and all others in active concert of participation, either alone or by legal or constructive joint venture and/or common law partnership, from using or otherwise disclosing Plaintiffs' trade secrets, including enjoining all future sales and trades of WEBS and iShares;
- (e) awards Plaintiffs their reasonable attorneys' fees for this action;
- (f) taxes the costs of this action to BGI; and
- (g) awards such further relief as the Court deems just and appropriate.

COUNT II
MISAPPROPRIATION AND THEFT OF TRADE SECRETS
THE SECOND DISCLOSURE

57. Plaintiffs incorporate and re-allege Paragraphs 1-47 of this Second Amended Complaint as if set forth herein.

58. The term "trade secrets" as used in this count refers to Plaintiffs' trade secrets of the second disclosure.

59. At the time BGI acquired Plaintiffs' trade secrets, BGI knew, or should have known:

- (a) that Plaintiffs owned the trade secrets;
- (b) that Plaintiffs' trade secrets were confidential and proprietary;
- (c) that BGI acquired Plaintiffs' trade secrets upon a breach of the confidentiality agreement;
- (d) that BGI acquired Plaintiffs' trade secrets as a result of discovery by improper means; and
- (e) that BGI acquired Plaintiffs' trade secrets through Most's misappropriation of same.

60. On information and belief, BGI used and disclosed Plaintiffs' trade secrets without Plaintiffs' express or implied consent in creating, listing, causing to be listed, trading, selling, offering for sale, marketing, advertising, promoting, and/or otherwise profiting from activities to groups of securities known as iShares that are traded on at least the Amex, the New York Stock Exchange, the Chicago Board Options Exchange, and/or that are soon to be traded on the London Stock Exchange, and Hong Kong Exchanges and Clearing Limited (a/k/a The Hong Kong Stock Exchange), further including without limitation: creating, promoting, and profiting from options on open-end mutual funds; accepting orders for iShares securities from institutional clients and customers that were part of Plaintiffs' proprietary and confidential customer lists; releasing market literature that incorporates Plaintiffs' streamlining techniques; and disclosing to and encouraging its market maker affiliates and other market makers to use Plaintiffs' valuation methods (the activities of this paragraph are collectively referred to in this count as "trading activities").

61. On information and belief, BGI's trading activities embodied, in substantial part, Plaintiffs' trade secrets.

62. On information and belief, BGI's trading activities were intentional and/or in willful and wanton disregard of Plaintiffs' rights to their trade secrets.

63. On information and belief, BGI profited from its trading activities.

64. At all times material hereto, Plaintiffs made reasonable efforts to maintain the secret, confidential, and proprietary nature of their trade secrets.

65. Plaintiffs have been damaged as a result of BGI's trading activities.

WHEREFORE, Plaintiffs respectfully pray that this Court enters judgment against BGI and that this Court:

- (a) awards Plaintiffs compensatory damages in an amount of a multitude of millions of dollars to be proved at trial;
- (b) awards Plaintiffs punitive damages;
- (c) disgorges BGI of its profits and other unjust enrichment that it acquired in misappropriating Plaintiffs' trade secrets;
- (d) permanently enjoins BGI, its officers, agents, servants, employees, attorneys, successors, and assigns, and all others in active concert of participation, either alone or by legal or constructive joint venture and/or common law partnership, from using or otherwise disclosing Plaintiffs' trade secrets, including enjoining all future sales and trades of WEBS and iShares;
- (e) awards Plaintiffs their reasonable attorneys' fees for this action;
- (f) taxes the costs of this action to BGI; and
- (g) awards such further relief as the Court deems just and appropriate.

COUNT III
UNFAIR COMPETITION
BGI

66. Plaintiffs incorporate and re-allege Paragraphs 1-65 of this Second Amended Complaint as if set forth herein.

67. The term "trade secrets" as used in this count refers to Plaintiffs' trade secrets of the first and second disclosures.

68. At the time BGI acquired Plaintiffs' trade secrets, it knew, or should have known:
- (a) that Plaintiffs' trade secrets were unknown by the general public, confidential, and proprietary;
 - (b) that it acquired Plaintiffs' trade secrets upon Most's breach of a confidentiality agreement;
 - (c) that it acquired Plaintiffs' trade secrets upon a breach of Most's duty to not disclose Plaintiffs' trade secrets ; and/or
 - (d) that it acquired Plaintiffs' trade secrets through improper means.

69. On information and belief, BGI exploited Plaintiffs' trade secrets by:
- (a) using Plaintiffs' trade secrets in substantial part without compensating Plaintiffs, including without limitation, as part of its activities as alleged in Counts I and II of this Second Amended Complaint;
 - (b) claiming Plaintiffs' trade secrets were its own work;
 - (c) intentionally interfering with Plaintiffs' expected business relationships with unnamed third parties with respect to Plaintiffs' United States Patent No. 6,088,685; and
 - (d) threatening Plaintiffs' business viability (subparagraphs (a)-(d) are collectively referred to in this count as "exploitations".)

70. BGI's exploitations constitute unfair competition.

71. On information and belief, BGI's exploitations were intentional and/or in willful and wanton disregard of Plaintiffs' rights to their trade secrets.

72. Plaintiffs have been damaged by BGI's exploitations.

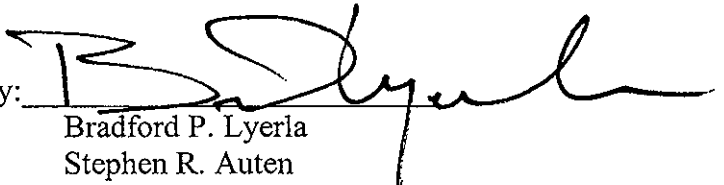
WHEREFORE, Plaintiffs respectfully pray for the entry of judgment in their favor against Defendant BGI as follows:

- (a) awards Plaintiffs compensatory damages in an amount of a multitude of millions of dollars to be proved at trial;
- (b) awards Plaintiffs punitive damages;
- (c) disgorges BGI of its profits and other unjust enrichment that it acquired in engaging in unfair competition;
- (d) permanently enjoins BGI, its officers, agents, servants, employees, attorneys, successors, and assigns, and all others in active concert of participation, either alone or by legal or constructive joint venture and/or common law partnership, from using or otherwise disclosing Plaintiffs' trade secrets, including enjoining all future sales and trades of WEBS and iShares;
- (e) awards Plaintiffs their reasonable attorneys' fees for this action;
- (f) taxes the costs of this action to BGI; and
- (g) awards such further relief as the Court deems just and appropriate.

A TRIAL BY JURY IS RESPECTFULLY DEMANDED.

Respectfully submitted,
MOPEX, INC.
REALTIMEMUTUALFUNDS.COM, CO.,

Dated: July 3, 2002

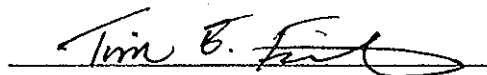
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing **SECOND AMENDED COMPLAINT** was served upon counsel for Defendant, via facsimile, with confirmation via first-class mail, postage prepaid, on this 3rd day of July, 2002, to the following:

Robert J. Kopecky
Daniel E. Laytin
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
Phone: (312) 861-2000
Facsimile: (312) 861-2200

A handwritten signature in black ink, appearing to read "Tim B. Fink", is written over a horizontal line.