

FINRA Dispute Resolution  
Midwest Processing Center  
55 West Monroe Street  
Suite 2600  
Chicago, IL 60603  
E-mail: [midwestprocessingcenter@finra.org](mailto:midwestprocessingcenter@finra.org)  
Phone: 312-899-4440  
Fax: 312-236-9239



Number of Pages including the Cover Sheet: \_\_\_\_\_

Date: 04/29/2013

Case Number: 10-04592

Case Name: Merrill Lynch, Pierce, Fenner & Smith Incorporated vs. Jeffrey R. Wescott

To: Darrell J. Graham Phone: 312-621-0301 Fax: 312 621-0301  
Gregg W. Marsano Phone: 610-854-4321 Fax: 610-854-7862

From: Alma Toplic  
Case Administrator

Message: OGA

---

This facsimile transmission is intended only for the addressee(s) shown above. It may contain information that is privileged, confidential, or otherwise protected from disclosure. Any review, dissemination or use of this transmission or its contents by persons other than addressee is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone at the above number.



**VIA FACSIMILE AND MAIL**

April 29, 2013

Darrell J. Graham, Esq.  
Roeser Bucheit & Graham LLC  
20 N. Wacker Drive,  
Suite 1330  
Chicago, IL 60606

Subject: FINRA Dispute Resolution Arbitration Number 10-04592  
Merrill Lynch, Pierce, Fenner & Smith Incorporated vs. Jeffrey R. Wescott

Dear Mr. Graham:

Enclosed please find the decision reached by the arbitrators in the above-referenced matter.

**Responsibility to Pay Monetary Award**

FINRA rules provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

- If not paid within 30 days of receipt;
- If the award is the subject of a motion to vacate which is denied; or
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrators.

**Expedited Suspension Proceedings for Non-Payment of Awards**

Article VI, Section 3 of the FINRA By-Laws and FINRA Rule 9554 permit FINRA to suspend or cancel the registration of any firm or associated person that fails to comply with a FINRA arbitration award.

Firms are required to notify FINRA in writing within 30 days of receipt of an award that they or their associated persons have paid or otherwise complied with the award, or to identify a valid basis for non-payment. We also request that prevailing claimants notify us in writing when their awards have not been paid within 30 days of receipt of the award.

Written notification concerning award compliance or lack thereof should be directed to:

Investor protection. Market integrity.

Dispute Resolution  
Midwest Regional Office

55 West Monroe Street  
Suite 2600  
Chicago, IL  
60603-5104

t 312 899 4440  
f 312 236 0239  
www.finra.org

David Carey  
FINRA Dispute Resolution  
One Liberty Plaza, 165 Broadway, 52nd Floor  
New York, NY 10006  
212-858-4333 (tel) | 301-527-4706 (fax) | david.carey@finra.org (email)

#### Right to File Motion to Vacate Award

FINRA rules provide that, unless the applicable law directs otherwise, all awards rendered are final and are not subject to review or appeal. Accordingly, FINRA has no authority to vacate this award. Any party wishing to challenge the award must make a motion to vacate the award in a federal or state court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, or applicable state statute. There are limited grounds for vacating an arbitration award, and a party must bring a motion to vacate within the time period specified by the applicable statute. If you are not represented by counsel and wish to challenge the award, we urge you to seek legal advice regarding any rights or remedies available to you.

#### Forum Fees

You will receive under separate cover an invoice that reflects the fees assessed and any outstanding balance or refund due. Fees are due and payable to FINRA Dispute Resolution upon receipt of the invoice and should be sent to the address specified on the invoice. Any applicable refunds will also be sent under separate cover approximately 45 days after the case closes. All questions regarding payment of fees and refunds should be directed to FINRA Finance at (240) 386-5910.

#### Arbitrator Evaluation

FINRA encourages parties to complete Arbitrator Evaluation Forms at the conclusion of every case. We will utilize your comments in our ongoing efforts to evaluate and improve the services our forum provides. You can complete the Arbitrator Evaluation Form on our website at [www.finra.org/arbevaluation](http://www.finra.org/arbevaluation).

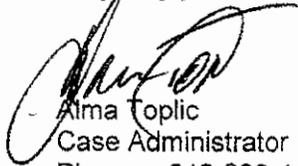
#### Party Submissions to Arbitrators After a Case Closes

FINRA rules provide that parties may not submit documents to arbitrators in cases that have been closed except under the following limited circumstances: 1) as ordered by a court; 2) at the request of any party within 10 days of service of an award, for typographical or computational errors, or mistakes in the description of any person or property referred to in the award; or 3) if all parties agree and submit documents within 10 days of service of an award. Any documents, if submitted, must be sent through FINRA.

Questions Concerning Award

Should you have any questions, please contact me at the phone number or email address provided below. Parties should not directly contact arbitrators under any circumstances.

Very truly yours,



Alma Topic  
Case Administrator  
Phone: 312-899-4440  
Fax: 301-527-4857  
Alma.Topic@finra.org

AS1:rv:LC09A  
idr: 08/29/2012

RECIPIENTS:

Darrell J. Graham, Esq., Jeffrey R. Wescott  
Roeser Bucheit & Graham LLC, 20 N. Wacker Drive,, Suite 1330, Chicago, IL 60606

Gregg W. Marsano, Esq., Merrill Lynch Pierce Fenner & Smith Inc.  
Rubin, Fortunato & Harbison, P.C, 10 South Leopard Road, Paoli, PA 19301

**AWARD**  
**FINRA Dispute Resolution**

---

In the Matter of the Arbitration Between:

Name of Claimant/Counter-Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

vs.

Case Number: 10-04592  
Hearing Site: Chicago, Illinois

Name of Respondent/Counter-Claimant

Jeffrey R. Wescott

---

**NATURE OF THE DISPUTE**

Member vs. Associated Person

**REPRESENTATION OF PARTIES**

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Claimant" or "MLPFS") was represented by Gregg W. Marsano, Esq., Rubin, Fortunato & Harbison, PC, Paoli, Pennsylvania.

Jeffrey R. Wescott ("Respondent" or "Wescott") was represented by Darrell J. Graham, Esq., Roeser Bucheit & Graham, LLC, Chicago, Illinois.

**CASE INFORMATION**

The Statement of Claim was filed on or about October 12, 2010. The Submission Agreement of Claimant was signed on or about October 11, 2010, by Tim Cunningham, Administrative Manager. The Answer to Respondent's Counterclaim was filed on or about February 4, 2011.

The Statement of Answer and Counterclaim was filed by Respondent on or about December 17, 2010. The Submission Agreement of Respondent was signed on or about December 16, 2010.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of promissory note and unjust enrichment. The causes of action related to Respondent's alleged failure to repay a promissory note ("Note") entered into between Claimant and Respondent, which the unpaid balance became due and owing to Claimant upon Respondent's termination from Claimant's employment on or about August 31, 2009.

FINRA Dispute Resolution  
 Arbitration No. 10-04592  
 Award Page 2 of 5

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

In the Counterclaim, Respondent asserted the following causes of action: promissory fraud/fraudulent inducement; breach of employment agreement; setoff; and unjust enrichment. The causes of action related to Respondent's allegations that Claimant made false and fraudulent promises and representations regarding Wescott's employment opportunity and methods for generating income to induce Wescott to leave Bank of America for MLPFS.

Unless specifically admitted in its Answer, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

### RELIEF REQUESTED

In the Statement of Claim, Claimant requested an award in the amount of:

Actual/Compensatory Damages	\$ 437,432.92
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Respondent requested that the claims asserted against him be denied in their entirety and that he be awarded his costs and attorneys' fees.

In the Counterclaim, Respondent requested an award in the amount of:

Actual/Compensatory Damages	\$1,000,000.00
Exemplary/Punitive Damages	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

Claimant requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

### OTHER ISSUES CONSIDERED & DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On or about March 18, 2013, Respondent filed a Motion to Issue Non-Party Subpoenas and to Permit Testimony by Telephone. On or about March 28, 2013, Claimant filed an Opposition to Respondent's Motion. On or about April 7, 2013, Respondent filed a Reply in Support of Motion to Issue Non-Party Subpoenas and to Permit Testimony by Telephone. At the hearing, the Panel granted Respondent's Motion.

On or about April 2, 2013, Claimant filed an Emergency Motion for a Protective Order Regarding the Testimony of John Thiel. On or about April 11, 2013, Respondent filed a Response to Claimant's Emergency Motion. At the hearing, Claimant introduced the Motion at the commencement of the hearing but the Panel deferred ruling on the Motion pending a hearing on the merits of this case. John Thiel did not testify at the hearing and therefore the Motion was rendered moot.

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.

### **AWARD**

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

- 1.) Claimant's claims, each and all, are hereby denied and dismissed with prejudice;
- 2.) Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc., is liable for and shall pay to Respondent, Jeffrey R. Wescott, the sum of \$232,505.00 in compensatory damages;
- 3.) Other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
- 4.) Any relief not specifically enumerated, including attorneys' fees, is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution will retain the non-refundable filing fees\* for each claim:

FINRA Dispute Resolution  
 Arbitration No. 10-04592  
 Award Page 4 of 5

Initial Claim filing fee	= \$ 2,125.00
Counterclaim filing fee	= \$ 1,575.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Merrill Lynch, Pierce, Fenner & Smith, Inc. is assessed the following:

Member surcharge	= \$ 1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 4,000.00

### **Adjournment Fees**

Adjournments granted during these proceedings:

<u>March 13-16, 2012, adjournment jointly requested by the parties</u>	= \$ 1,200.00
Total Adjournment Fees	= \$ 1,200.00

The Panel has assessed \$1,200.00 of the adjournment fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

### **Hearing Session Fees and Assessments**

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

Two (2) Pre-hearing sessions with Panel x \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: April 8, 2011	1 session
March 16, 2012	1 session
Eight (8) Hearing sessions x \$1,200.00	= \$ 9,600.00
Hearing Dates: April 16, 2013	2 sessions
April 17, 2013	2 sessions
April 18, 2013	2 sessions
April 19, 2013	2 sessions
<u>Total Hearing Session Fees</u>	<u>= \$ 12,000.00</u>

FINRA Dispute Resolution  
Arbitration No. 10-04592  
Award Page 5 of 5

---

The Panel has assessed \$12,000.00 of the hearing session fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Leon Fox - Public Arbitrator, Presiding Chair  
David M. Zimberoff - Public Arbitrator  
Thomas H. Stone - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures:

/s/ Leon Fox  
Leon Fox  
Public Arbitrator, Presiding Chair

April 29, 2013  
Signature Date

/s/ David M. Zimberoff  
David M. Zimberoff  
Public Arbitrator

April 27, 2013  
Signature Date

/s/ Thomas H. Stone  
Thomas H. Stone  
Non-Public Arbitrator

April 26, 2013  
Signature Date

April 29, 2013  
Date of Service (For FINRA office use only)

FINRA Dispute Resolution  
Arbitration No. 10-04592  
Award Page 5 of 5

The Panel has assessed \$12,000.00 of the hearing session fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Leon Fox - Public Arbitrator, Presiding Chair  
David M. Zimberoff - Public Arbitrator  
Thomas H. Stone - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures:

Leon Fox  
Leon Fox  
Public Arbitrator, Presiding Chair

4-29-2013  
Signature Date

David M. Zimberoff  
David M. Zimberoff  
Public Arbitrator  
Thomas H. Stone  
Thomas H. Stone  
Non-Public Arbitrator

Signature Date  
4/24/13  
Signature Date

Date of Service (For FINRA office use only)

FINRA Dispute Resolution  
Arbitration No. 10-04592  
Award Page 5 of 5

The Panel has assessed \$12,000.00 of the hearing session fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Leon Fox - Public Arbitrator, Presiding Chair  
David M. Zimberoff - Public Arbitrator  
Thomas H. Stone - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures:**

\_\_\_\_\_  
Leon Fox  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
David M. Zimberoff  
Public Arbitrator

\_\_\_\_\_  
4-27-13  
Signature Date

\_\_\_\_\_  
Thomas H. Stone  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For FINRA office use only)

The Panel has assessed \$12,000.00 of the hearing session fees to Merrill Lynch, Pierce, Fenner & Smith, Inc.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

Leon Fox - Public Arbitrator, Presiding Chair  
David M. Zimberoff - Public Arbitrator  
Thomas H. Stone - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

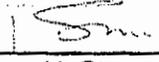
Concurring Arbitrators' Signatures:

\_\_\_\_\_  
Leon Fox  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
David M. Zimberoff  
Public Arbitrator

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Thomas H. Stone  
Non-Public Arbitrator

4/26/13  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For FINRA office use only)