

Award
FINRA Dispute Resolution

In the Matter of the Arbitration Between:

Claimant/Counter-Respondent
Merrill Lynch, Pierce, Fenner & Smith Incorporated

Case Number: 11-02987

vs.

Respondent/Counter-Claimant
Rene' Tapia Espinoza

Hearing Site: Phoenix, Arizona

Nature of the Disputes: Member vs. Associated Person
 Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Claimant" or "Merrill Lynch"): Christopher S. Koller, Esq. and Kathleen M. Laubenstein, Esq., Rubin, Fortunato & Harbison, P.C., Paoli, Pennsylvania.

For Respondent/Counter-Claimant Rene' Tapia Espinoza ("Respondent"): Peter S. Roeser, Esq. and Darrell J. Graham, Esq., Roeser, Bucheit & Graham, LLC, Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on or about: July 29, 2011.

Claimant signed the Submission Agreement: July 26, 2011.

Statement of Answer and Counterclaim filed by Respondent on or about: November 23, 2011.

Respondent signed the Submission Agreement: November 23, 2011.

Statement of Answer to the Counterclaim filed by Claimant on or about: January 18, 2012.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: breach of promissory note and unjust enrichment. The causes of action relate to a promissory note executed by Respondent while he was employed by Claimant.

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

In his Counterclaim, Respondent asserted the following causes of action: breach of contract; breach of covenant of good faith and fair dealing; and defamation and expungement of Form U5 termination report.

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:

1. The principal balance in the amount of \$247,999.96;
2. Interest in the additional amount of 2.95% per annum on the principal balance, equaling \$20.04 per day for each day from July 14, 2011 through such date as the principal balance is fully paid;
3. Reasonable attorneys' fees and costs incurred; and
4. Such other and further relief as the Panel deems just and appropriate.

In his Statement of Answer and Counterclaim, Respondent requested:

1. Dismissal of the Statement of Claim;
2. Damages proximately caused by Claimant's breach of the employment agreement in the principal amount of no less than \$247,999.96 together with interest of \$20.04 per day for each day from July 14, 2011 through the date such amount is fully paid, but to be limited by the aggregate award to be issued in this case not to exceed \$500,000.00;
3. Damages proximately caused by Claimant's breach of implied covenant and duty of good faith and fair dealing in the principal amount of no less than \$247,999.96 together with interest of \$20.04 per day for each day from July 14, 2011 through the date such amount is fully paid, but to be limited by the aggregate award to be issued in this case not to exceed \$500,000.00;
4. Damages resulting from Respondent's losses sustained as a result of Claimant's solicitation of Respondent's clients in an amount to be determined at the time of hearing in this matter, but to be limited by the aggregate award to be issued in this case not to exceed \$500,000.00;
5. Expungement of the termination information on his Central Registration Depository ("CRD") record relating to his employment with Claimant;
6. Replacement of the termination reason with "Permitted to Resign";
7. Replacement of the termination comments with "Conduct in accordance with specific guidelines and instructions from Merrill Lynch, and through no wrongdoing of Broker";
8. Pre and post-judgment interest at the legal rate;

9. Attorneys' fees and costs; and
10. Such other relief as the Panel deems just and equitable.

In its Statement of Answer to the Counterclaim, Claimant requested:

1. Dismissal of the counterclaims in their entirety;
2. Assessment of all costs against Respondent;
3. Award of the relief requested in the Statement of Claim; and
4. All other relief that the Panel deems reasonable and appropriate.

At the close of the hearing, Respondent's claim for damages was specified in detail as either \$1,208,276.00 or \$1,327,747.00, depending on which of two set of assumptions the Panel elected to apply.

OTHER ISSUES CONSIDERED AND DECIDED

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

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.

FINDINGS

The Panel finds that Claimant terminated Respondent without cause. Pursuant to the employment contract, the balance owed on the promissory note that forms the basis of Claimant's claim is offset by an equal amount payable under the employment contract. Accordingly, Claimant recovers nothing on its claim and the parties will bear their own costs and attorneys' fees with respect to that claim.

On the counterclaim for breach of contract, the Panel finds that Claimant did not breach the contract. On the counterclaim for defamation, the Panel finds that the context of the reason for termination in the Form U5 was defamatory but that no damages were proven to have been caused by that defamation and the only relief to which Respondent is entitled is the expungement recommendation in the Award section below. In addition, the parties will bear their own costs and attorneys' fees incurred in connection with the counterclaim.

The Panel finds that although the reason given for Respondent's termination in Section 3 of his Form U5 is not defamatory when read in isolation, when it is viewed in context with Merrill Lynch's answers to Disclosure Questions 7B and 7F1, it is. The reason is that the evidence produced at the hearing did not support Merrill Lynch's contention that Respondent had acted dishonestly or had violated any statutes, regulations, rules, or industry standards in connection with the surrender of annuities and the submission of new or replacement annuity orders. Likewise, the evidence established that Merrill Lynch's written policy was not violated and that its system for regarding replacement orders for annuities was not designed to deal with new annuity orders for customers of a registered representative moving to Merrill Lynch who had previously owned proprietary annuities with the registered representative's previous firm, and who chose to surrender

them and have the proceeds deposited into their Merrill Lynch account, and then purchase new annuities with issuers with which Merrill Lynch did business.

AWARD

After considering the pleadings, the testimony and 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 are denied in their entirety.
2. The Panel recommends the expungement of the Termination Explanation in Section 3 of Respondent/Counter-Claimant Rene' Tapia Espinoza's Form U5 (CRD #4050886), filed by Merrill Lynch, Pierce, Fenner & Smith Incorporated on August 11, 2011, and maintained by the CRD. The current Termination Explanation shall be expunged in its entirety and replaced with "THE REGISTERED PERSON WAS TERMINATED FOR CONDUCT RELATING TO THE SURRENDER OF ANNUITIES AND THE SUBMISSION OF ANNUITY ORDERS, EVEN THOUGH IT WAS SUBSEQUENTLY DETERMINED BY AN ARBITRATION PANEL NO REASONABLE BASIS EXISTED TO SUPPORT THE MEMBER'S DETERMINATION THAT SUCH CONDUCT HAD CONSTITUTED GROUNDS TO TERMINATE THE REGISTERED PERSON FOR CAUSE." In addition, the Panel recommends the expungement of the answer to Section 4 of the Termination Disclosure Reporting Page of the foregoing Form U5 and that the expunged language be replaced with the foregoing replacement language. The Reason for Termination shall remain the same.

The Panel further recommends that the answer to Section 3 of the Internal Review Disclosure Reporting Page of the foregoing Form U5 be expunged and replaced with the following language:

"After an arbitration panel heard evidence on this matter, it determined that the customer complaint that led to the investigation was due both to the fault of Merrill Lynch's confusing policies and process relating to the purchase of replacement annuities as well as to the Registered Person's failure to adequately monitor the situation and advocate for the customer. However, this customer complaint was not asserted as the reason for terminating the Registered Person."

In addition, the Panel recommends the expungement of the Yes answer to Section 4 of the Internal Review Disclosure Reporting Page of the foregoing Form U5 and that the answer be changed to "No."

In addition, the Panel recommends the expungement of the answer to Question 5(b) of the Internal Review Disclosure Reporting Page filed on December 2, 2011 and that the following language replace the expunged language:

"After an arbitration panel heard evidence on this matter, it determined that the customer complaint that led to the investigation was due both to the fault of Merrill Lynch's confusing policies and process relating to the purchase of

replacement annuities as well as to the Registered Person's failure to adequately monitor the situation and advocate for the customer. However, this customer complaint was not asserted as the reason for terminating the Registered Person."

These recommendations are based on the defamatory nature of the information. The above recommendations apply to any subsequent disclosures concerning the same events, including but not limited to, the Amended Form U4 filed on August 15, 2011.

The registration records are not automatically amended to include the changes indicated above. Respondent/Counter-Claimant Rene' Tapia Espinoza must forward a copy of this Award to FINRA's Registration and Disclosure Department for the amendments to be incorporated into the registration records.

3. Any and all relief not specifically addressed herein is denied.
4. The Panel has provided an explanation of their decision in this Award. The explanation is for the information of the parties only and is not precedential in nature.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee	=\$ 2,125.00
Counterclaim Filing Fee	=\$ 1,800.00

**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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Merrill Lynch Pierce Fenner & Smith Incorporated is assessed the following:

Member Surcharge	=\$ 1,700.00
Pre-Hearing Processing Fee	=\$ 750.00
Hearing Processing Fee	=\$ 5,000.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

January 29-31, February 1, 4, 2013, adjournment by Respondent	=\$ 1,200.00
February 10-14, 2014, adjournment by Respondent	=\$ 1,200.00
May 6-9, 2014, adjournment by parties	=\$ 1,200.00
<hr/> Total Adjournment Fees	<hr/> =\$ 3,600.00

1. The Panel has assessed \$1,800.00 of the adjournment fees to Claimant.
2. The Panel has assessed \$1,800.00 of the adjournment fees to Respondent.

Contested Motion for Issuance of a Subpoena Fees

Fees apply for each decision on a contested motion for the issuance of a subpoena.

One (1) Decision on a contested motion for the issuance of a subpoena
(1) one arbitrator @ \$200.00 = \$ 200.00

Total Contested Motion for Issuance of Subpoenas Fees = \$ 200.00

1. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees to Claimant.
2. The Panel has assessed \$100.00 of the contested motion for issuance of subpoenas fees to Respondent.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A 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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00/session = \$ 450.00
Pre-hearing conference: November 6, 2012 1 session

Seven (7) Pre-hearing sessions with the Panel @ \$1,200.00/session = \$8,400.00
Pre-hearing conferences: April 2, 2012 1 session
January 15, 2013 1 session
April 10, 2013 1 session
May 14, 2013 1 session
January 10, 2014 1 session
February 13, 2014 1 session
September 25, 2014 1 session

Eight (8) Hearing sessions @ \$1,200.00/session = \$9,600.00
Hearing Dates: February 17, 2015 2 sessions
February 18, 2015 2 sessions
February 19, 2015 2 sessions
February 20, 2015 2 sessions

Total Hearing Session Fees = \$18,450.00

1. The Panel has assessed \$9,225.00 of the hearing session fees to Claimant.
2. The Panel has assessed \$9,225.00 of the hearing session fees to Respondent.

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

ARBITRATION PANEL

Marc Kalish	-	Public Arbitrator, Presiding Chairperson
Richard Kent Mahrle	-	Public Arbitrator
James W. Warren	-	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



Marc Kalish
Public Arbitrator, Presiding Chairperson

March 13, 2015
Signature Date

Richard Kent Mahrle
Public Arbitrator

Signature Date

James W. Warren
Non-Public Arbitrator

Signature Date

March 13, 2015
Date of Service (For FINRA Dispute Resolution office use only)

ARBITRATION PANEL

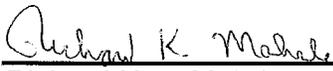
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Marc Kalish
Public Arbitrator, Presiding Chairperson

Signature Date



Richard Kent Mahrle
Public Arbitrator

3-12-15

Signature Date

James W. Warren
Non-Public Arbitrator

Signature Date

March 13, 2015
Date of Service (For FINRA Dispute Resolution office use only)

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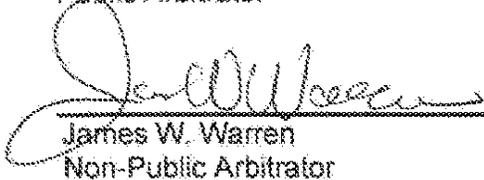
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Signature Date

Richard Kent Mahrle
Public Arbitrator

Signature Date



James W. Warren
Non-Public Arbitrator

3-13-15

Signature Date

March 13, 2015

Date of Service (For FINRA Dispute Resolution office use only)