

**Award
FINRA Dispute Resolution**

In the Matter of the Arbitration Between:

Claimants
Meri Ramazio
Tamara Smolchek

Case Number: 10-04432

vs.

Respondent
Merrill Lynch Pierce Fenner & Smith Inc.

Hearing Site: Boca Raton, Florida

Nature of the Dispute: Associated Persons vs. Member

REPRESENTATION OF PARTIES

For Claimants Meri Ramazio and Tamara Smolchek: Michael S. Taaffe, Esq., Michael D. Bressan, Esq. and Jarrod J. Malone, Esq., Shumaker, Loop & Kendrick, LLP, Sarasota, Florida.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc. ("Merrill Lynch"): Douglas K. Spaulding, Esq., Reed Smith, LLP, Washington, DC and Peter W. Homer, Esq., HomerBonner, Miami, Florida.

CASE INFORMATION

Statement of Claim filed on or about: October 1, 2010.

Tamara Smolchek signed the Submission Agreement: September 27, 2010.

Meri Ramazio signed the Submission Agreement: October 1, 2010.

Statement of Answer filed by Respondent on or about: December 1, 2010.

Merrill Lynch Pierce Fenner & Smith Inc. signed the Submission Agreement: December 1, 2010.

Denial of Affirmative Defenses filed by Claimants on or about: December 21, 2010.

Motion to Require Compliance with Rule 13204 filed by Respondent on or about: March 11, 2011.

Response to Motion to Require Compliance with Rule 13204 filed by Claimants on or about: March 21, 2011.

Notice to FINRA Pursuant to Rule 13204 filed by Claimants on or about: March 21, 2011.

Objection to FINRA Jurisdiction over FACAAP Claims filed by Respondent on or about: March 11, 2011.

Response to Objection to FINRA Jurisdiction over FACAAP Claims filed by Claimants on or about: March 21, 2011.

Emergency Motion for Sanctions and Independent Review of Discovery filed by Claimants on or about: January 5, 2012.

Opposition to Emergency Motion for Sanctions and Independent Review of Discovery filed by Respondent on or about: January 10, 2012.

Reply on Emergency Motion for Sanctions and Independent Review of Discovery filed by Claimants on or about: January 10, 2012.

Request for Reconsideration of the Panel's January 11, 2012 Order filed by Respondent on or about: January 12, 2012.

Review of Threats of Sanctions by Reed Smith/Merrill Lynch in Related Cases Regarding Relevant Documents Produced in Related Cases and Issues Regarding Subpoenas to Board of Director Members filed by Claimants on or about: January 30, 2012.

Correspondence in Connection with Review of Threats of Sanctions by Reed Smith/Merrill Lynch in Related Cases filed by Claimants on or about: January 30, 2012.

Response to Oral Motion for this Panel to Intervene in Arbitrations Pending Before Other Panels filed by Respondent on or about: January 30, 2012.

Reply to Response to Review of Threats of Sanctions in Other Cases and Subpoena Issues filed by Claimants on or about: January 31, 2012.

Further Response to Requests Regarding Discovery Motions Before Other Panels and Subpoenas in this Case filed by Respondent on or about: January 31, 2012.

CASE SUMMARY

Claimants asserted the following causes of action: breach of contract (FACAAP, Growth Award and Wealthbuilder); breach of duty of good faith and fair dealing; breach of fiduciary duty; constructive trust; unjust enrichment; conversion; unfair competition; tortious interference with advantageous business relations; defamation; violation of FINRA Rule 2010; negligence; and, fraud. The causes of action relate to Claimants' employment and subsequent termination of employment with Respondent following a change in control of Respondent, including the administration and disposition of Claimants' deferred compensation plans.

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

In their Denial of Affirmative Defenses, Claimants denied all of the affirmative defenses contained in Respondent's Answer.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested: the value of Claimants' FACAAP, Growth Award and Wealthbuilder plans as of November 28, 2008, as defined in the plan agreements; compensatory damages; punitive damages; daily interest at the Florida statutory rate based on the value of unpaid FACAAP, Growth Award and Wealthbuilder as of the date of resignation until full payment by Respondent; attorneys' fees; costs; and, any other relief deemed just and proper by the Panel.

At the close of the hearing, Claimant Smolchek requested compensatory damages in the combined total amount of between \$3,253,281.00 and \$4,886,439.00 (inclusive of 9% interest on the deferred compensation vesting portion of the damages) plus an additional 100% of \$166,335.00 in liquidated damages for unpaid compensation pursuant to NY Labor Code Article 6, Section 198; and, Claimant Ramazio requested compensatory damages in the combined total amount of between \$663,937.00 and \$1,146,046.00 (inclusive of 9% interest on the deferred compensation vesting portion of the damages) plus an additional 100% of \$20,872.00 in liquidated damages for unpaid compensation pursuant to NY Labor Code Article 6, Section 198. Additionally, both Claimants requested the following: (1) punitive damages of at least \$10,000,000.00 (\$5,000,000.00 per Claimant); (2) attorneys' fees and costs; (3) discovery sanctions; and, (4) any other relief requested in the Statement of Claim or Trial Brief. In addition, Claimants requested that attorneys' fees in the amount of \$500,000.00 be awarded as a sanction, and filed an affidavit that reflected a total amount of \$689,973.49 in attorneys' fees and costs incurred by Claimants in this matter.

Respondent requested: an award in its favor; denial of the Statement of Claim in its entirety; attorneys' fees; costs; and, such other relief as deemed just and proper by the Panel.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about March 11, 2011, Respondent filed a Motion to Require Compliance with Rule 13204 in which it asserted that Claimants had not filed a notice that meets the requirements of the rule because Claimants had not affirmatively stated that they would not participate in the class action or any recovery resulting therefrom. On or about March 21, 2011, Claimants filed a notice of compliance with Rule 13204. Additionally, in response to Respondent's motion, Claimants asserted that they believed the notice previously provided to FINRA was sufficient, but in order to satisfy Respondent's objection, they affirmatively stated that they would not participate in any class action with regard to the deferred compensation plans or any recovery that may result from that class action. Inasmuch as Claimants filed a notice of compliance with Rule 13204, the Panel issued an Order on or about April 12, 2011 that denied Respondent's Motion to Require Compliance with Rule 13204.

On or about March 11, 2011, Respondent filed an Objection to FINRA Jurisdiction Over FACAAP Claims in which it asserted that the FACAAP Agreement contains a forum selection clause that requires disputes to be arbitrated before the American Arbitration Association or JAMS. In response, Claimants asserted, among other things, that Respondent: (1) is required under the FINRA rules to arbitrate this case; (2) contractually agreed to arbitrate this case in a Form U4; (3) previously and repeatedly submitted to FINRA jurisdiction on identical claims; and, (4) provided the Panel with plan language from the wrong year. On or about April 12, 2011, the Panel issued an Order that denied Respondent's Objection to FINRA Jurisdiction Over FACAAP Claims.

On or about January 5, 2012, Claimants filed an Emergency Motion for Sanctions and Independent Review of Discovery in which they asserted, among other things, that Respondent intentionally withheld numerous significant and relevant documents in violation of the Panel's January 3, 2012 Order. In response, Respondent asserted, among other things, that: (1) sanctions in this case cannot be based on allegations of discovery failures in other cases; (2) sanctions may not be imposed based on Claimants' rank speculation that there must be more documents; and, (3) the July 22, 2010 email was not intentionally withheld and cannot be a basis for sanctions. On or about January 11, 2012, the Panel issued an Order that directed Respondent to produce specified documents to Claimants no later than 4:00 p.m. on January 12, 2012. The Order further stated that the sanctions for non-compliance would be: (1) a fine of \$1,000.00 commencing at 4:01 p.m. on Thursday, January 12, 2012, payable to Claimants, for each calendar day that the documents ordered to be produced were not produced; and, (2) an adverse inference regarding Respondent by the Panel if the documents were not produced as ordered.

On or about January 12, 2012, Respondent filed a Request for Reconsideration of the Panel's January 11, 2012 Order in which Respondent asserted that: (1) it is impossible to comply with the Order within the short time period provided; and, (2) the Order is based on a misunderstanding about the processes used in prior productions, and/or based on misrepresentations by Claimants' counsel about those productions and processes. On or about January 13, 2012, the Panel issued an Order that denied Respondent's Request for Reconsideration and further stated that the sanctions provisions remained in effect. Thereafter, the Panel deferred final disposition on the sanctions portion of the Order in order to evaluate Respondent's production.

Pursuant to a discovery Order issued by the Panel on January 12, 2012, the Panel directed Respondent to bring to the evidentiary hearing beginning on January 23, 2012 a hard copy of the documents contained in Diane Waller's e-mailbox, segregating private documents and providing a privilege log to the Panel and Claimants. Respondent failed to produce the privilege log at the outset of the hearing and was thus ordered by the Panel to produce it by 10:00 a.m. on January 25, 2012. By 1:30 p.m. on January 25, 2012, Respondent still had not produced the ordered privilege log. As a result, the Panel, among other things, issued sanctions against Respondent in the amount of \$1,000.00 per hour until the log was produced. Respondent produced the log at 4:37 p.m. Respondent was sanctioned a total of \$3,500.00 by the Panel, which was thereafter paid to Claimants.

At the conclusion of the evidentiary hearing conducted on January 27, 2012, Claimants orally moved for this Panel to, among other things, issue an Order preventing Respondent from moving for sanctions in other related FINRA arbitrations based upon the proffer of evidence from those matters that the Panel deemed "related" to this case. The Panel directed the parties to provide briefs on this issue no later than 10:00 a.m. on January 30, 2012. In compliance with the Panel's directive, Claimants filed a Review of Threats of Sanctions by Reed Smith/Merrill Lynch in Related Cases Regarding Relevant Documents Produced in Related Cases and Issues Regarding Subpoenas to Board of Director Members in which they asserted that the documents produced in this case from another arbitration were relevant to this case, should have been produced by

Respondent in this case, and that entering such relevant documents into evidence in the instant case did not breach confidentiality. Respondent asserted in its response, among other things, that it would be improper for this Panel to take action that would effectively prevent FINRA panels in other arbitrations from enforcing the orders and confidentiality agreements properly entered in those other cases. The Panel reviewed the submissions and determined that the documents were relevant, should have been produced, and production would not breach any confidentiality. Thereafter, on or about February 1, 2012, the Panel issued an Order that, among other things: (1) prevented Merrill Lynch and Reed Smith from filing or threatening motions for sanctions or requests for relief from FINRA due to appropriate disclosure of relevant documents in this matter and related in any way to events occurring in the instant case; and, (2) stated that the Panel viewed Respondent's latest tactic as a deliberate attempt by Respondent to not only further delay this proceeding, but to prevent relevant documents from rightfully being presented in this hearing and to distract Claimants' counsel from preparing for and conducting this hearing in a competent and fair manner. The Order further directed Respondent and its counsel to take no action of any kind whatsoever that would further impede and delay the final disposition of this arbitration.

During the evidentiary hearing conducted on February 14, 2012, Respondent attempted to introduce medical records into evidence to which Claimants objected based upon the Panel's prior Order that medical issues were not part of this case and any medical records were prohibited from being introduced. The Panel did not allow the introduction of the evidence into the record. Additionally, the Panel issued an Order on the record, and later memorialized in writing, sanctioning Respondent for its blatant disregard of the Panel's prior orders not to introduce medical records or history into this hearing. Specifically, the following sanctions were imposed: (1) Respondent was precluded from conducting any further cross-examination of witness Tamara Smolchek; and, (2) Respondent was ordered to pay \$10,000.00 to Tamara Smolchek by 12:00 p.m. on February 15, 2012. The Order further stated that failure to comply with the terms of the Order would result in dismissal of Respondent's defenses with prejudice.

On February 15, 2012, Respondent moved for reconsideration and a stay of the Panel's February 14, 2012 Order and requested a pre-hearing conference with the Panel and further asserted that: (1) the evidence is relevant and admissible; (2) the evidence was obtained properly; (3) the evidence is not in violation of prior orders of the Panel; (4) physician-patient privilege is inapplicable based upon waiver and under the "issue injection" doctrine; and, (5) sanctions are unwarranted. In response, Claimants asserted that: (1) Respondent violated the February 13, 2012 Order of the Panel; (2) the medical record in no way impeached Claimant Smolchek's testimony; and, (3) the sanction of dismissal of Respondent's defenses is appropriate. On or about February 21, 2012, the Panel issued an Order that denied Respondent's request for a pre-hearing conference and further stated the following: (1) the monetary sanctions imposed by the Panel were appropriate and warranted and thus, remained unchanged; and, (2) notwithstanding Respondent's misconduct, the Panel continues to be committed to the fair and equitable process of arbitration and maintaining the objectives of this forum to hear from both parties; as such, the Panel reconsidered the portion of their sanction regarding the continuation of the cross examination of Claimant Smolchek, and allowed Respondent to continue the cross examination with certain limitations.

On February 15, 2012, Respondent filed with FINRA Dispute Resolution notice of payment of the \$10,000.00 sanction to Claimant Smolchek.

On or about March 14, 2012, during the evidentiary hearing, Claimants moved for adverse inferences based upon Respondent's lack of production in connection with the 2008 modeling information, to which Respondent objected. In lieu of an adverse inference, the Panel directed Respondent to produce the document by 1:15 p.m. that day, which Respondent did.

During the evidentiary hearing, Claimants withdrew their causes of action for conversion and constructive trust, with prejudice.

During the final few days of the evidentiary hearing, Respondent requested permission to file a written motion to dismiss, to which Claimants objected based on, among other things, the timing of the motion and their inability to prepare a written response. Due to time constraints, the Panel determined that it would hear oral argument on the motion. Thereafter, the parties agreed to combine their arguments on the motion to dismiss with their closing arguments.

During closing argument, Respondent moved to dismiss Claimants' claims based upon Claimants' failure to meet the burden of proving their case on any of their claims. Rather than ruling on the motion to dismiss, the Panel determined to rule on the merits of the case, as set forth in the award section below.

On the final day of the evidentiary hearing, Respondent moved to introduce into evidence an amended pre-hearing brief to which Claimants objected. The Panel ruled that it would be unfair to accept the untimely submission.

After the conclusion of the hearing, the Panel authorized the parties to file affidavits regarding the amount of attorneys' fees incurred in connection with this matter per said requests for relief in both the Statement of Claim and Answer. Claimants filed an affidavit. Respondent did not. No other submissions were considered by the Panel.

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 evidence presented at the hearing, and Claimants' authorized post-hearing submission, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

COMPENSATORY DAMAGES

Claimants are entitled to an award of compensatory damages for:

- Breach of Contract (FACAAP, Growth Award and Wealthbuilder)
- Breach of Duty of Good Faith and Fair Dealing
- Breach of Fiduciary Duty

- Unjust Enrichment
- Unfair Competition
- Tortious Interference with Advantageous Business Relations
- Defamation
- Fraud
- Negligence

In the following amounts:

Tamara Smolchek:	\$4,275,000.00
Meri Ramazio:	\$ 875,000.00

The compensatory damages awarded are for unpaid wages, unpaid deferred compensation, lost wages, lost book, value of business, reputation and all other liquidated damages that Respondent and its employees caused Claimants, and is inclusive of all interest on such damages to which Claimants are entitled to the date of this award. The Claimants withdrew their claims of Conversion and Constructive Trust, with prejudice, and all other claims made and all other damages not specified above or elsewhere in this award are denied. Consistent with the Panel Chair's previous ruling that medical issues would not be a part of this case, no portion of the compensatory damages were for mental anguish or emotional stress. Additionally, although the Panel finds that there was a violation of FINRA Rule 2010 by Respondent, the Panel is not awarding any damages pursuant to that cause of action.

DISCOVERY SANCTIONS

As reflected in several of the Panel's orders and the various Claimants' Motions during the course of this arbitration proceeding relating to Respondent's ongoing discovery abuses and delay tactics in violation of the FINRA Code of Arbitration Procedure (the "Code"), the Panel has determined that Respondent hindered, disrupted and delayed this proceeding and undermined the integrity of this arbitration proceeding in a manner that has prejudiced Claimants in their presentation of evidence. As a result, and pursuant to Rule 12511 of the Code, the Panel is awarding Claimants Smolchek and Ramazio the amounts of \$50,000.00 and \$50,000.00, respectively, as a monetary sanction for Respondent's non-compliance with the Code and discovery abuses. This sanction is not to be construed as an award of attorneys' fees or costs. This ruling represents the Panel's final determination on this issue as well as its final determinations on the outstanding Claimants' Motions, written and oral, for relief regarding discovery issues on which the Panel deferred rulings until the end of the evidentiary hearing. It is in addition to any previously ordered monetary sanctions against Respondent in this arbitration proceeding (as discussed in the Other Issues section of this Award).

This sanction is intended to deter Respondent from engaging in such practices in the future. Such abuses cannot and must not be tolerated by any arbitration panel in any arbitration proceeding. Respondent was warned on multiple occasions about its abuses, yet said abuses continued throughout the hearing. As an example of Respondent's misconduct during this proceeding, for which Respondent was sanctioned, the Panel cites from its Order issued on February 21, 2012:

"The Panel has reviewed the documents and makes the following ruling:

1. Respondent Merrill Lynch clearly and blatantly violated the Panel's previous clear and unequivocal Orders regarding the injection of any medical issue and/or the utilization of medical records in this arbitration whatsoever. To call the document in question ... or **any** portion of its contents, anything but a medical record is a falsehood. These notes were ... off limits to both parties for use for any purpose whatsoever in this arbitration. If the Panel would allow the Respondent to introduce this document in violation of its Orders, then the door would be open to the injection of medical testimony and possibly other medical records, which the Panel has already decided are irrelevant to this proceeding.
2. To claim ignorance of the Panel's Orders regarding introduction of such a document is yet another falsehood. While hearing Respondent's Motion to Compel Full Disclosure of Medical Records and an Independent Examination on December 6, 2011, Respondent was told that the motion was denied in its entirety because this Panel did not consider ... medical condition an issue in this arbitration. Further, the Panel considered ... medical condition/diagnosis and medical records regarding same to be private and confidential. Both counsel for Claimants and Respondent specifically asked about medical records/releases produced/shared prior to this discovery hearing. Counsel for both parties were told, in no uncertain terms, that "no medical records, medical histories or medical testimony, regardless of when or how they were obtained, are to make their way into this hearing, in any way, shape or form." Counsel was told that the Panel would not tolerate any infraction of this Order. Both Mr. Taaffe and Mr. Spaulding agreed that they understood and were clear on the Orders of the Chair regarding this issue.
3. Further, on several occasions during this hearing, most recently on February 13, 2012, both Claimants and Respondent were reminded of these Orders by the Panel. It was made abundantly clear that the introduction of exhibits, testimony dealing with witnesses' medical condition or diagnosis, etc. was strictly prohibited and that the Panel would not tolerate any violations.
4. The Panel does not view the medical record's introduction as a "mere effort to introduce a document that contained no medical information", to quote Respondent. Rather, it sees it as flagrant attempts to not only violate specific Orders of the Panel, but to intentionally utilize underhanded tactics to disrupt this hearing. Particularly, the Panel did not appreciate the waving of the document clearly headed, in large bold letters ... for the purpose of intimidating the witness with a document they knew was inadmissible into evidence. The Panel had no choice but to immediately adjourn for an Executive Session.
5. The monetary sanctions imposed by the Panel were appropriate and warranted and thus, remain unchanged. Respondent has been warned and progressively sanctioned for violation of the Panel's Orders as outlined by

Claimants' Response and Opposition to Respondent's Motion for Reconsideration.

6. Notwithstanding the above misconduct by the Respondent, the Panel continues to be committed to the fair and equitable process of arbitration and maintaining the objectives of this forum to hear from both parties. Accordingly, we have reconsidered the portion of our sanction regarding the continuation of the cross examination of Ms. Tamara Smolchek, and will allow Respondent to continue the cross examination with the following limitations:
 - a. Maximum of two (2) additional hours for cross-examination by Respondent, which will amount to approximately twice the amount of time Claimants' counsel had for direct examination of Ms. Smolchek;
 - b. Prior review by Panel of documents to be used by Respondent for the continued cross examination;
 - c. No medical records, redacted or otherwise, or discussion regarding medical issues will be used in this hearing for any purpose whatsoever; and
 - d. Any attempt by Respondent to conduct cross examination in a less than professional manner will result in the termination of the cross examination, without further warning."

Further, the Panel cites yet another order, issued February 1, 2012, regarding discovery misconduct by the Respondent:

"The Panel has reviewed the documents and grants Claimants all relief requested:

1. The documents entered into evidence from "S" case and "Z" case are relevant to Claimants' claims for Good Reason vesting;
2. The documents were subject to production in the instant case;
3. The "S" and "Z" confidentiality Orders were applied to the instant case;
4. Merrill Lynch and Reed Smith are prevented from filing or threatening motions for sanctions or requests for relief from FINRA due to appropriate disclosure of relevant documents in the Smolchek case and related in any way to events occurring in the instant case; and
5. The Panel will provide assistance, as needed, for the subpoenaed witnesses to appear.

More specifically, the Panel reviewed all of the subject documents (all contained in Claimants' Exhibit 3) and made a determination that these documents were relevant and admissible into evidence in support of the claims.

1. The Panel rules that the documents entered into evidence which were obtained during the "S" and "Z" arbitrations were subject to and ordered to be produced in this arbitration hearing. The Panel finds that Respondent failed

to produce documents contained in Exhibit 3, even though they were requested and/or ordered to be produced.

2. The Panel has once again reviewed the Confidentiality Order in the "Z" arbitration and the emails to/from Jeffrey Bresch, Reed Smith and Michael Bressan, Claimants' counsel dated December 22, 2011, permitting Claimants' counsel to use documents produced in the "S" case in the "Z" case. The Panel finds that the Confidentiality Order in the "Z" case permitted Claimants to use the documents from the "S" and "Z" arbitrations in this arbitration proceeding. Moreover, the Panel ordered Claimants if they became aware of any withheld documents to bring all such documents to the Panel in connection with numerous prior discovery hearings, their Motions to Compel and the Panel's Orders to Compel. The Panel finds that Claimants have acted in accordance with the Panel's Orders and thereby permitted [use of the documents] under Paragraph 5 of the "Z" Order of Confidentiality. The "Z" Order of Confidentiality was also entered into evidence. It should be noted that the "S" Confidentiality Order also contains a similar provision in Paragraph 5.
3. Further, transcripts of prior testimony of witnesses who are also testifying in this arbitration may be used for impeachment purposes, as previously noted by the Chair during discovery hearings.
4. The Panel views this latest tactic as a deliberate attempt by Respondent to not only further delay this proceeding, but to prevent relevant documents from rightfully being presented in this hearing and to distract Claimants' counsel from preparing for and conducting this hearing in a competent and fair manner. Accordingly, the Panel orders that Respondent and its counsel take no action of any kind whatsoever that shall further impede and delay the final disposition of this arbitration."

ATTORNEYS' FEES

The Panel has not determined any issue of attorneys' fees. However, for the purposes of deciding any attorneys' fee issue, the Panel advises FINRA, the parties and any Court that if the Panel had the authority to determine the issue of attorneys' fees, that it would award attorneys' fees to Claimants as the "prevailing party" for the reasons stated in Claimants' Final Arbitration Brief for "unpaid wages" under Florida law (F.S. 448.08) on all non-contract claims and New York law (NY Labor Code Article 6, Section 198) for "unpaid compensation" on the Breach of Contract claims.

PUNITIVE DAMAGES

Based upon all of the evidence presented, the Panel has determined that Respondent Merrill Lynch directly and indirectly through its Senior Management, who were corporate officers, managing agents, and/or corporate policymakers, have intentionally, willfully and deliberately engaged in a systematic and systemic fraudulent scheme to deprive Claimants of their rights and benefits under its Deferred Compensation Programs (FACAAP, Growth Award and Wealthbuilder) as well as other benefits to avoid liability

after the change in control in September, 2008. The Respondent made fraudulent misrepresentations and withheld important information from Claimants and used other retaliatory and coercive tactics against Claimants to accomplish its unlawful objective. These Senior Management personnel include, but are not limited to: Bob McCann, Vice Chairman and President, Merrill Lynch Global Wealth Management; Lester Ranson, Sr. Vice President, Human Resources, Mergers & Acquisitions, Executive Compensation and Benefits; Diane Waller, Sr. Vice President, Financial Advisor Long Term Compensation Programs; Neil Barron, Director of Compensation and Executive Compensation Equity Manager; other Senior Management personnel that were members of the "Good Reason Committee"; Senior Management Personnel that were responsible for the design and implementation of the Advisor Transition Program; and Jeff Ransdell, Managing Director, Merrill Lynch Business Units, Southeast Division.

The Panel has also determined that Respondent Merrill Lynch, through its Senior Management (as listed above) intentionally, willfully and deliberately breached its fiduciary duty as the Deferred Compensation Programs' Plan Administrator to deprive Claimants of their vesting rights under the Deferred Compensation Plans in an arbitrary manner and in bad faith as part of a fraudulent scheme to avoid any liability under the Deferred Compensation Programs after the change in control in September, 2008. Respondent's misconduct was no less than an intentional and willful constructive fraud upon Claimants.

The testimony and evidence presented could not convince the Panel that the "Good Reason Committee" was anything but a sham committee that did nothing more than rubber stamp denials of Claimants' "Good Reason" claims. There was no credible documentation of any protocol for making decisions, reasons for decisions, guidelines for determining approval/denial, or any evidence that any investigation was conducted for the Claimants' claims, nor for any other employee that made a claim, for that matter. There were blanket denials made based upon generalizations and no evidence of any individual considerations given to Claimants for their claims, or any claim made by other departed employees. The Panel was shocked that although over 3,000 Financial Advisors left the employ of Respondent after the change in control, not one claim has been approved for vesting for "Good Reason" under the Deferred Compensation Programs. This zero dollar payout from the Financial Advisor Deferred Compensation Programs contrasts sharply to Respondent's own numerous "Financial Advisor Good Reason Liability Exposure" analyses and anticipated turnover projections that indicated anywhere from hundreds of millions to several billion dollars in potential liability.

All of these determinations were made by the Panel after Claimants' presented "clear and convincing" evidence of the misconduct described above.

As a result of Respondent's and its Senior Management personnel's "intentional misconduct" and at the very least, "gross negligence" in connection with the administration of the Deferred Compensation Plans described above, the Panel has decided to award Claimants punitive damages in the following amounts:

Tamara Smolchek:	\$3,500,000.00
Meri Ramazio:	\$1,500,000.00

The basis for this Panel's authority is found in F.S. 768.72 et seq. and the Court opinions in Lance v. Wade, Rogers v. Mitzi and Schropp v. Crown Eurocars, Inc. (as referenced in Claimants' Final Arbitration Brief) for the intentional and willful Fraud and Breach of Fiduciary Duty or Constructive Fraud by Respondent's Senior Management personnel who were corporate officers, managing agents and/or corporate policy makers and/or through the fault of Respondent in its negligent administration of the Deferred Compensation Programs and negligent supervision of Jeff Ransdell. This award of punitive damages is intended to punish Respondent Merrill Lynch for engaging in such fraudulent misconduct and to deter such misconduct in the future.

Any and all relief not specifically addressed herein is denied.

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	= \$ 1,250.00
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**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, Respondent is assessed the following:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Processing Fee	= \$ 750.00
Hearing Processing Fee	= \$ 2,200.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

March 7-9, 2012; adjournment by Claimants

The Panel has determined to waive the fee in connection with the adjournment of the evidentiary hearing.

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

March 7-9, 2012; adjournment by Claimants

The Panel has determined to waive the three-day cancellation fee in connection with the adjournment of the evidentiary hearing.

Discovery-Related Motion Fees

Fees apply for each decision rendered on a discovery-related motion.

Six (6) Decisions on discovery-related motions on the papers or during the evidentiary hearings with (3) three arbitrator(s) @ \$600.00/decision = \$3,600.00

Claimants filed (4) four discovery motions
Respondent filed (2) two discovery motions

Total Discovery-Related Motion Fees = \$3,600.00

Notwithstanding any preliminary fee assessments in prior orders, the Panel has assessed the total \$3,600.00 discovery-related motion 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 with (1) one arbitrator @ \$200.00 = \$200.00

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

Notwithstanding any preliminary fee assessments in prior orders, the Panel has assessed the total \$200.00 contested motion for the issuance of a subpoena fee 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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$900.00
Pre-hearing conferences: December 6, 2011 1 session
December 19, 2011 1 session

One Pre-hearing session with the Panel @ \$1,000.00/session = \$1,000.00
Pre-hearing conference: February 25, 2011 1 session

Thirty Seven (37) Hearing sessions @ \$1,000.00/session = \$37,000.00
Hearing Dates: January 23, 2012 2 sessions
January 24, 2012 2 sessions
January 25, 2012 2 sessions
January 26, 2012 2 sessions
January 27, 2012 2 sessions
February 2, 2012 2 sessions
February 3, 2102 2 sessions
February 6, 2012 2 sessions
February 8, 2012 3 sessions

February 9, 2012	2 sessions
February 13, 2012	2 sessions
February 14, 2012	2 sessions
February 27, 2012	2 sessions
March 12, 2012	2 sessions
March 13, 2012	2 sessions
March 14, 2012	3 sessions
March 15, 2012	3 sessions

Total Hearing Session Fees	\$38,900.00
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Notwithstanding any preliminary fee assessments in prior orders, the Panel has assessed \$500.00 of the hearing session fees jointly and severally to Claimants specifically in connection with the initial pre-hearing conference conducted on February 25, 2011.

Notwithstanding any preliminary fee assessments in prior orders, the Panel has assessed the total remaining hearing session fees in the amount to \$38,400.00 solely to Respondent.

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

ARBITRATION PANEL

Bonnie A. Pearce	-	Public Arbitrator, Presiding Chairperson
Fred Abramoff	-	Public Arbitrator
Harriet A. Kottick	-	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/
Bonnie A. Pearce
Public Arbitrator, Presiding Chairperson

April 3, 2012
Signature Date

/s/
Fred Abramoff
Public Arbitrator

April 3, 2012
Signature Date

/s/
Harriet A. Kottick
Non-Public Arbitrator

April 3, 2012
Signature Date

April 3, 2012

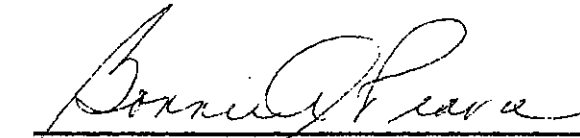
Date of Service (For FINRA Dispute Resolution office use only)

ARBITRATION PANEL

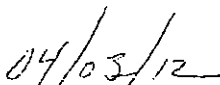
Bonnie A. Pearce	-	Public Arbitrator, Presiding Chairperson
Fred Abramoff	-	Public Arbitrator
Harriet A. Kottick	-	Non-Public Arbitrator

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



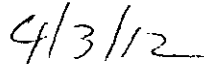
Bonnie A. Pearce
Public Arbitrator, Presiding Chairperson



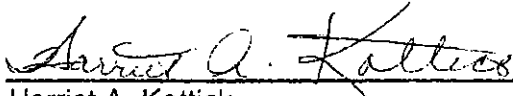
Signature Date




Fred Abramoff
Public Arbitrator



Signature Date



Harriet A. Kottick
Non-Public Arbitrator



Signature Date

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-80355-CIV-MARRA/BRANNON

MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC.,

Petitioner.

vs.

TAMARA SMOLCZEK and
MERI RAMAZIO,

Respondents.

ORDER DENYING PETITION TO VACATE ARBITRATION AWARD

THIS CAUSE is before the Court upon Merrill Lynch, Pierce, Fenner & Smith, Inc.'s ("Merrill Lynch's") Petition to Vacate Arbitration Award (DE 1),¹ filed pursuant to section ten of the Federal Arbitration Act ("FAA"). The petition has been extensively briefed and is ripe for adjudication. Upon a careful review of the record and the evidence presented by the parties, the Court finds no basis to overturn the arbitration panel's ruling and will therefore deny Merrill Lynch's petition and will grant Respondent's cross-petition.

BACKGROUND

Respondents Tamara Smolchek and Meri Ramazio are former financial advisors with Merrill

¹Respondents independently filed a corresponding petition to *confirm* the arbitration award. Because the petitions addressed the same arbitration agreement and seek opposite relief, the Court consolidated the petitions, *see* Order Consolidating Cases (DE 8), and will resolve both petitions with the instant ruling.

Lynch. Respondents brought arbitration claims against Merrill Lynch seeking certain long-term compensation under their employment agreements and damages under various tort theories. After a seventeen-day arbitration hearing, the three-member panel awarded Respondents—who were claimants in the arbitration proceeding—\$10,250,000 in damages. The parties then filed competing petitions seeking either to confirm or vacate the award.

Merrill Lynch asserts three bases for vacating the award. First, it alleges evident partiality on the part of the chairwoman of the arbitration panel under section 10(a)(2) of the FAA relating to her failure to disclose certain facts suggesting a possibility of bias. Second, Merrill Lynch alleges misconduct under section 10(a)(3) relating to the panel's decisions to limit Merrill Lynch's presentation of its case and to impose sanctions against it. Last, Merrill Lynch argues that, in imposing the aforementioned sanctions without allowing Merrill Lynch sufficient notice or opportunity to be heard, the panel exceeded its powers under section 10(a)(4).

Respondents oppose the petition, arguing that Merrill Lynch failed to establish evident partiality because it did not demonstrate that the chairwoman knew the undisclosed facts. Additionally, Respondents assert Merrill Lynch knew the alleged facts prior to the final hearing and therefore waived any objections. Finally, Respondents argue that in light of the wide latitude afforded arbitrators under the FAA, Merrill Lynch has not shown that the panel engaged in misconduct or that it exceeded its powers.

JURISDICTION AND VENUE

The Court has diversity jurisdiction over this action under 28 U.S.C. § 1332(a)(1) because the parties are diverse and the amount in controversy exceeds \$75,000. Venue is proper under 28

U.S.C. § 1391(b)(2) because the arbitration proceeding underlying this action took place in this judicial district.

DISCUSSION

At the outset, the Court notes that federal policy favors arbitration. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1310-11; *Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). For that reason, “[i]t is well settled that judicial review of an arbitration award is narrowly limited.” *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1188 (11th Cir. 1995). Generally speaking, “federal courts should defer to the arbitrator’s resolution of [a] dispute whenever possible.” *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992). However, the FAA enumerates “four narrow bases for vacating [an] arbitration award,” three of which Merrill Lynch raises in the instant case. *Lifecare Int’l Inc. v. CD Med., Inc.*, 68 F.3d 429 (11th Cir. 1995). The Court will address each of Merrill Lynch’s bases for vacation in turn.

A. *Evident Partiality*

The FAA states that a district court may vacate an arbitration award “[w]here there was evident partiality . . . in the arbitrators.” 9 U.S.C. § 10(a)(2). The Eleventh Circuit has interpreted this statute to mean that an award may be vacated due to an arbitrator’s evident partiality “only when either (1) an actual conflict exists, or (2) [an] arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.” *Gianelli*, 146 F.3d at 1312. “The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award.” *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

In the instant case, Merrill Lynch contends that the chairwoman of the arbitration panel, Bonnie Pearce (“Mrs. Pearce”), did not disclose: (a) the nature of her husband’s law practice, (b) the sizeable award he earned against Merrill Lynch in 2005,² or (c) comments her husband (“Mr. Pearce”) made to a newspaper after the award to the effect that he was particularly satisfied at having obtained an award against Merrill Lynch.³ From the record, it appears clear that Mrs. Pearce did not disclose these facts. The Court will address the questions whether the undisclosed information “would lead a reasonable person to believe that a potential conflict exists,” *id.*, and whether Mrs. Pearce knew the information of which Merrill Lynch complains after discussing Respondents’ waiver argument.

After the Court granted the parties leave to conduct limited discovery, Merrill Lynch filed a Notice to Supplement and Clarify Petitioner’s Petition to Vacate (DE 30). In the supplemental filing, Merrill Lynch revealed for the first time evidence indicating that it knew at least some of the information Mrs. Pearce is alleged to have withheld. Specifically, Merrill Lynch disclosed that its counsel had in its files eight pages printed from Mr. Pearce’s website, each dated before the arbitration hearing, which commenced on January 23, 2012. Included with the printouts was an undated copy of the arbitration award in *Friedman*. Merrill Lynch also submitted an affidavit of attorney Douglas Spaulding, in whose files these documents were found, stating that he had no

²*Friedman v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Dispute Resolution No. 03-06176 (“*Friedman*”).

³Specifically, Mr. Pearce stated that “winning” the case against Merrill Lynch was a “highlight in [his] career” and a “sweet victory” in light of the “attitude on the other side of the table.” Homer Decl. Ex. 6.

recollection of accessing or reviewing them. Response Opp'n to Respondents' Not., Ex. A (DE 33-2). The affidavit is dated May 31, 2012.

Notwithstanding Spaulding's declaration, the Court finds that Merrill Lynch knew of Mr. Pearce's practice and his participation in the *Friedman* arbitration prior to the hearing. The fact that Mr. Spaulding has no present recollection of accessing or reviewing the information is not relevant. A Merrill Lynch attorney had the information in his files, which included a copy of an arbitration award referenced on the website.⁴ The only logical conclusion that can be drawn from these facts is that a Merrill Lynch agent reviewed Mr. Pearce's website, noticed the *Friedman* reference, and gathered the arbitration award and other related documents. These facts undermine any suggestion or assertion that Merrill Lynch did not have knowledge, since knowledge of an agent is imputed to its principal. *Computel, Inc. v. Emery Air Freight Corp.*, 919 F.2d 678, 685 (11th Cir. 1990). In actuality, these facts make out a more compelling case for Merrill Lynch's actual knowledge of the relevant information than that of Mrs. Pearce, whose knowledge is merely presumed by virtue of her marital relationship.

Concluding that Merrill Lynch had knowledge of Mr. Pearce's practice and involvement in *Friedman*, the Court must now consider whether the doctrine of waiver applies. Merrill Lynch knew the relevant information and failed to raise the issue of Mrs. Pearce's partiality before the commencement of the hearing. The hearing then proceeded for at least five days, with Merrill Lynch

⁴ The Court concludes that all of the relevant information in Spaulding's files were gathered before the arbitration hearing commenced. Although the printout of *Friedman* is undated, if a Merrill Lynch agent would have learned of it after the commencement of the hearing, Spaulding most definitely would have recalled that fact.

objecting only after Mrs. Pearce announced several decisions adverse to it. *See* Pet. to Vacate Arbitration Award ¶¶ 32-34, 56 (DE 1). The purpose of the waiver doctrine is to prevent a party that knows of possible bias from making a tactical decision to try its luck with a proceeding and keep a proverbial ace up its sleeve in case things go badly. *See, e.g., Bianchi v. Roadway Express., Inc.*, 441 F.3d 1278, 1285 (11th Cir. 2006). While it is true that in the instant case Merrill Lynch did not wait until it received a final adverse ruling to state its concerns about Mrs. Pearce's bias, it did wait until the panel announced several adverse rulings with which it disagreed. Pet. to Vacate Arbitration Award ¶¶ 32-34, 56 (DE 1). Thus, the very same principles are at play. A party that discovers the possibility of bias cannot ignore it, proceed as if it has no concerns regarding bias, and then after receiving a detrimental ruling, announce what it had known before the proceeding began. Even though Merrill Lynch did not wait until it had finally lost, it still made a "calculated decision not to object to the alleged bias" and to attempt "to keep two strings in [its] bow." *Bianchi*, 441 F.3d at 1286.

At the very least, the Court finds that Merrill Lynch's acceptance of the panel with knowledge of what Mrs. Pearce allegedly failed to disclose eliminates the presumption of bias that generally arises in failure to disclose cases, as it signifies that Merrill Lynch did not view the withheld information as significant enough to suggest partiality even alongside Mrs. Pearce's failure to disclose it. *See Gianelli*, 146 F.3d at 1313 ("Gianelli accepted Houck as an arbitrator with full knowledge of Gray Harris' representation of Kelley in the Nielson case. Therefore, Houck's knowledge of that connection cannot be the basis for a finding of 'evident partiality.'"). Absent this presumption, the Court cannot say that Merrill Lynch has demonstrated that Mrs. Pearce labored

under an actual conflict.⁵ The alleged bias must be “direct, definite, and capable of demonstration.” not “remote, uncertain, and speculative.” *Lifecare*, 68 F.3d at 434. In the instant case, Merrill Lynch relies almost exclusively on the fact of Mr. and Mrs. Pearce’s marriage to show that Mrs. Pearce knew the details of Mr. Pearce’s practice which she failed to disclose.⁶ Moreover, it is unclear why Mr. Pearce’s experience representing a customer against a Merrill Lynch analyst for breach of fiduciary duty would predispose Mrs. Pearce in favor of a former analyst of Merrill Lynch suing for employment benefits and compensation for injury to reputation, mental anguish, and the like.⁷ Considering the record as a whole, the Court finds the alleged bias too remote and speculative to warrant vacatur.

Merrill Lynch points out that nothing in Spaulding’s files indicated that he knew of Mr. Pearce’s comments in the *Palm Beach Post*:

Winning this case, especially in view of the odds [is my career highlight]. Merrill Lynch wasn’t going to settle this case because they had been so successful. Putting them down the way I did was a highlight in my career. This was most gratifying, not so much in terms of numbers—I’ve had bigger settlements—just the attitude on the other side of the table made this a sweet victory.”

⁵The Court discusses the decisions Merrill Lynch finds controversial in greater detail in Part B of this section.

⁶Notably, Merrill Lynch elected not to depose Mr. or Mrs. Pearce despite requesting and receiving “leave from the court to conduct narrow and limited discovery ‘to prove that the panel chair had actual knowledge of [a] conflict of interest that she failed to disclose.’” Order (DE 18) (quoting Am. Mot. for Order Implementing Schedule for Briefing and Procedures and for Leave to Conduct Limited Discovery (DE 13)).

⁷Mr. Pearce’s website states that he represents both investors and brokers and lists sample awards earned in both types of cases. Not. Suppl. & Clarify Petitioner’s Pet. to Vacate, Ex. A 7-9 (DE 30-1).

Homer Decl. Ex. 6. Merrill Lynch argues that it cannot be said to have waived its bias objection when it did not know of these particular comments. The Court disagrees. Merrill Lynch knew of the arbitration award obtained by Mr. Pearce, and the additional fact that he relished the victory adds nothing to the bias calculus. "If merely adding additional facts to a bias claim were enough to avoid waiver, then waiver would be easily avoidable." *Bianchi v. Roadway Express, Inc.*, 441 F.3d 1278, 1285 (11th Cir. 2006). "[W]here the bias is *apparent enough*, waiver will occur." *Id.* (emphasis added). Moreover, Merrill Lynch has not demonstrated that Mrs. Pearce knew of the comments, or even if she had known of them at one time, that it would be reasonable to expect her to recall and disclose comments published over six years prior to the events in question. Thus, the comments are insufficient to demonstrate evident partiality.

In light of the foregoing, the Court finds that Merrill Lynch has failed to establish evident partiality and will deny this ground of its petition to vacate the award.

B. Arbitrator Misconduct & Exceeding of Powers

As its second and third grounds for vacating the arbitration award, Merrill Lynch points to sections 10(a)(3) and (a)(4) of the FAA, which allow a district court to vacate an arbitration award in the following circumstances:

- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(3), (4). Merrill Lynch suggests the following incidents demonstrate the applicability of these two sections:

- The panel allowed Respondents to keep Merrill Lynch's documents in their possession for approximately twenty-four hours after Merrill Lynch alerted it that some of the documents were privileged. Pet. ¶¶ 32-33 (DE 1).
- After learning that Respondents had kept some of the privileged documents for nearly ten days after the panel ordered them returned, the panel did not admonish them. Pet. ¶ 34 (DE 1).
- The panel precluded Merrill Lynch's counsel from participating and sanctioned them \$1,000 for every hour it took them after the panel's deadline to create a privilege log. Merrill Lynch felt that despite working "around the clock," it could not meet the panel's deadline. Pet. ¶¶ 35-36 (DE 1).
- The panel imposed a \$10,000 sanction, interrupted Merrill Lynch's cross-examination, and allowed only two hours at a later date to complete the cross-examination when Merrill Lynch attempted to use redacted medical records to impeach one of the Respondents. Merrill Lynch felt that the panel's prior orders limiting the use of medical information did not prohibit their use of redacted records for impeachment on a critical issue, but the panel disagreed. Pet. ¶¶ 49-50 (DE 1).
- Merrill Lynch believes the panel ruled unfairly against it on several issues, including relieving Respondents from having to identify specific clients they had lost, allowing a Respondent to testify about purported injuries and mental anguish without allowing

Merrill Lynch to cross-examine or obtain an independent medical evaluation, allowing Respondents' leading questions but precluding Merrill Lynch from leading witnesses even on cross examination, allowing Respondents more time to present their case, and refusing to accept a written motion to dismiss at the conclusion of Respondents' case-in-chief. Pet. ¶ 51-55, 57-59, 61 (DE 1).

- The panel disqualified one of Merrill Lynch's designated corporate representatives shortly before the hearing because Respondents would be upset and intimidated by his presence and then excluded a second potential corporate representative because he was a fact witness, despite allowing Respondents, who were also fact witnesses, to attend the entire hearing. Pet. ¶ 56 (DE 1).

The Court has carefully reviewed the transcripts provided by the parties and each of Merrill Lynch's claims of misconduct. However, the Court's review of the panel's actions is necessarily a limited one, as "federal courts should defer to an arbitrator's decision whenever possible." *Robbins*, 954 F.2d at 682; *see also Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) ("[J]udicial review of an arbitration award is narrowly limited."). "Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they 'are not constrained by formal rules of procedure or evidence.'" *Rosensweig*, 494 F.3d at 1333 (quoting *Robbins*, 954 F.2d at 685). Thus, mere disagreement with one of the panel's decisions is not a basis to vacate the award; rather, the Court is only concerned with decisions that deprived the parties of "a fundamentally fair hearing." *Id.*

For each challenged decision, the Court finds that the panel had at least some reasonable

basis for the actions it took, and while the panel's decisions were in some cases detrimental to Merrill Lynch's case, Merrill Lynch has not demonstrated that it was unfairly prejudiced to the point of being denied a fundamentally fair hearing. With respect to the \$10,000 sanction the panel imposed for Merrill Lynch's purported violation of its orders regarding medical information, although the panel refused to hear Merrill Lynch's objections at the time it issued the order, it did consider Merrill Lynch's motion for reconsideration, denied it, and restated its position. Under these circumstances, the Court will defer to the panel's interpretation of its own evidentiary rulings and directions to the parties.

CONCLUSION

After extensive briefing and thorough review of the record, the Court concludes that Merrill Lynch has not sufficiently demonstrated evident partiality on the part of the panel or that the panel engaged in misconduct or exceeded its powers. The Court will therefore deny Merrill Lynch's petition and confirm the award.⁸

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

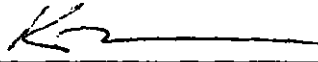
1. The Petition to Vacate Arbitration Award (DE 1) is **DENIED**.

⁸In their response to the Petition, Respondents make passing reference to sanctions under Rule 11. Resp. Opp'n Pet. to Vacate Arbitration Award ¶ 65 (DE 7). Their request does not comply with the procedural requirements of Fed. R. Civ. P. 11(c)(2) and is therefore denied.

2. The award entered in the underlying arbitration is **CONFIRMED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 17th day of September,

2012.



KENNETH A. MARRA
United States District Judge

2012 WL 4056092

Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., Petitioner,

v.

Tamara SMOLCHEK and Meri Ramazio,
Respondents.

No. 12–80355–CIV. | Sept. 17, 2012.

Opinion

ORDER DENYING PETITION TO VACATE ARBITRATION AWARD

[KENNETH A. MARRA](#), District Judge.

*1 THIS CAUSE is before the Court upon Merrill Lynch, Pierce, Fenner & Smith, Inc.’s (“Merrill Lynch’s”) Petition to Vacate Arbitration Award (DE 1),¹ filed pursuant to section ten of the Federal Arbitration Act (“FAA”). The petition has been extensively briefed and is ripe for adjudication. Upon a careful review of the record and the evidence presented by the parties, the Court finds no basis to overturn the arbitration panel’s ruling and will therefore deny Merrill Lynch’s petition and will grant Respondent’s cross-petition.

BACKGROUND

Respondents Tamara Smolchek and Meri Ramazio are former financial advisors with Merrill Lynch. Respondents brought arbitration claims against Merrill Lynch seeking certain long-term compensation under their employment agreements and damages under various tort theories. After a seventeen-day arbitration hearing, the three-member panel awarded Respondents—who were claimants in the arbitration proceeding—\$10,250,000 in damages. The parties then filed competing petitions seeking either to confirm or vacate the award.

Merrill Lynch asserts three bases for vacating the award. First, it alleges evident partiality on the part of the

chairwoman of the arbitration panel under section 10(a)(2) of the FAA relating to her failure to disclose certain facts suggesting a possibility of bias. Second, Merrill Lynch alleges misconduct under section 10(a)(3) relating to the panel’s decisions to limit Merrill Lynch’s presentation of its case and to impose sanctions against it. Last, Merrill Lynch argues that, in imposing the aforementioned sanctions without allowing Merrill Lynch sufficient notice or opportunity to be heard, the panel exceeded its powers under section 10(a)(4).

Respondents oppose the petition, arguing that Merrill Lynch failed to establish evident partiality because it did not demonstrate that the chairwoman knew the undisclosed facts. Additionally, Respondents assert Merrill Lynch knew the alleged facts prior to the final hearing and therefore waived any objections. Finally, Respondents argue that in light of the wide latitude afforded arbitrators under the FAA, Merrill Lynch has not shown that the panel engaged in misconduct or that it exceeded its powers.

JURISDICTION AND VENUE

The Court has diversity jurisdiction over this action under [28 U.S.C. § 1332\(a\)\(1\)](#) because the parties are diverse and the amount in controversy exceeds \$75,000. Venue is proper under [28 U.S.C. § 1391\(b\)\(2\)](#) because the arbitration proceeding underlying this action took place in this judicial district.

DISCUSSION

At the outset, the Court notes that federal policy favors arbitration. [Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.](#), 146 F.3d 1309, 1310–11; [Booth v. Hume Publ’g, Inc.](#), 902 F.2d 925, 932 (11th Cir.1990). For that reason, “[i]t is well settled that judicial review of an arbitration award is narrowly limited.” [Davis v. Prudential Sec., Inc.](#), 59 F.3d 1186, 1188 (11th Cir.1995). Generally speaking, “federal courts should defer to the arbitrator’s resolution of [a] dispute whenever possible.” [Robbins v. Day](#), 954 F.2d 679, 682 (11th Cir.1992). However, the FAA enumerates “four narrow bases for vacating [an] arbitration award,” three of which Merrill Lynch raises in the instant case. [Lifecare Int’l Inc. v. CD Med., Inc.](#), 68 F.3d 429 (11th Cir.1995). The Court will address each of Merrill Lynch’s bases for vacation in

turn.

A. Evident Partiality

*2 The FAA states that a district court may vacate an arbitration award “[w]here there was evident partiality ... in the arbitrators.” 9 U.S.C. § 10(a)(2). The Eleventh Circuit has interpreted this statute to mean that an award may be vacated due to an arbitrator’s evident partiality “only when either (1) an actual conflict exists, or (2)[an] arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.” *Gianelli*, 146 F.3d at 1312. “The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award.” *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir.1982).

In the instant case, Merrill Lynch contends that the chairwoman of the arbitration panel, Bonnie Pearce (“Mrs.Pearce”), did not disclose: (a) the nature of her husband’s law practice, (b) the sizeable award he earned against Merrill Lynch in 2005,² or (c) comments her husband (“Mr.Pearce”) made to a newspaper after the award to the effect that he was particularly satisfied at having obtained an award against Merrill Lynch.³ From the record, it appears clear that Mrs. Pearce did not disclose these facts. The Court will address the questions whether the undisclosed information “would lead a reasonable person to believe that a potential conflict exists,” *id.*, and whether Mrs. Pearce knew the information of which Merrill Lynch complains after discussing Respondents’ waiver argument.

After the Court granted the parties leave to conduct limited discovery, Merrill Lynch filed a Notice to Supplement and Clarify Petitioner’s Petition to Vacate (DE 30). In the supplemental filing, Merrill Lynch revealed for the first time evidence indicating that it knew at least some of the information Mrs. Pearce is alleged to have withheld. Specifically, Merrill Lynch disclosed that its counsel had in its files eight pages printed from Mr. Pearce’s website, each dated before the arbitration hearing, which commenced on January 23, 2012. Included with the printouts was an undated copy of the arbitration award in *Friedman*. Merrill Lynch also submitted an affidavit of attorney Douglas Spaulding, in whose files these documents were found, stating that he had no recollection of accessing or reviewing them. Response Opp’n to Respondents’ Not., Ex. A (DE 33–2). The affidavit is dated May 31, 2012.

Notwithstanding Spaulding’s declaration, the Court finds that Merrill Lynch knew of Mr. Pearce’s practice and his

participation in the *Friedman* arbitration prior to the hearing. The fact that Mr. Spaulding has no present recollection of accessing or reviewing the information is not relevant. A Merrill Lynch attorney had the information in his files, which included a copy of an arbitration award referenced on the website.⁴ The only logical conclusion that can be drawn from these facts is that a Merrill Lynch agent reviewed Mr. Pearce’s website, noticed the *Friedman* reference, and gathered the arbitration award and other related documents. These facts undermine any suggestion or assertion that Merrill Lynch did not have knowledge, since knowledge of an agent is imputed to its principal. *Computel, Inc. v. Emery Air Freight Corp.*, 919 F.2d 678, 685 (11th Cir.1990). In actuality, these facts make out a more compelling case for Merrill Lynch’s actual knowledge of the relevant information than that of Mrs. Pearce, whose knowledge is merely presumed by virtue of her marital relationship.

*3 Concluding that Merrill Lynch had knowledge of Mr. Pearce’s practice and involvement in *Friedman*, the Court must now consider whether the doctrine of waiver applies. Merrill Lynch knew the relevant information and failed to raise the issue of Mrs. Pearce’s partiality before the commencement of the hearing. The hearing then proceeded for at least five days, with Merrill Lynch objecting only after Mrs. Pearce announced several decisions adverse to it. *See* Pet. to Vacate Arbitration Award ¶¶ 32–34, 56 (DE 1). The purpose of the waiver doctrine is to prevent a party that knows of possible bias from making a tactical decision to try its luck with a proceeding and keep a proverbial ace up its sleeve in case things go badly. *See, e.g., Bianchi v. Roadway Express, Inc.*, 441 F.3d 1278, 1285 (11th Cir.2006). While it is true that in the instant case Merrill Lynch did not wait until it received a final adverse ruling to state its concerns about Mrs. Pearce’s bias, it did wait until the panel announced several adverse rulings with which it disagreed. Pet. to Vacate Arbitration Award ¶¶ 32–34, 56 (DE 1). Thus, the very same principles are at play. A party that discovers the possibility of bias cannot ignore it, proceed as if it has no concerns regarding bias, and then after receiving a detrimental ruling, announce what it had known before the proceeding began. Even though Merrill Lynch did not wait until it had finally lost, it still made a “calculated decision not to object to the alleged bias” and to attempt “to keep two strings in [its] bow.” *Bianchi*, 441 F.3d at 1286.

At the very least, the Court finds that Merrill Lynch’s acceptance of the panel with knowledge of what Mrs. Pearce allegedly failed to disclose eliminates the presumption of bias that generally arises in failure to disclose cases, as it signifies that Merrill Lynch did not view the withheld information as significant enough to

suggest partiality even alongside Mrs. Pearce's failure to disclose it. See *Gianelli*, 146 F.3d at 1313 ("Gianelli accepted Houck as an arbitrator with full knowledge of Gray Harris' representation of Kelley in the Nielson case. Therefore, Houck's knowledge of that connection cannot be the basis for a finding of 'evident partiality.'"). Absent this presumption, the Court cannot say that Merrill Lynch has demonstrated that Mrs. Pearce labored under an actual conflict.⁵ The alleged bias must be "direct, definite, and capable of demonstration," not "remote, uncertain, and speculative." *Lifecare*, 68 F.3d at 434. In the instant case, Merrill Lynch relies almost exclusively on the fact of Mr. and Mrs. Pearce's marriage to show that Mrs. Pearce knew the details of Mr. Pearce's practice which she failed to disclose.⁶ Moreover, it is unclear why Mr. Pearce's experience representing a customer against a Merrill Lynch analyst for breach of fiduciary duty would predispose Mrs. Pearce in favor of a former analyst of Merrill Lynch suing for employment benefits and compensation for injury to reputation, mental anguish, and the like.⁷ Considering the record as a whole, the Court finds the alleged bias too remote and speculative to warrant vacatur.

*4 Merrill Lynch points out that nothing in Spaulding's files indicated that he knew of Mr. Pearce's comments in the *Palm Beach Post*:

Winning this case, especially in view of the odds [is my career highlight]. Merrill Lynch wasn't going to settle this case because they had been so successful. Putting them down the way I did was a highlight in my career. This was most gratifying, not so much in terms of numbers—I've had bigger settlements—just the attitude on the other side of the table made this a sweet victory."

Homer Decl. Ex. 6. Merrill Lynch argues that it cannot be said to have waived its bias objection when it did not know of these particular comments. The Court disagrees. Merrill Lynch knew of the arbitration award obtained by Mr. Pearce, and the additional fact that he relished the victory adds nothing to the bias calculus. "If merely adding additional facts to a bias claim were enough to avoid waiver, then waiver would be easily avoidable." *Bianchi v. Roadway Express, Inc.*, 441 F.3d 1278, 1285 (11th Cir.2006). "[W]here the bias is *apparent enough*, waiver will occur." *Id.* (emphasis added). Moreover, Merrill Lynch has not demonstrated that Mrs. Pearce knew of the comments, or even if she had known of them

at one time, that it would be reasonable to expect her to recall and disclose comments published over six years prior to the events in question. Thus, the comments are insufficient to demonstrate evident partiality.

In light of the foregoing, the Court finds that Merrill Lynch has failed to establish evident partiality and will deny this ground of its petition to vacate the award.

B. Arbitrator Misconduct & Exceeding of Powers

As its second and third grounds for vacating the arbitration award, Merrill Lynch points to [sections 10\(a\)\(3\) and \(a\)\(4\)](#) of the FAA, which allow a district court to vacate an arbitration award in the following circumstances:

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(3), (4). Merrill Lynch suggests the following incidents demonstrate the applicability of these two sections:

- The panel allowed Respondents to keep Merrill Lynch's documents in their possession for approximately twenty-four hours after Merrill Lynch alerted it that some of the documents were privileged. Pet. ¶¶ 32–33 (DE 1).

- After learning that Respondents had kept some of the privileged documents for nearly ten days after the panel ordered them returned, the panel did not admonish them. Pet. ¶ 34 (DE 1).

- The panel precluded Merrill Lynch's counsel from participating and sanctioned them \$1,000 for every hour it took them after the panel's deadline to create a privilege log. Merrill Lynch felt that despite working "around the clock," it could not meet the panel's deadline. Pet. ¶¶ 35–36 (DE 1).

- *5 • The panel imposed a \$10,000 sanction, interrupted Merrill Lynch's crossexamination, and allowed only two hours at a later date to complete the crossexamination when Merrill Lynch attempted

to use redacted medical records to impeach one of the Respondents. Merrill Lynch felt that the panel's prior orders limiting the use of medical information did not prohibit their use of redacted records for impeachment on a critical issue, but the panel disagreed. Pet. ¶¶ 49–50 (DE 1).

- Merrill Lynch believes the panel ruled unfairly against it on several issues, including relieving Respondents from having to identify specific clients they had lost, allowing a Respondent to testify about purported injuries and mental anguish without allowing Merrill Lynch to cross-examine or obtain an independent medical evaluation, allowing Respondents' leading questions but precluding Merrill Lynch from leading witnesses even on cross examination, allowing Respondents more time to present their case, and refusing to accept a written motion to dismiss at the conclusion of Respondents' case-in-chief. Pet. ¶ 51–55, 57–59, 61 (DE 1).

- The panel disqualified one of Merrill Lynch's designated corporate representatives shortly before the hearing because Respondents would be upset and intimidated by his presence and then excluded a second potential corporate representative because he was a fact witness, despite allowing Respondents, who were also fact witnesses, to attend the entire hearing. Pet. ¶ 56 (DE 1).

The Court has carefully reviewed the transcripts provided by the parties and each of Merrill Lynch's claims of misconduct. However, the Court's review of the panel's actions is necessarily a limited one, as "federal courts should defer to an arbitrator's decision whenever possible." *Robbins*, 954 F.2d at 682; see also *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir.2007) ("[J]udicial review of an arbitration award is narrowly limited."). "Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they 'are not constrained by formal rules of procedure or evidence.'" *Rosensweig*, 494 F.3d at 1333 (quoting *Robbins*, 954 F.2d

at 685). Thus, mere disagreement with one of the panel's decisions is not a basis to vacate the award; rather, the Court is only concerned with decisions that deprived the parties of "a fundamentally fair hearing." *Id.*

For each challenged decision, the Court finds that the panel had at least some reasonable basis for the actions it took, and while the panel's decisions were in some cases detrimental to Merrill Lynch's case, Merrill Lynch has not demonstrated that it was unfairly prejudiced to the point of being denied a fundamentally fair hearing. With respect to the \$10,000 sanction the panel imposed for Merrill Lynch's purported violation of its orders regarding medical information, although the panel refused to hear Merrill Lynch's objections at the time it issued the order, it did consider Merrill Lynch's motion for reconsideration, denied it, and restated its position. Under these circumstances, the Court will defer to the panel's interpretation of its own evidentiary rulings and directions to the parties.

CONCLUSION

*6 After extensive briefing and thorough review of the record, the Court concludes that Merrill Lynch has not sufficiently demonstrated evident partiality on the part of the panel or that the panel engaged in misconduct or exceeded its powers. The Court will therefore deny Merrill Lynch's petition and confirm the award.⁸

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. The Petition to Vacate Arbitration Award (DE 1) is **DENIED**.
2. The award entered in the underlying arbitration is **CONFIRMED**.

Footnotes

- 1 Respondents independently filed a corresponding petition to *confirm* the arbitration award. Because the petitions addressed the same arbitration agreement and seek opposite relief, the Court consolidated the petitions, see Order Consolidating Cases (DE 8), and will resolve both petitions with the instant ruling.
- 2 *Friedman v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Dispute Resolution No. 03–06176 ("*Friedman*").
- 3 Specifically, Mr. Pearce stated that "winning" the case against Merrill Lynch was a "highlight in [his] career" and a "sweet victory" in light of the "attitude on the other side of the table." Homer Decl. Ex. 6.
- 4 The Court concludes that all of the relevant information in Spaulding's files were gathered before the arbitration hearing commenced. Although the printout of *Friedman* is undated, if a Merrill Lynch agent would have learned of it after the commencement of the hearing, Spaulding most definitely would have recalled that fact.

- 5 The Court discusses the decisions Merrill Lynch finds controversial in greater detail in Part B of this section.
- 6 Notably, Merrill Lynch elected not to depose Mr. or Mrs. Pearce despite requesting and receiving “leave from the court to conduct narrow and limited discovery ‘to prove that the panel chair had actual knowledge of [a] conflict of interest that she failed to disclose.’ “ Order (DE 18) (quoting Am. Mot. for Order Implementing Schedule for Briefing and Procedures and for Leave to Conduct Limited Discovery (DE 13)).
- 7 Mr. Pearce’s website states that he represents both investors and brokers and lists sample awards earned in both types of cases. Not. Suppl. & Clarify Petitioner’s Pet. to Vacate, Ex. A 7–9 (DE 30–1).
- 8 In their response to the Petition, Respondents make passing reference to sanctions under Rule 11. Resp. Opp’n Pet. to Vacate Arbitration Award ¶ 65 (DE 7). Their request does not comply with the procedural requirements of [Fed.R.Civ.P. 11\(c\)\(2\)](#) and is therefore denied.