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Merrill Lynch Savaged By FINRA Arbitrators In Historic Employee Dispute

In a Financial Industry Regulatory Authority ("FINRA") Arbitration *Statement of Claim* filed in September 2010, Claimants asserted the following causes of action against Respondent Merrill Lynch:

- 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 allegations arose in connection with the Claimants' employment and subsequent termination of employment with Respondent following a change in control of Respondent. Moreover, said control change extended into the administration and disposition of Claimants' deferred compensation plans. In the Matter of the FINRA Arbitration Between Meri Ramazio and Tamara Smolchek, *Claimants*, v. Merrill Lynch Pierce Fenner & Smith Inc., *Respondent* (FINRA Arbitration 10-04432, April 3, 2012).

Ultimately, Claimants sought the following damages:

- the value of Claimants' FACAAP, Growth Award and Wealthbuilder plans as of November 28, 2008, as defined in the plan agreements;
- $10,000,000 in combined 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;

- $500,000 attorneys' fees (An Affidavit stated actual attorney's fees were $689,973.49); and
- fees and costs

At the close of the hearing:

Claimant Smolchek sought:

- Between $3,253,281.00 and $4,886,439.00 compensatory damages (inclusive of interest on the deferred compensation);
- $166,335.00 in liquidated damages for unpaid compensation pursuant to NY Labor Code Article 6, Section 198; and,

Claimant Ramazio sought

- Between $663,937.00 and $1,146,046.00 compensatory damages (inclusive of interest on the deferred compensation);
- $20,872.00 in liquidated damages for unpaid compensation pursuant to NY Labor Code .

Respondent Merrill Lynch generally denied the allegations and asserted various affirmative defenses.

Battle Royale

On or about March 11, 2011, Respondent Merrill Lynch filed a *Motion to Require Compliance with Rule 13204* because Claimants allegedly had not affirmatively stated that they would not participate in a class action. The following day, Claimants filed a *Notice of Compliance* and affirmed that they would not participate in any class action with regard to the deferred compensation plans. Accordingly, the Panel denied the Motion.

On or about March 11, 2011, Respondent filed an *Objection to FINRA Jurisdiction Over FACAAP Claims,* asserting that the FACAAP Agreement contains a forum selection clause that requires disputes to be arbitrated before the American Arbitration Association or JAMS. Claimants countered that the dispute was subject to mandatory FINRA intra-industry arbitration. The Panel denied the objection.

On or about January 5, 2012, Claimants filed an *Emergency Motion for Sanctions and Independent Review of Discovery,* claiming that Respondent had intentionally withheld numerous significant and relevant documents in violation of the Panel's January 3, 2012 Order. In response, Respondent disputed the issue of intentionality and dismissed many of the assertions as speculative. On or about January 11, 2012, the Panel issued an Order directing Respondent to produce specified documents to Claimants no later than 4:00 p.m. on January 12, 2012, subject to a $1,000 daily fine for non-compliance starting at 4:01 p.m. on January 12th. Further, the Panel admonished Respondent that the arbitrators would draw an adverse inference regarding Respondent for non-production. On January 12th, Respondent filed a *Request for Reconsideration of the Panel's January 11. 2012 Order,* citing the short time provided for compliance and other factors. On or about January 13, 2012, the Panel denied the request and reiterated 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. Following Respondent's failure to produce the privilege log as ordered, the Panel required production by 10 a.m. on January 25th. When that deadline passed without the ordered production of the privilege log, at 1:30 p.m. the Panel imposed a $1,000.00 per hour sanction until the log was produced, which occurred at 4:37 p.m., resulting in the subsequent payment of $3,500.00 by Respondent to the Claimants.

At the conclusion of the January 27, 2012 evidentiary hearing, Claimants orally moved for 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. Following its review of the parties' submissions, the Panel determined that the disputed 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;
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; and
3. 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 and following Claimants' objection, the Panel declined to accept the offers into evidence. Additionally, the Panel issued an Order sanctioning Respondent for its blatant disregard of the Panel's prior orders not to introduce medical records or history into this hearing and imposing the following sanctions:

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, subject to dismissal of Respondent's defenses with prejudice for non-compliance. The $10,000 was paid on February 15, 2012.

On February 15, 2012, Respondent moved for reconsideration and a stay of the Panel's February 14th Order, which was opposed by Claimants. The Panel denied the request but reconsidered the portion of their sanction regarding the continuation of the cross examination of Claimant Smolchek, and allowed it subject to certain limitations.

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 2008 modeling information, which Respondent objected to. 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.

Compensatory Damages

Upon the conclusion of the hotly contested arbitration, the FINRA Arbitration Panel, awarded compensatory damages inclusive of interest for unpaid wages, unpaid deferred compensation, lost wages, lost book, value of business, reputation and all other liquidated damages:

Claimant Smolchek: $4,275,000.00

Claimant Ramazio: $ 875,000.00

Consistent with 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 found that there was a violation of FINRA Rule 2010: *Standards of Commercial Honor and Principles of Trade* by Respondent, the Panel did not award any damages for hat cause of action.

Damages for Hindrance, Disruption, and Delay

The Panel determined that because 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," the following awards were rendered:

Claimant Smolchek: $50,000

Claimant Ramazio: $50,000.00

In strongly worded language that is as pointed as I have ever seen in this regard, the Panel admonished the the $100,000 in discovery sanctions:

> 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 (of which I have provided only a portion):
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> "The Panel has reviewed the documents and makes the following ruling:
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> 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.
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> 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. . .

Punitive Damages

Finally this FINRA Arbitration Panel offers an incredibly blunt rebuke of Respondent Merrill Lynch's conduct in the form of an award of punitive damages:

Respondent Smolchek: $3,500,000

Respondent Ramazio: $1,500,000

Consider this rationale in the *Decision*:

> [T]he 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. . .

Bill Singer's Comment

BRAVO! An amazing *Decision* that should go down as an historic commentary. This FINRA Arbitration Panel is in a class of its own. Great job folks. I suspect that at all the major Wall Street firms, JP Morgan, Goldman Sachs, Morgan Stanley, Wells Fargo — wherever there are deferred comp packages or brokers headed for arbitration — that this case will become legendary.

Following the initial publication of this analysis, several readers asked about the outcome of the "Attorneys' Fees" request. This is how that was addressed in the *Decision:*

> 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.
