

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Kimberlyn Underwood, Claimant v. Merrill Lynch, Pierce, Fenner & Smith Incorporated
and Riley O. Etheridge, Jr., Respondents

Merrill Lynch, Pierce, Fenner & Smith Incorporated, Counter-Claimant v. Kimberlyn
Underwood, Counter-Respondent

Case Number: 04-02774

Hearing Site: San Francisco, California

Nature of the Dispute: Associated Person v. Member and Associated Person
Member v. Associated Person

REPRESENTATION OF PARTIES

For Claimant/Counter-Respondent

Kimberlyn Underwood ("Underwood"):

Lawrence Alioto, Esq.
Attorney at Law
San Francisco, California

For Respondent/Counter-Claimant

Merrill Lynch, Pierce, Fenner & Smith
Incorporated ("Merrill Lynch") and
Respondent Riley O. Etheridge, Jr. ("Etheridge"):

Michael J. Fortunato, Esq.
Karen L. Palermo, Esq.
Rubin, Fortunato, Harbison &
Dougherty, P.C.
Paoli, Pennsylvania

CASE INFORMATION

Statement of Claim filed: April 13, 2004

Amended Statement of Claim filed: July 28, 2004

Underwood's Uniform Submission Agreement signed: April 13, 2004

Joint Statement of Answer (to Statement of Claim) filed by Merrill Lynch and Etheridge,
including a Counterclaim by Merrill Lynch: June 7, 2004

Joint Statement of Answer (to the Amended Statement of Claim) filed by Merrill Lynch

and Etheridge, including a Counterclaim by Merrill Lynch: August 10, 2004

Merrill Lynch's Uniform Submission Agreement signed: May 19, 2004

Etheridge's Uniform Submission Agreement signed: not dated

Underwood's Reply to Counterclaim filed: June 16, 2004

CASE SUMMARY

In her Statement of Claim, Underwood alleged breach of covenant of good faith and fair dealing, fraud, promissory estoppel, and wrongful termination. Underwood's allegations revolve around her employment at Merrill Lynch. In her Amended Statement of Claim, Underwood added violation of California Labor Code §970 and §1050.

Merrill Lynch and Etheridge denied the allegations of wrongdoing set forth in Underwood's Statements of Claim and asserted various affirmative defenses.

In its Counterclaim, Merrill Lynch alleged breach of contract and unjust enrichment relating to a promissory note that Merrill Lynch alleges Underwood still owes.

Underwood denied the allegation of wrongdoing set forth in Merrill Lynch's Counterclaim.

RELIEF REQUESTED

Underwood requested approximately \$4,000,000.00 in compensatory damages, and costs, including attorney's fees.

Merrill Lynch and Etheridge requested dismissal of Claimant's Statements of Claim in their entirety.

In its counterclaim, Merrill Lynch requested \$138,151.36 for repayment of a promissory note, interest at the rate of 4.750%, and costs, including attorney's fees.

Underwood requested dismissal of Merrill Lynch's Counterclaim in its entirety, and costs, including attorney's fees.

OTHER ISSUES CONSIDERED AND DECIDED

The parties 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, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Underwood's claims are denied in their entirety.
- 2) Underwood is liable to and shall pay Merrill Lynch the sum of \$69,075.36 in compensatory damages, which represents half of the principle due on the disputed promissory note when Underwood's employment at Merrill Lynch was terminated.
- 3) The Panel recommends expungement of the following language from Underwood's Form U-5, item 3, maintained by the NASD Central Registration Depository ("CRD"): "and for failure to perform to firm standards." After such expungement, the reason for termination shall be stated as follows: "Ms. Underwood's employment was terminated on April 16, 2003, for failure to comply with firm standards regarding employee personal conduct. This matter did not involve Ms. Underwood's servicing of client accounts." Pursuant to NASD Notice to Members 99-09 and 99-54, Underwood must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4) The parties shall bear their respective costs, including attorney's fees.
- 5) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 600.00
Merrill Lynch's Counterclaim Filing Fee	= \$1,000.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Merrill Lynch is a party and the following fees are assessed:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,000.00
Total Member Fees	= \$ 8,550.00

Forum Fees and Assessments

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion decided on the papers. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Decision on discovery-related motions on the papers with one (1) arbitrator @ \$200.00	= \$ 200.00
Claimant submitted one discovery-related motion	

One (1) Pre-hearing conference session with a single arbitrator @ \$ 450/session	= \$ 450.00
Pre-hearing conference: September 22, 2005	1 session

Two (2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 2,400.00
Pre-hearing conferences: September 8, 2005	1 session
March 3, 2006	1 session

Ten (10) Hearing sessions @ \$1,200.00/session	= \$12,000.00
Hearings: May 1, 2006	2 sessions

May 2, 2006	2 sessions
May 3, 2006	2 sessions
May 4, 2006	2 sessions
May 5, 2006	2 sessions

Total Forum Fees	= \$15,050.00
-------------------------	----------------------

The Panel assessed the entire balance of the forum fees, in the amount of \$15,050.00, to Merrill Lynch pursuant to *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *Little v. Auto Stigler*, 20 Cal 4th 1064; *cert denied*, 124 S. Ct. 83 (2003); and, *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76 (2003).

Fee Summary

1. Underwood is charged with the following fees and costs:

Filing Fee	= \$ 200.00
<u>Less payments</u>	<u>= \$(1,800.00)</u>
Refund paid to Claimant	= \$(1,600.00)

2. Merrill Lynch is charged with the following fees and costs:

Balance due for Claimant's Filing Fee	= \$ 400.00
Counterclaim Filing Fee	= \$ 1,000.00
Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$ 15,050.00</u>
<u>Total Fees</u>	<u>= \$ 25,000.00</u>
<u>Less payments</u>	<u>= \$(11,075.00)</u>
Balance Due NASD Dispute Resolution	= \$ 13,925.00

All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Carol Ann Jensen	-	Public Arbitrator, Presiding Chair
Joseph Berzok	-	Public Arbitrator
Gene S. Evenskaas	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Carol Ann Jensen
Chair, Public Arbitrator

May 18, 2006
Signature Date

Joseph Berzok
Public Arbitrator

Signature Date

Gene S. Evenskaas
Non-Public Arbitrator

Signature Date

May 19, 2006
Date of Service
(NASD Use Only)

ARBITRATION PANEL

Carol Ann Jensen	-	Public Arbitrator, Presiding Chair
Joseph Berzok	-	Public Arbitrator
Gene S. Evenskas	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Carol Ann Jensen
Chair, Public Arbitrator

Signature Date



Joseph Berzok
Public Arbitrator

5/18/06
Signature Date

Gene S. Evenskas
Non-Public Arbitrator

Signature Date

May 19, 2006
Date of Service
(NASD Use Only)

ARBITRATION PANEL

Carol Ann Jensen	-	Public Arbitrator, Presiding Chair
Joseph Berzok	-	Public Arbitrator
Gene S. Evenskaas	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Carol Ann Jensen
Chair, Public Arbitrator

Signature Date

Joseph Berzok
Public Arbitrator

Signature Date



Gene S. Evenskaas
Non-Public Arbitrator

May 18, 2006
Signature Date

May 19, 2006
Date of Service
(NASD Use Only)