

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Claimants,

Case Number: 05-03717

v.

Hearing Site: Indianapolis, Indiana

Wells Fargo Investments, LLC, Wilbur C. Boren,  
Dennis R. Creasbaum, Douglas M. Mick,  
Eric D. Robinson, Sr. and Michael P. Santa,  
Respondents.

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Nature of the Dispute: Member Firm v. Member Firm and Associated Persons

**REPRESENTATION OF PARTIES**

Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Claimant": David F. McComb, Esq. of the law firm, Rubin, Fortunato, Harbison, & Dougherty, located in Paoli, Pennsylvania.

Wells Fargo Investments, LLC ("Wells Fargo"), Wilbur C. Boren ("Boren"), Dennis R. Creasbaum ("Creasbaum"), Douglas M. Mick ("Mick"), Eric D. Robinson, Sr. ("Robinson") and Michael P. Santa ("Santa"), hereinafter collectively referred to as "Respondent": Martin T. Fletcher, Sr. of the law firm Eilbacher Fletcher, located in Fort Wayne, Indiana. Respondents were later represented by Theresa M. Gallion, Esq. and William E. Grob, Esq. of the law firm, Fisher & Phillips, LLP located in Tampa, Florida.

**CASE INFORMATION**

Statement of Claim and Motion for a Permanent Injunction filed on or about: July 20, 2005  
Merrill Lynch signed the Uniform Submission Agreement: July 21, 2005  
Claimant filed a Reply to Respondents' Answer and Counterclaims on September 21, 2005

Statement of Answer and Counterclaim jointly filed by Respondents, Wells Fargo, Boren, Creasbaum, Mick, Robinson and Santa on or about: September 16, 2005  
Respondent Wells Fargo signed the Uniform Submission Agreement: July 26, 2005  
Respondent Boren signed the Uniform Submission Agreement: July 25, 2005  
Respondent Creasbaum signed the Uniform Submission Agreement: July 25, 2005  
Respondent Mick signed the Uniform Submission Agreement: July 25, 2005  
Respondent Robinson signed the Uniform Submission Agreement: July 25, 2005  
Respondent Santa signed the Uniform Submission Agreement: July 25, 2005

Respondents each filed a Motion for Summary Judgment on October 20, 2005.  
Merrill Lynch filed a Motion to Compel Discovery and Cross-Motion to Strike Respondents' Summary Judgment Motions.

Merrill Lynch further filed a Response to Respondents' Motion for Summary Judgment on October 28, 2005.

Respondents filed a Response to Claimant's Motion to Compel Discovery and Cross-Motion to Strike Respondents' Motions for Summary Judgment on October 27, 2005.

Respondents also filed on October 27, 2005, a Motion to Compel, or Alternatively, to Dismiss Merrill Lynch's Claims Due to Failure to Respond to Discovery in Good Faith.

On or about November 11, 2005, Claimant filed a Motion in Limine and Respondent filed a Motion to Strike Exhibits. By agreement of all parties and arbitrators, said motions and responses thereto were sent directly via facsimile and overnight mail to the arbitrators.

### **CASE SUMMARY**

Merrill Lynch asserted the following causes of action: breach of employment contract, breach of fiduciary duty, misappropriation and conversion, interference with prospective and actual business relations, unfair competition and unjust enrichment. The causes of action relate to the conduct of former employees of Merrill Lynch who solicited Merrill Lynch customers to transfer business from Merrill Lynch to Wells Fargo.

Unless specifically admitted in their Answer, Respondents Wells Fargo, Boren, Creasbaum, Mick, Robinson and Santa, denied the allegations made in the Statement of Claim and asserted various counterclaims: breach of contract, breach of duty of good faith and fair dealing and tortious interference with business relations

### **RELIEF REQUESTED**

Merrill Lynch requested permanent injunction, unspecified amount in compensatory damages against all Respondents, an award be issued requiring Boren to repay the amounts owed to Merrill Lynch pursuant to his Agreement to Repay Costs of Training signed on December 8, 2004, and for Respondent Creasbaum to repay the amounts owed to Merrill Lynch pursuant to his Promissory Note with Merrill Lynch signed on July 30, 2004.

Respondents Wells Fargo, Boren, Creasbaum, Mick, Robinson and Santa requested that all claims alleged against them be dismissed. In their Counterclaim against Merrill Lynch, Respondents requested costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On August 3, 2005, the parties reached a settlement with respect to the request for permanent injunction filed by Merrill Lynch. In the Panel's Scheduling Order of September 7, 2005, it was reflected that Claimant's motion for permanent injunction was withdrawn.

A pre-hearing conference was held on November 4, 2005 on the Motions to Compel and for Summary Judgment filed by the parties. The panel issued the following ruling on November 4, 2005:

Respondent's Motion for Summary Judgment: The motion was taken under advisement pending conclusion of the hearing on the merits scheduled for November 15-17, 2005.

Claimant's Motion to Compel Discovery: The motion was withdrawn as moot.

Respondents' Motion to Compel Discovery: The motion was denied as untimely filed.

At the commencement of hearing, the Panel addressed parties' pending motions, specifically, Claimant's Motion in Limine and Respondent's Motion to Strike Exhibits. The Panel denied both motions.

At the hearing of this matter on November 16, 2005, Respondent Wilbur C. Boren was dismissed from this arbitration by stipulation of the parties.

### **AWARD**

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

1. Any and all claims asserted by Merrill Lynch, Pierce, Fenner & Smith, Inc. against Respondent, Wilbur C. Boren, are dismissed with prejudice.
2. Respondent, Dennis R. Creasbaum, is solely liable for and shall pay Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc., the sum of \$85,000.00 as compensatory damages for payment in full of the sum outstanding on the promissory note between Creasbaum and Merrill Lynch dated July 30, 2004.
3. Respondent, Eric D. Robinson, Sr., is solely liable for and shall pay Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$93,400.00 as compensatory damages.
4. Respondent, Wells Fargo Investments, LLC, is solely liable for and shall pay Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc., the sum of \$139,500.00 as compensatory damages.
5. Any and all claims asserted by Merrill Lynch, Pierce, Fenner & Smith, Inc. against Respondent, Douglas M. Mick, are denied and dismissed with prejudice.
6. Any and all claims asserted by Merrill Lynch, Pierce, Fenner & Smith, Inc. against Respondent, Michael P. Santa, are denied and dismissed with prejudice.
7. Any and all counterclaims filed by Respondents, Wells Fargo Investments, LLC, Wilbur C. Boren, Dennis R. Creasbaum, Douglas M. Mick, Eric D. Robinson and Michael P. Santa, are denied and dismissed with prejudice, with the exception that Claimant shall either pay to Respondents the sum of \$25,000.00, or, at Claimant's option, forthwith deliver to Respondents the computer software identified at hearing as the ACT! System, together with all their computer hardware and peripheral equipment.
8. Except as otherwise specified herein, parties shall bear their own costs, including attorneys' fees.
9. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee = \$ 500.00

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Wells Fargo Investments, LLC, are both parties to this proceeding and are assessed the following fees:

Member surcharge	= \$ 1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 2,200.00

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

1. Member firm, Merrill Lynch, Pierce, Fenner & Smith, Inc., is assessed:

Injunctive relief surcharge	= \$ 2,500.00
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**Forum Fees and Assessments**

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

Two(2) Pre-hearing sessions with Panel @ \$1,000.00	= \$ 2,000.00
Pre-hearing conferences:	
September 7, 2005	1 session
November 4, 2005	1 session
Six (6) Hearing sessions @ \$1,000.00	= \$ 6,000.00
Hearing Dates:	
November 15, 2005	2 sessions
November 16, 2005	2 sessions
November 17, 2005	2 sessions
<hr/> Total Forum Fees	<hr/> = \$ 8,000.00

1. The Panel has assessed 50% of the total forum fees in the amount of \$4,000.00 solely to Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc.
2. The Panel has assessed 50% of the total forum fees in the amount of \$4,000.00 jointly and severally to Respondents, Wells Fargo Investments, LLC, Dennis R. Creasbaum, Douglas M. Mick, Eric D. Robinson and Michael P. Santa.

**Fee Summary**

1. Claimant, Merrill Lynch, Pierce, Fenner & Smith, Inc. is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$ 4,450.00
Injunctive Relief Fees	= \$ 2,500.00

<u>Forum Fees</u>	= \$ 4,000.00
<u>Total Fees</u>	= \$11,450.00
<u>Less payments</u>	= \$ 5,950.00
Balance Due NASD Dispute Resolution	= \$ 5,500.00

2. Respondent, Wells Fargo Investments, LLC, is solely liable for:

<u>Member Fees</u>	= \$ 4,450.00
<u>Less payments</u>	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 0.00

2. Respondents, Wells Fargo Investments, LLC, Dennis R. Creasbaum, Douglas M. Mick, Eric D. Robinson, Sr. and Michael P. Santa, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 4,000.00
<u>Less payments</u>	= \$ 2,200.00
Balance Due NASD Dispute Resolution	= \$ 1,800.00

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

**ARBITRATION PANEL**

Terry F. Peppard, Esq.	-	Public Arbitrator, Presiding Chairperson
Richard A. Van Kalker, Esq.	-	Public Arbitrator
Marilyn R. Rathbun	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/ Terry F. Peppard, Esq.  
Terry F. Peppard, Esq.  
Public Arbitrator, Presiding Chairperson

11/23/05  
Signature Date

/s/ Richard A. Van Kalker, Esq.  
Richard A. Van Kalker, Esq.  
Public Arbitrator

11/22/05  
Signature Date

/s/ Marilyn R. Rathbun  
Marilyn R. Rathbun  
Non-Public Arbitrator

11/29/05  
Signature Date

11/23/05  
Date of Service (For NASD Dispute Resolution use only)

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Member Fees	= \$ 4,450.00
Injunctive Relief Fees	= \$ 2,500.00
<u>Forum Fees</u>	<u>= \$ 4,000.00</u>
Total Fees	= \$11,450.00
<u>Less payments</u>	<u>= \$ 5,950.00</u>
Balance Due NASD Dispute Resolution	= \$ 5,500.00
  
2. Respondent, Wells Fargo Investments, LLC, is solely liable for:

Member Fees	= \$ 4,450.00
<u>Less payments</u>	<u>= \$ 4,450.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00
  
2. Respondents, Wells Fargo Investments, LLC, Dennis R. Creasbaum, Douglas M. Mick, Eric D. Robinson, Sr. and Michael P. Santa, are jointly and severally liable for:


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Public Arbitrator, Presiding Chairperson

11/23/05  
Signature Date

Richard A. Van Kalker, Esq.  
Public Arbitrator

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Non-Public Arbitrator

Signature Date

NASD Dispute Resolution  
Arbitration No. 05-03717  
Award Page 5 of 6

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Less payments	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 0.00

2. Respondents, Wells Fargo Investments, LLC, Dennis R. Creasbaum, Douglas M. Mick, Eric D. Robinson, Sr. and Michael P. Santa, are jointly and severally liable for:

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Less payments	= \$ 2,200.00
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Marilyn R. Rathbun	-	Non-Public Arbitrator

### Concurring Arbitrators' Signatures

Terry F. Peppard, Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

  
Richard A. Van Kalker, Esq.  
Public Arbitrator

11/22/08  
Signature Date

Marilyn R. Rathbun  
Non-Public Arbitrator

Signature Date

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4/29/2005  
Signature Date