

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

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In the Matter of the Arbitration Between:

Name of the Claimant

Merrill Lynch, Pierce, Fenner & Smith, Inc.

Case Number: 06-01493

Name of Respondent

James Alan Burnette

Hearing Site: Boca Raton, Florida

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Nature of the Dispute: Member vs. Associated Person.

**REPRESENTATION OF PARTIES**

For Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), hereinafter referred to as "Claimant": James P. McLaughlin, Esq., Rubin Fortunato, P.C., Paoli, Pennsylvania.

For James Alan Burnette ("Burnette"), hereinafter referred to as "Respondent": Scott W. Zappolo, Esq., Watterson & Zappolo, P.A., Palm Beach Gardens, Florida.

**CASE INFORMATION**

Statement of Claim filed on or about: March 22, 2006.

Claimant signed the Uniform Submission Agreement: March 20, 2006.

Answer, Affirmative Defenses and Counterclaim filed by Respondent on or about: August 1, 2006.

Respondent did not file an executed Uniform Submission Agreement.

Answer to Counterclaim filed by Claimant on or about: August 29, 2006.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of promissory note and unjust enrichment. The causes of action relate to Respondent's alleged failure to repay a promissory note after his employment with Claimant terminated.

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

In his Counterclaim, Respondent alleged that the promissory note was obtained through fraudulent inducement and that Claimant breached the terms of said note.

Unless specifically admitted in its Answer, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$174,483.04 (the outstanding principal balance of the promissory note); interest in the additional amount of 4.250% per annum from December 2005 through such date as the principal and interest are fully paid (accumulating at a rate of \$20.32 per day); attorneys' fees and costs as determined by the Panel; and, any additional relief the Panel deemed just and appropriate. Additionally, Claimant requested that Respondent's Counterclaim be denied in its entirety.

Respondent requested unspecified compensatory damages; unspecified punitive damages; attorneys' fees; costs; and, such other relief as the Panel deemed appropriate.

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

Respondent did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

At the close of Claimant's case-in-chief, Respondent moved to dismiss, to which Claimant objected. The Panel denied Respondent's motion.

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 the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondent is liable on the claim of breach of promissory note and shall pay to Claimant compensatory damages in the amount of \$174,483.04, plus interest at the Florida statutory rate of 11%, accruing from the date of service of this Award until payment in full to Claimant.

Respondent's Counterclaim is denied in its entirety.

The parties' respective requests for attorneys' fees are denied.

Any and all claims for relief not specifically addressed herein, including Respondent's request for punitive damages, are 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	= \$1,000.00
Counterclaim filing fee	= \$ 250.00

#### **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, Claimant MLPFS is a member firm and a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$2,750.00</u>
Total Member Fees	= \$5,200.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No adjournment fees were incurred in this matter.

#### **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:

No three-day cancellation fees were incurred in this matter.

#### **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.

No injunctive relief fees were incurred in this matter.

**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 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 a discovery-related motion on the papers by (1) one arbitrator @ \$200.00	= \$ 200.00
One (1) Pre-hearing session with a single arbitrator @ \$450.00 Pre-hearing conference: December 5, 2006 1 session	= \$ 450.00
One (1) Pre-hearing session with the Panel @ \$1,125.00/session Pre-hearing conference: August 28, 2006 1 session	= \$1,125.00
Four (4) Hearing sessions @ \$1,125.00/session Hearing Dates: January 3, 2007 2 sessions January 4, 2007 2 sessions	= \$4,500.00
<hr/> Total Forum Fees	<hr/> = \$6,275.00

The Panel has assessed \$3,137.50 of the forum fees to Claimant.  
The Panel has assessed \$3,137.50 of the forum fees to Respondent.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred in this matter.

**Fee Summary**

Claimant is solely liable for:

Initial Filing Fee	= \$1,000.00
Member Fees	= \$5,200.00
Forum Fees	= \$3,137.50
<hr/> Total Fees	<hr/> = \$9,337.50
Less payments	= \$7,325.00
<hr/> Balance Due NASD Dispute Resolution	<hr/> = \$2,012.50

Respondent is solely liable for:

Counterclaim Filing Fee	= \$ 250.00
Forum Fees	= \$3,137.50
Total Fees	= \$3,387.50
Less payments	= \$1,250.00
Balance Due NASD Dispute Resolution	= \$2,137.50

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

**ARBITRATION PANEL**

Myron S. Dunay, Esq.	-	Public Arbitrator, Presiding Chairperson
Roy B. Gonas, Esq.	-	Public Arbitrator
Alexander I. Heckman, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/  
Myron S. Dunay, Esq.  
Public Arbitrator, Presiding Chairperson

February 1, 2007  
Signature Date

/s/  
Alexander I. Heckman, Esq.  
Non-Public Arbitrator

February 1, 2007  
Signature Date

**Dissenting Arbitrator's Signature**

/s/  
Roy B. Gonas, Esq.  
Public Arbitrator

February 1, 2007  
Signature Date

February 2, 2007  
Date of Service (For NASD Dispute Resolution office use only)

**Respondent is solely liable for:**


**Balance Due NASD Dispute Resolution = \$2,137.50**

pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

**Alexander I. Heckman, Esq.** - **Non-Public Arbitrator**

**Concurring Arbitrators' Signatures**

  
Myron S. Dunay, Esq.  
Public Arbitrator, Presiding Chairperson

2-1-07  
Signature Date

### Non-Public Arbitrator

**Signature Date**

**Dissenting Arbitrator's Signature**

Public Arbitrator

**Signature Date**

**Date of Service (For NASD Dispute Resolution office use only)**

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Public Arbitrator, Presiding Chairperson

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Signature Date

  
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Alexander I. Heckman, Esq.  
Non-Public Arbitrator

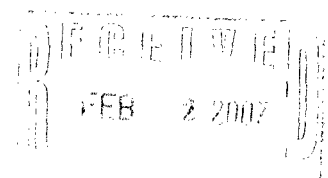
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Roy B. Gonas, Esq.  
Public Arbitrator

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Alexander I. Heckman, Esq.	-	Non-Public Arbitrator

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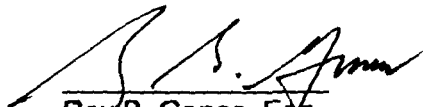
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FILED  
FEB 2 2007  
CJ