

9710110

AWARD

NASD Regulation, Incorporated Office of Dispute Resolution

In the Matter of Arbitration Between

Lawrence D. Ryan,

Claimant,

and

No. 96-04403

Merrill Lynch, Pierce, Fenner & Smith Inc., and Merrill
Lynch & Co., Inc. as plan sponsor, plan administrator,
and as named fiduciary for the Merrill Lynch & Co., Inc.
Salary and Benefit Continuation Policy and the Merrill
Lynch & Co., Inc. Health Benefit Plan,

Respondents.

REPRESENTATION OF PARTIES

For Claimant: Lawrence D. Ryan ("Claimant") was represented by Brian E. Martin, Esq. and James W. Collins, Esq. of Bell, Boyd & Lloyd, located in Chicago, Illinois.

For Respondents: Merrill Lynch, Pierce, Fenner & Smith Inc., and Merrill Lynch & Co., Inc. as plan sponsor, plan administrator, and as named fiduciary for the Merrill Lynch & Co., Inc. Salary and Benefit Continuation Policy and the Merrill Lynch & Co., Inc. Health Benefit Plan, (hereinafter collectively referred to as "Respondents"), were represented by William D. Bubb, Esq. of Merrill Lynch, Pierce, Fenner & Smith, Inc., located in New York, New York.

CASE INFORMATION

Claimant's Statement of Claim was filed on: October 3, 1996.

Claimant's Submission Agreement was signed on: September 30, 1996.

Respondents' Statement of Answer was filed on: February 8, 1997.

Respondents' Submission Agreement was signed on: January 27, 1997 by Terry Kassel, First Vice President of Merrill Lynch & Co., Inc.

HEARING INFORMATION

Pre-hearing conferences: None.

Hearing dates/sessions: August 26, 1997 for two (2) sessions; and
August 27, 1997 for three (3) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant brought this action to recover damages allegedly suffered from Respondents' failure to pay his yearly bonus and for Respondents' failure to pay benefits under a severance plan. According to Claimant, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") employed him from 1990 until February 15, 1996, when his employment with Merrill Lynch was summarily terminated without cause. Claimant stated that he was a "participant" in a health plan during his employment by Merrill Lynch and is now a "participant" in a severance plan as that term is defined in § 3(7) of ERISA, 29 U.S.C. § 1002(7). Claimant asserted that Merrill Lynch informed him through his attorneys, that he would be entitled to receive his bonus of at least \$300,000 for the 1995 calendar year provided he was employed on January 31, 1996, the date such bonus was payable. Claimant maintained that he was employed by Merrill Lynch on January 31, 1996. Claimant asserted the following claims: (1) breach of employment agreement; (2) breach of duty to pay him his special payment benefits under the severance plan pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which are equal to, and in lieu of, the bonus an employee would otherwise have received had severance not occurred prior to the bonus payment date, and which is brought as an alternative to the first claim; (3) breach of duty to pay him 14 weeks of compensation and benefits in violation of ERISA and the severance plan pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); (4) breach of fiduciary duty for failure to satisfy the reporting and disclosure requirements of Title I of ERISA, failure to administer the plans in accordance with their terms, and failure to act in its fiduciary capacity solely in the interest of participants and beneficiaries of the plan pursuant to §§ 502(a)(2) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(2) and 1132(1)(3); (5) estoppel resulting from Claimant's reasonable reliance upon Merrill Lynch's representations not knowing of their falsity, which thereby induced him to accept the position of managing the Chicago JX office; and (6) breach of terms of the deferred compensation plan for closing his Merrill Lynch deferred compensation plan account without his permission, and withholding \$37,602 for payment of income taxes, and assessing various other charges against his account and paying him \$83,700 of the remaining account balance, which had been approximately \$126,000.

9776110

Respondents denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on their part. Respondents stated that Claimant was fully informed of what needed to be accomplished with the Chicago commodities office he managed, as well as the importance of making the operation there profitable. Respondents further contended that Claimant was not promised any bonuses and knew that bonuses were discretionary. However, according to Respondents, Claimant was informed that if the Chicago office he managed became profitable, he may receive a bonus. Respondents asserted that during Claimant's tenure as manager of the Chicago commodities operation, the operation did not improve in any material way. Respondents further contended that Merrill Lynch has the right under the deferred compensation plan to make a lump sum payment to discharged employees. As affirmative defenses, Respondents asserted that Claimant's first claim for relief is barred by the Statute of Frauds, and that Claimant has failed to state a claim upon which relief may be granted.

RELIEF REQUESTED

Claimant requested an award for the following damages:

1. An amount of not less than \$300,000 for the bonus payable by Merrill Lynch, or otherwise compelling Merrill Lynch to pay him his full accrued bonus in accordance with the terms of his agreement with Merrill Lynch; in the alternative, in an amount of not less than \$300,000 as compensatory damages equivalent to the amount of the benefits payable to him as a special payment under the severance plan, or otherwise compelling Respondents to pay him his full severance plan benefits;
2. An order compelling Respondents to pay him additional benefits under the severance plan in an amount equal to 14 weeks severance pay at the rate of his average annual compensation for the prior three years (or \$114,423.08);
3. An amount of compensatory damages equivalent to the amount of the benefits payable to him under the severance plan, which benefits have a lump sum present value of at least \$414,423.08 as of February 15, 1996, or otherwise compelling Respondents to pay him his full benefits under the severance plan;
4. An amount of compensatory damages in excess of \$40,000 for the breach of Merrill Lynch's obligations under the deferred compensation plan; directing Respondents to satisfy the reporting and disclosure requirements of ERISA with respect to Claimant;

5. Coverage under the health plan until such time as he is no longer eligible for such coverage under the terms of the health plan or ERISA;
6. Pre-judgment interest on all amounts due and owing from January 31, 1996 until the date of the award;
7. Costs and expenses he has incurred in prosecuting this action;
8. Reasonable attorneys' fees he has incurred in prosecuting this action; and
9. Punitive damages of at least \$100,000.

Respondents requested that the claim asserted against them be dismissed.

OTHER ISSUES CONSIDERED AND DECIDED

By agreement, the Claimant amended the claim to substitute Merrill Lynch & Co., Inc. for Merrill Lynch, Pierce, Fenner & Smith Inc. relating to allegations against the plan sponsor, plan administrator, and/or named fiduciary of the Severance Plan and the Health Plan. Pursuant to the parties agreement, Merrill Lynch & Co., Inc., a non-member of the NASD, voluntarily submitted to arbitration before the NASD Regulation, Inc., Office of Dispute Resolution.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD Regulation, Incorporated Office of Dispute Resolution.

AWARD

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

1. Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch & Co., Inc are jointly and severally liable for and shall pay to Claimant Lawrence D. Ryan compensatory damages of \$300,000.00, plus interest thereon accruing at the rate of 9% per annum from March 1, 1996 until said amount is paid in full;

2. In addition, Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch & Co., Inc. are jointly and severally liable for and shall pay to Claimant Lawrence D. Ryan the sum of \$40,000.00 for attorney fees. In deciding to award attorneys' fees, the panel considered the arguments of the parties and determined that authority existed for an award of attorneys' fees to the Claimant;

3. Furthermore, Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch & Co., Inc. are jointly and severally liable for and shall pay Claimant punitive damages in the sum of \$75,000.00. In deciding to award punitive damages, the panel considered the arguments presented by the parties, as well as the evidence presented, and determined that authority existed for an award of punitive damages to the Claimant, Lawrence D. Ryan;

4. Any further costs of arbitration, including any additional attorneys' fees, shall be borne by the party incurring the cost, except for those specifically enumerated in this award; ~~awarded, considered and decided.~~

5. Any relief not specifically awarded is hereby denied;

FORUM FEES

Pursuant to §10205(b) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: Five (5) hearing sessions x \$1,000.00 per session = \$5,000.00.

Pursuant to §10205(c) of the Code, the NASD Regulation, Inc., Office of Dispute Resolution shall retain the non-refundable filing fee of \$500.00 and shall retain as forum fees the hearing session deposit of \$1,000.00 previously deposited with the NASD Regulation, Inc., Office of Dispute Resolution by Claimant Lawrence D. Ryan. Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch & Co., Inc. are jointly and severally liable for and shall pay the NASD Regulation, Inc., Office of Dispute Resolution forum fees of \$4,000.00 (= \$5,000.00 total forum fees - \$1,000.00 hearing session deposit by Claimant).

Respondents Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch & Co., Inc. are jointly and severally liable for and shall pay to Claimant Lawrence D. Ryan the sum of \$1,000.00 as reimbursement of the hearing session deposit paid by Claimant.

Pursuant to §10333 of the Code, the NASD Regulation, Inc., Office of Dispute Resolution shall retain the non-refundable member surcharge of \$500.00 previously deposited with the NASD

NASD Arbitration No. 96-04403

Award Page 6 of 6

Regulation, Inc., Office of Dispute Resolution by Merrill Lynch, Pierce, Fenner & Smith Inc.

Respondent Merrill Lynch, Pierce, Fenner & Smith Inc. is liable for and shall pay the NASD Regulation, Inc., Office of Dispute Resolution postponement fees of \$1,000.00.

Fees are payable to the NASD Regulation, Incorporated Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Marc B. Horin
Marc B. Horin
Chairperson
Industry Arbitrator

October 8, 1997
Dated:

/s/ William M. Bayuk
William M. Bayuk
Industry Arbitrator

October 11, 1997
Dated:

/s/ Robert L. Sanders
Robert L. Sanders
Industry Arbitrator

October 8, 1997
Dated:

For NASD use only:

Date Award was served on the parties: October 20, 1997