

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
John Michael Palombo

Case Number: 20-01175

vs.

Respondent
Merrill Lynch, Pierce, Fenner & Smith Inc.

Hearing Site: Houston, Texas

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Associated Person vs. Member

This matter was decided by an all-public panel pursuant to Rule 13802 of the Code of Arbitration Procedure (“Code”).

The evidentiary hearing was conducted partially by videoconference.

REPRESENTATION OF PARTIES

For Claimant John Michael Palombo (“Claimant”): Michelle Atlas-Quinn, Esq. and Benjamin Winograd, Esq., AdvisorLaw LLC, Westminster, Colorado.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc. (“Respondent”): Rima F. Hartman, Esq. and Carole G. Miller, Esq., Bressler, Amery & Ross, P.C., Birmingham, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: April 10, 2020.

Response to Statement of Answer filed on or about: August 11, 2020.

Claimant signed the Submission Agreement: April 9, 2020.

Statement of Answer filed on or about: July 22, 2020.

Counterclaim filed on or about: February 12, 2021.

Respondent signed the Submission Agreement: July 22, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: discrimination, retaliation and hostile work environment, fraud in the inducement, and breach of contract. The causes of action related to Claimant’s allegation that under federal and Texas law, he is a

qualified person with a disability and is part of a protected class as an individual over age 40 and he was discriminated against. Claimant also asserted that Respondent materially misrepresented information to him about its Client Transition Program (“CTP”) and then breached the CTP agreement entered into between Claimant and Respondent (“CTP Agreement”).

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

In the Response to Statement of Answer, Claimant disputed statements in the Statement of Answer and asserted that Claimant’s claims are actionable and that Respondent’s asserted defenses and counterarguments are irrelevant to the issues at hand.

In the Counterclaim, Respondent asserted the following causes of action: breach of contract, breach of duty of loyalty, unjust enrichment, breach of the covenant of good faith and fair dealing, conversion, violation of the Defend Trade Secrets Act (18 U.S.C. § 1836 et. seq.), unfair competition, tortious interference with prospective business relations, violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030), and violation of the Texas Uniform Trade Secrets Act. The causes of action related to the circumstances surrounding Claimant’s departure from his employment with Respondent and allegations that Claimant violated his contractual agreements with Respondent before and after resigning from his employment with Respondent.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested an award of compensatory damages in the amount of \$2,000,000.00, punitive damages in the amount of \$5,000,000.00, attorneys’ fees and costs, and that the CTP Agreement be voided and nullified.

In the Statement of Answer, Respondent requested that Claimant’s claim be denied and that he recover nothing from this proceeding.

In the Response to Statement of Answer, Claimant requested that his requests in the Statement of Claim be granted.

In the Counterclaim, Respondent requested the following relief:

1. An award of \$595,370.39 pursuant to the CTP Agreement, plus interest;
2. Attorneys’ fees, expenses, and costs associated with Respondent’s enforcement of the CTP Agreement, including but not limited to those incurred in connection with the Counterclaim;
3. That Claimant be permanently enjoined from continuing to violate his contractual and legal obligations, by competing and/or using confidential information or trade secrets of Merrill, and required to return to Respondent any such information in his possession, custody, or control;
4. That Claimant be disgorged of any profits, commissions, or other monies earned by him as a result of his unlawful actions, as alleged;
5. Compensation for any monetary losses caused by Claimant’s misconduct; and
6. Additional relief the Panel deems just and appropriate.

At the close of the hearing, Respondent requested \$2,377,558.87, consisting of non-salary CTP payments Claimant received in the amount of \$595,370.39, interest due from November 30, 2020-January 3, 2022 in the amount of \$32,541.48, lost profits in the amount of \$1,400,000.00, plus attorneys' fees and costs in the amount of \$349,647.00.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

The Panel determined that the court reporter's transcript would serve as the official record of the proceeding pursuant to Rule 13606(b)(1) of the Code.

On September 25, 2020, Respondent filed a Partial Motion to Dismiss pursuant to Rule 13504 of the Code ("Motion to Dismiss"). On October 21, 2020, Claimant filed a Response to the Motion to Dismiss. On November 6, 2021, Respondent filed a Reply Brief in Support of the Motion to Dismiss. On December 15, 2020, the Panel heard oral arguments on the Motion to Dismiss. In an Order dated December 16, 2020, the Panel granted the Motion to Dismiss in part on the following grounds:

[T]he [CTP] agreement executed by Claimant on December 1, 2018, constituted, *inter alia*, a valid release of any and all legal claims or causes of action against [Respondent] arising from actions on or before that date. As to Claimant's arguments that the CTP is unenforceable due to mutual mistake and/or fraudulent inducement, the Panel finds that Claimant knowingly operated from that date under the CTP and accepted payments in accordance with its terms and conditions. Accordingly, Claimant's actions constituted ratification of the CTP agreement and its provisions. To the extent that Claimant asserts breach of contract in that he has not been fully reimbursed under the terms of the CTP or has any claims for discrimination or retaliation and/or hostile work environment arising after December 1, 2018, those allegations may proceed. Respondent's Motion to Dismiss is granted in all other respects.

On February 12, 2021, Respondent filed a Motion for Leave to Amend Answer Through the Submission of a Statement of Counterclaim ("Motion for Leave"). On February 19, 2021, Claimant filed an Opposition to Respondent's Motion for Leave. On February 23, 2021, Respondent filed a Reply in Support of its Motion for Leave. On March 10, 2021 Claimant filed a Notice of Withdrawal of the Opposition to the Motion for Leave. In an Order dated March 12, 2021, the Panel granted the Motion for Leave.

On April 9, 2021, Respondent filed a Motion to Bar Claimant from Presenting Defenses or Facts to Respondent's Counterclaim ("Motion to Bar"). On April 26, 2021, Claimant filed an Opposition to the Motion to Bar. On May 10, 2021, Respondent filed a Reply in Support of Motion to Bar. In an Order dated May 12, 2021, the Panel denied the Motion to Bar.

On August 25, 2021, Claimant filed a Motion for Reconsideration of the Order on Respondent's Motion to Dismiss ("Motion for Reconsideration"). On September 2, 2021, Respondent filed an Opposition to the Motion for Reconsideration. On September 7, 2021, Claimant filed a Reply in Support of the Motion for Reconsideration. On September 8, 2021, Respondent filed a Sur-

Reply in Further Opposition to the Motion for Reconsideration. In an Order dated September 11, 2021, the Panel denied the Motion for Reconsideration.

Respondent moved to dismiss allegations of discrimination following the conclusion of Claimant's case. Respondent also moved to dismiss Claimant's claims of breach related to the CTP agreement. Respondent argued that Claimant failed to prove any elements of these claims. In addition, Respondent moved for a directed verdict on its Counterclaim for damages. To the extent that Claimant's discrimination claims were before the Panel, the Motion to Dismiss was granted on the record at the hearing. In all other respects, Respondent's motion was denied.

The Award in this matter may be executed in counterpart copies.

AWARD

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

1. Claimant's claims for discrimination, retaliation and hostile work environment, fraud in the inducement, and breach of contract are denied in their entirety.
2. Claimant is liable for and shall pay to Respondent the sum of \$595,370.39 in non-salary compensation under the CTP Agreement, plus \$32,541.48 in interest.
3. Claimant is liable for and shall pay to Respondent the sum of \$696,000.00 in lost profits from breach of the CTP Agreement non-compete provision.
4. Claimant is liable for and shall pay to Respondent the sum of \$115,383.51 in attorneys' fees pursuant to Texas Civil Practice and Remedies Code § 38.001.
5. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and treble damages are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	= \$	2,250.00
Counterclaim Filing Fee	= \$	2,550.00

**The filing fee is made up of a non-refundable and a refundable portion.*

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, as a party, Respondent is assessed the following:

Member Surcharge	= \$	3,600.00
Member Process Fee	= \$	6,800.00

Late Pre-hearing Cancellation Fees

Fees apply when a pre-hearing conference is cancelled within three business days of the scheduled conference:

March 15, 2021, cancellation requested by Claimant	= \$	300.00
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Total Late Pre-Hearing Cancellation Fees	= \$	300.00

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees to Claimant.

The Panel has assessed \$150.00 of the late pre-hearing cancellation fees to Respondent.

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

October 4-8, 2021, postponement requested by Claimant	Waived
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Discovery-Related Motion Fees

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with three (3) Arbitrators @ \$600.00/decision	= \$	600.00
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Non-Party submitted one (1) discovery-related motion

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Total Discovery-Related Motion Fees	= \$	600.00

The Panel has assessed the total discovery-related motion fees to Claimant.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator(s), including a pre-hearing conference with the Arbitrator(s), which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with the Panel @ \$1,500.00/session	= \$	3,000.00
Pre-hearing Conferences: August 25, 2020	1 session	
December 15, 2020	1 session	
Five (5) hearing sessions @ \$1,500.00/session	= \$	7,500.00
Hearing Dates: November 30, 2021	2 sessions	
December 1, 2021	2 sessions	

December 2, 2021

1 session

Total Hearing Session Fees = \$ 10,500.00

The Panel has assessed \$5,250.00 of the hearing session fees to Claimant.

The Panel has assessed \$5,250.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Daniel J. Pagnano	-	Public Arbitrator, Presiding Chairperson
G. Maynard Green	-	Public Arbitrator
Brian James Tagtmeier	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Daniel J. Pagnano

Daniel J. Pagnano
Public Arbitrator, Presiding Chairperson

12/16/2021

Signature Date

G. Maynard Green

G. Maynard Green
Public Arbitrator

12/15/2021

Signature Date

Brian James Tagtmeier

Brian James Tagtmeier
Public Arbitrator

12/16/2021

Signature Date

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December 16, 2021

Date of Service (For FINRA Dispute Resolution Services use only)