UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,	)	
Petitioner,	)	
v.	)	No. _____
TAMARA SMOLCHEK and MERI RAMAZIO,	)	
Respondents.	)	

PETITION TO VACATE ARBITRATION AWARD

Pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") moves to vacate the arbitration award issued in *Tamara Smolchek and Meri Ramazio v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, FINRA Case No. 10-04432, and in support states as follows:[1]

THE PARTIES

1. Petitioner Merrill Lynch is organized under the laws of Delaware and is headquartered in New York. Merrill Lynch is one of the world's premier providers of wealth management, securities trading and sales, corporate finance and investment banking services. Merrill Lynch is a member of the Financial Industry Regulatory Authority ("FINRA").

[1] Merrill Lynch reserves the right to amend this petition and file further supporting declarations and a memorandum in support of this petition within 14 days of receipt of the complete transcripts of the arbitration hearing. Merrill Lynch has requested those transcripts.

2. Respondents Tamara Smolchek and Meri Ramazio ("Claimants") are former employees of Merrill Lynch who reside in Palm Beach County, Florida and thus are citizens of the State of Florida.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this petition pursuant to 28 U.S.C. § 1332(a)(1) because the parties are citizens of different States and the amount in controversy, exclusive of interest and costs is greater than $75,000, and pursuant to 9 U.S.C. § 10.

4. This Court has jurisdiction over Ms. Smolchek and Ms. Ramazio because they are citizens and residents of the State of Florida and received an arbitration award pursuant to an arbitration proceeding that took place in Boca Raton, Florida.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(1) and (c).

INTRODUCTION

6. Ms. Smolchek and Ms. Ramazio are former Merrill Lynch financial advisors who brought claims in arbitration against Merrill Lynch under FINRA's Code of Arbitration Procedure for Industry Disputes approximately two years after they voluntarily resigned their employment with Merrill Lynch to join one of its competitors. They sought damages based on contractual theories, claiming that they were entitled to immediate vesting and payment of unvested awards under the "Good Reason" provisions of certain long-term contingent compensation plans. They also sought damages for purported losses to their business, injury to their reputation, and mental anguish based on various tort theories. After a 17-day arbitration hearing, a three-member arbitration panel entered an award finding in favor of Claimants and awarding $10,250,000 in damages.

7. Although arbitrators are afforded wide deference in conducting arbitration hearings and those hearings need not adhere to the same procedural and evidentiary formalities as judicial proceedings, an arbitration proceeding must be conducted in a fashion that is fundamentally fair to all parties involved. For multiple reasons, Merrill Lynch was deprived of the fundamentally fair hearing the law requires. Three separate statutory grounds warrant vacatur of the arbitration award pursuant to Section 10 of the FAA.

8. ***First***, the arbitration award should be vacated under Section 10(a)(2) because there was "evident partiality" on the part of the chair of the arbitration panel that entered the award. 9 U.S.C. § 10(a)(2) (authorizing district court to vacate arbitration award "where there was evident partiality … in the arbitrators"). Evident partiality exists when an "arbitrator knows of, but fails to, disclose information that would lead a reasonable person to believe that a potential conflict exists" or would "create a reasonable impression of partiality." *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002). The panel chair here failed to disclose facts that reasonably would create an appearance of partiality or bias. And, throughout the course of the proceedings, the panel chair demonstrated overt hostility toward Merrill Lynch. When viewed together with her failure to disclose information suggesting possible bias and partiality, the panel chair's conduct, comments and rulings—including rulings precluding Merrill Lynch from introducing relevant evidence critical to its defense—create further support for a finding of "evident partiality" as a basis to vacate the award.

9. ***Second***, the arbitration award should be vacated under Section 10(a)(3) because the "arbitrators were guilty of misconduct in ... in refusing to hear evidence pertinent and material to the controversy [and] other misbehavior … by which the rights of [Merrill Lynch] were prejudiced." 10 U.S.C. § 10(a)(3). The panel made numerous rulings that unfairly prejudiced

Merrill Lynch—including rulings that prohibited Merrill Lynch from introducing relevant and non-cumulative evidence crucial to its defense, imposing sanctions precluding Merrill Lynch's from participating in the hearing during Claimants' counsel's examination of a key witness (a Merrill Lynch employee), sanctioning Merrill Lynch for violating supposed prohibitions that did not appear in the panel's orders, repeatedly threatening Merrill Lynch with sanctions if its counsel persisted in engaging in conduct necessary and appropriate to present Merrill Lynch's defense, and imposing severe limits on Merrill Lynch's presentation of its case that were not similarly imposed on Claimants. In short, Merrill Lynch did not receive a fair hearing.

10. ***Third***, the sanctions imposed on Merrill Lynch should be vacated under Section 10(a)(4) because the arbitrators "exceeded their powers" in imposing sanctions without affording Merrill Lynch the required notice or any meaningful opportunity to be heard. An arbitration panel may not award relief that no court could issue or violate the rules of the agreed-upon arbitral forum because such actions are outside the scope of what a contracting party reasonably would expect. Rather, the United States Supreme Court has made clear that arbitrators may not "stray[ ] from interpretation and application of the agreement and effectively dispense[] [their] own brand of industrial justice" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (citation and internal quotation marks omitted, certain alterations in original). When an arbitration panel acts in excess of its authority, its "decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for an arbitrator's task is to interpret and enforce a contract, not to make public policy. *Id.* (vacating arbitration award where "what the arbitration panel did was simply impose its own view of sound policy").

FACTUAL AND PROCEDURAL BACKGROUND

A. The Arbitration Claim

11. On October 1, 2010, more than two years after their resignations from Merrill Lynch, Claimants filed an arbitration claim with FINRA. (The Statement of Claim is attached as Exhibit 1 to the Declaration of Peter W. Homer ("Homer Decl.") filed herewith). Claimants demanded immediate vesting and payment of unvested awards under long-term contingent incentive compensation plans—the Financial Advisor Capital Accumulation Award Plan, the Merrill Lynch Growth Award Plan for Financial Advisors, and the Wealthbuilder Account Plan For a Select Group of Eligible Employees (collectively the "Plans"). According to Claimants, they were entitled to those awards because they had resigned their employment with Merrill Lynch for "Good Reason," as that term is defined in the Plans, following a "Change in Control" of Merrill Lynch.

12. The Plans' expressly stated purpose is to promote the retention of Merrill Lynch Financial Advisors by incentivizing them with awards that do not vest for several years. Accordingly, contingent compensation awards made pursuant to the Plans are subject to specific vesting periods of three to eight years. Apart from limited exceptions (death, disability or retirement), such awards are cancelled unless the participant remains continually employed by Merrill Lynch for the entire vesting period. Under an exception to the general vesting and cancellation rules, contingent awards are subject to accelerated vesting if an employee resigns "for Good Reason" "following a Change in Control."

13. Claimants alleged that they were entitled to immediate vesting and payment of 100% of their awards because they resigned on November 28, 2008 for "Good Reason" following the announcement of the merger between Merrill Lynch and Bank of America.

Claimants also sought damages for economic harm, reputational injuries, and mental anguish under a variety of tort theories.

14. Merrill Lynch filed its answer and affirmative defenses on December 1, 2010. (The Answer is attached to the Homer Decl. as Exhibit 2). In the Answer, Merrill Lynch denied the asserted claims on the grounds that: (1) Merrill Lynch implemented no changes prior to Claimants' November 28, 2008 resignations that could be deemed "Good Reason," as defined in the Plans; (2) the changes to Merrill Lynch's compensation program implemented in 2009 after Claimants' resignations did not constitute "Good Reason"; (3) Claimants did not resign "for Good Reason," but rather to accept what they believed to be more lucrative opportunities, including larger up-front payments, with Morgan Stanley; and (4) Claimants' tort-based claims were without merit.

15. The parties submitted to FINRA arbitration.

16. The hearing commenced on January 23, 2012, and ended after 17 hearing days on March 15, 2012.

B. Arbitrator Selection And The Panel Chairperson's Violation Of Her Disclosure Obligations

17. As required by FINRA's Code of Arbitration Procedure, FINRA provided a list of proposed arbitrators to both Merrill Lynch and Claimants. The proposed arbitrator list included the names and background on 30 potential arbitrators, their initial disclosures, and a list of their past FINRA awards. The parties were asked to rank the proposed arbitrators as specified by FINRA Code of Arbitration Procedure for Industry Disputes and were permitted to strike up to four individuals on the list of proposed public arbitrators, up to four individuals on the list of proposed non-public arbitrators, and up to four individuals on the list of proposed chairs.

18. After the parties submitted their rankings and strikes, FINRA appointed Bonnie Pearce and Fred Abramoff as the public arbitrators, and Harriett Kottick as the non-public arbitrator. Ms. Pearce was appointed by FINRA to be chair of the Panel. None of the members of the Panel is a lawyer.

19. Pursuant to FINRA Rule 13408, an arbitrator must disclose "any circumstances which might preclude him or her from rendering an objective and impartial determination in the proceeding" including:

> (2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are ***likely to affect impartiality or might reasonably create an appearance of partiality or bias***; (3) Any such relationship or circumstances involving members of the ***arbitrator's family*** or the arbitrator's current employers, partners, or business associates.

FINRA Rule 13408(a)(2) & (3) (emphasis added); *see also* ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon II (A)(2) (Persons who are requested to serve as arbitrators should ... disclose: ... (2) Any known existing or past financial, business, professional or *personal relationships* which *might reasonably affect impartiality or lack of independence in the eyes of any of the parties*. ... They should also disclose any such relationships involving their *families or household members* or their current employers, partners, or professional or business associates *that can be ascertained by reasonable efforts*.") (emphasis added). The FINRA Arbitrator's Manual emphasizes the importance of making the required disclosure, stating: "Aside from an actual conflict of interest, even the appearance of a conflict might render a decision suspect. It cannot be emphasized enough that arbitrators must be free in fact and in appearance from all bias and prejudice."

20. Ms. Pearce submitted an Arbitrator Disclosure Report to FINRA, which FINRA, in turn, provided to Merrill Lynch and Claimants as part of the arbitrator selection process. In the

"conflict/disclosure" section of her Report, Ms. Pearce stated that she currently had accounts with Citigroup Global Markets and Smith Barney Harris Upham, Inc. (and thus a related conflict with Morgan Stanley & Co. and Morgan Stanley Brokerage due to mergers or acquisitions) and once had an account with Merrill Lynch. She also indicated that her husband was a securities lawyer employed by Robert Wayne Pearce, PA and that Amex Financial Advisors, Asset Management Securities Corp. and Biltmore Securities were former clients of her husband. (Ms. Pearce's Arbitration Disclosure Report is attached to the Homer Decl. as Exhibit 3).

21. Ms. Pearce later filed a second disclosure, which stated that "my husband is a securities attorney. As he does not discuss any of his cases with me, I am unaware of the issues he has been/is involved in." This disclosure was provided to Merrill Lynch and Claimants after the initial arbitrator selection process. (Ms. Pearce's second disclosure is attached to the Homer Decl. as Exhibit 4).

22. At the start of the arbitration hearing (and immediately before asking if anyone was aware of any potential conflict of interest or objection to the Panel), Ms. Pearce affirmed that she had "no additional disclosures." (Transcript of January 23, 2012 Hearing at p. 5, lines 1-2, a copy of which is attached to the Homer Decl. as Exhibit 5). Ms. Pearce also remarked that she was bound by Canon I of the ABA Code of Ethics for Commercial Arbitrations.

23. After the hearings began, Merrill Lynch learned that Ms. Pearce's disclosure did not comply with FINRA's Rules or the ABA Code of Ethics for Arbitrators in Commercial Disputes because she failed to disclose information that would create a reasonable impression of partiality.

24. More specifically, Ms. Pearce did not disclose that her husband has represented clients *adverse* to Merrill Lynch and that his "securities law" practice focuses on the

representation of *individuals* in actions brought against financial services institutions. In fact, Ms. Pearce's Arbitrator Disclosure Report suggested just the opposite—that her husband primarily represents financial services institutions—because the only former clients of Mr. Pearce listed in Ms. Pearce's Arbitrator Disclosure Report are institutional clients (Amex Financial Advisors, Asset Management Securities Corp. and Biltmore Securities).

25. Mr. Pearce not only has represented clients adverse to Merrill Lynch, but he has expressed personal animosity toward the company. In an interview with the PALM BEACH POST, Mr. Pearce identified a case he filed against Merrill Lynch, *Gary Friedman, et al. v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Dispute Resolution, Case No. 03-06176 (Boca Raton, Fla.), which resulted in a "$1 million-plus" award, as his career "highlight." As far as Merrill Lynch was concerned, he stated: "Putting them [Merrill Lynch] down the way I did was a highlight in my career. This was most gratifying, not so much in terms of numbers—I've had bigger settlements—just the attitude on the other side of the table made this a sweet victory." Robert Wayne Pearce, PALM BEACH POST, May 2, 2005, at 9F (Inside Local Business), 2005 WLNR 6995153. (The article is attached to the Homer Decl. as Exhibit 6).

26. After Merrill Lynch learned about the nature of Mr. Pearce's practice, it undertook an independent investigation (which the law does not require) and discovered that he had represented clients (financial advisors or customers) adverse to Merrill Lynch in at least four matters in addition to the *Friedman* case cited in the previous paragraph.

27. Mr. Pearce's representation of clients adverse Merrill Lynch, and his regular representation of clients adverse to other financial services institutions, is exactly the type of relationship that would create a potential for bias and a reasonable impression of partiality, which FINRA Rule 13408 expressly requires a potential arbitrator to disclose. If Ms. Pearce had

disclosed this information, Merrill Lynch would have stricken Ms. Pearce as an arbitrator during the arbitrator selection process. None of this information, however, was disclosed.

28. Ms. Pearce's failure to disclose information about her husband's law practice is not excused by the fact that she claims that she does not "discuss any of his cases" with him, as she asserted in her second disclosure. (*See* Homer Decl. Exh. 4).[2] The need for disclosure is viewed from the party's perspective, not from the perspective of the arbitrators. Prospective arbitrators are required to make "reasonable efforts" to inform themselves of relationships and interests, including those involving their immediate family, that "might reasonably affect impartiality or lack of of independence in the eyes of any of the parties." ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon II (A)(2). Once this is done, disclosures must be made when, "in the eyes of the parties," there is an interest or relationship that might affect the independence or raise concerns about partiality. Moreover, there is every reason to believe that Ms. Pearce was aware of her husband's views on Merrill Lynch, particularly given the statements attributed to him in THE PALM BEACH POST.

29. Immediately after learning about Ms. Pearce's failure to make the required disclosures, Merrill Lynch wrote to FINRA's Director of Arbitration and asked that Ms. Pearce be removed from the arbitration panel pursuant to FINRA Rules 13410(b) and 13408, which authorize the Director of Arbitrations to remove a panel member after the hearing has commenced when it is discovered that the panel member failed to make the required disclosures. (Merrill Lynch's letter is attached to the Homer Decl. as Exhibit 7). The Director referred the matter to the local FINRA staff in the Southeast Regional Office, which denied the request.

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[2] Significantly, she did not claim that she does not discuss her FINRA arbitrations with her husband.

C. The Arbitration Hearing

30. Several of the rulings Ms. Pearce made during the course of the proceedings provide additional support for her "evident partiality" and underscore why Merrill Lynch did not receive a fair hearing.

1. The Panel Chair Allows Claimants' Counsel To Take Possession Of Merrill Lynch's Privileged Documents

31. On Friday, January 20, 2012—the business day before the first day of the hearing—Ms. Pearce entered an order requiring Merrill Lynch to bring to the hearing certain categories of documents in hard copy, together with an index of the documents. The order also instructed Merrill Lynch to identify and segregate the documents it considered to be privileged. The order expressly stated that Merrill Lynch was to provide the documents for the Panel's review. Merrill Lynch complied with the order and arranged for approximately 27 boxes of documents to be brought to the hearing. Approximately 12 boxes contained documents that had been identified as containing one or more "search" terms,[3] but after review were identified as not responsive to Claimants' request for production of documents. Because the order expressly stated that documents were being provided for *the Panel's review,* Merrill Lynch did not expect that the documents would be turned over to Claimants' counsel until the Panel reviewed the documents and resolved pending discovery disputes.

32. On the second day of the hearing and without first conducting a review, Ms. Pearce ruled that Claimants' counsel could take physical possession of all of the boxes containing non-responsive documents and allowed Claimants' counsel to remove the documents from the hearing room and take them to their hotel room. Claimants' counsel immediately transported the

[3] Broad search terms had been identified by Claimants' counsel, and the Panel had directed Merrill Lynch to use those terms in conducting searches for electronically-stored information.

documents to their hotel. Later that day, Merrill Lynch's counsel learned that the non-responsive documents (which Merrill Lynch was required to assemble over the weekend before trial) had not been reviewed for privilege and that the boxes the Panel allowed Claimant's counsel to take into their possession likely contained privileged documents. Accordingly, Merrill Lynch asked Ms. Pearce to order Claimants' counsel to return the documents to the hearing room. Ms. Pearce denied Merrill Lynch's request. When Merrill Lynch pointed out that Claimants' counsel was in possession of Merrill Lynch's privileged documents, Ms. Pearce responded that the solution would be for Claimants' counsel to return any privileged documents they might come across.[4] In short, Ms. Pearce authorized *Claimants' counsel* to review the documents and determine whether a privilege was applicable.

33. Claimants' counsel ultimately had possession of the boxes containing Merrill Lynch's privileged documents for approximately 24-hours after Merrill Lynch's counsel alerted the Panel to the privilege issue before being directed to return them to the hearing room.

34. It was later discovered that Claimants' counsel had not complied with the order to return all the documents to FINRA and had retained Merrill Lynch's documents, several of which were privileged, for nearly 10 days over the course of a recess in the hearing. Ms. Pearce did not admonish Claimants' counsel, but instead simply asked them to return the documents to the care of the Panel.

[4] Several of the documents included in the boxes given to Claimants' counsel already had been adjudicated as privileged. *Newman and Potter v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, FINRA Arb. No. 10-00393; *Chambers v. Merrill Lynch & Co., Inc*, No. 10-cv-07109 (S.D.N.Y.).

2. The Panel Chair Enters Sanctions Precluding Merrill Lynch's Counsel From Participating In The Hearing

35. In a series of discovery orders entered on the second day of the hearing, Ms. Pearce directed Merrill Lynch to, among other things, supplement the index of the documents ordered to be brought to the hearing (see above) by 9:00 a.m. the next day by creating detailed privilege logs. Working around the clock, Merrill Lynch and its counsel complied with several of the panel's orders, but did not have time to convert the indices of documents into privilege logs in the short time provided.

36. The next day, during a break in the testimony of a Merrill Lynch employee called to the stand by Claimants' counsel, Ms. Pearce ordered that until the privilege logs arrived, Merrill Lynch's counsel would be precluded from participating in the hearing—that is, although they could attend, they could not examine witnesses or interpose objections. Put differently, Ms. Pearce ordered that a Merrill Lynch witness had to continue to undergo questioning by Claimants' counsel without the benefit of legal representation based on a failure to convert an index of over 1,000 documents into a privilege log. Ms. Pearce further ordered that Merrill Lynch would be sanctioned in the amount of $1,000 for every hour that passed before delivery of the logs. Over Merrill Lynch's objections, Claimants' counsel then recalled to the witness stand the Merrill Lynch employee who Claimants' counsel himself had identified as a "critical" witness. When Merrill Lynch's counsel asked if the witness examination could be deferred until the logs arrived—so that a key Merrill Lynch employee would not be examined while Merrill Lynch was without legal representation[5]—Ms. Pearce admonished Merrill Lynch's counsel that if he continued to object or seek any continuance, she would consider imposing the ultimate

[5] FINRA Rule 13208(b) provides that "[a]t any stage of an arbitration proceeding ..., all parties shall have the right to be represented by an attorney."

sanction and strike Merrill Lynch's defenses. The sanctions were not lifted until Merrill Lynch delivered the logs. Merrill Lynch then was forced to defend the action under the continued threat of unwarranted sanctions through the remainder of the proceedings.

3. The Panel Chair Sanctions Merrill Lynch And Significantly Limits Its Cross-Examination of Claimants

37. In her Statement of Claim, Ms. Smolchek sought damages based on purported personal injuries she alleged were caused by Merrill Lynch's conduct. Because Ms. Smolchek put her medical condition at issue, Merrill Lynch sought discovery of her medical records. In turn, Ms. Smolchek provided records in response to Merrill Lynch's requests and also signed medical information release authorization forms authorizing certain of her physicians, including Dr. Jodi Starr (her treating psychiatrist), to provide records to Merrill Lynch.

38. Pursuant to Ms. Smolchek's signed release, Dr. Starr produced medical records to Merrill Lynch's counsel. Copies of all of the records Dr. Starr produced were provided to Claimants' counsel.

39. Among the records Dr. Starr produced was a document dated November 12, 2008 and entitled "Psychopharmacology Follow-up." The document relates to a visit that Ms. Smolchek had with her doctor on that date, and it contains notes indicating that Ms. Smolchek told Dr. Starr that she was "transferring to Morgan Stanley from Merrill Lynch" and was "resigning on 11/21/08."

40. At the hearing, both Claimants testified on direct examination that they did not decide to leave Merrill Lynch to join Morgan Stanley until November 28, 2008—the day they resigned. Claimants alleged that proposed office relocations communicated to them on November 26, 2008 were the reason for their decision to resign and they claimed that this constituted "Good Reason" under the Plans.

41. Early in his cross-examination of Ms. Smolchek, Merrill Lynch's counsel attempted to impeach her assertion that she did not decide to resign until November 28, 2008, specifically asking whether she actually had made her decision before November 21, 2008, (as indicated in Dr. Starr's notes). Ms. Smolchek responded that she had not. [6]

42. Because Dr. Starr's contemporaneous handwritten notes directly contradicted Ms. Smolchek's assertions about the timing of her decision to resign, Merrill Lynch's counsel attempted to use a redacted copy of Dr. Starr's notes for impeachment. The redacted document included only Ms. Smolchek's statement regarding her decision to leave Merrill Lynch to join Morgan Stanley on November 21, 2008, the title and date of the document, and Dr. Starr's signature. It did *not* contain any medical information.

43. Ms. Pearce—on her own initiative, and not in response to an objection by Claimants' counsel—abruptly stopped the hearing and ordered the panel into executive session. She would not allow Merrill Lynch's counsel to explain the relevance of the document or explain that all medical information had been redacted. She then ordered everyone to leave the hearing room.

44. After an approximate 40 minutes recess, Ms. Pearce directed the parties and counsel to return to the hearing room. Rather than simply ruling on the admissibility of the redacted document, without giving Merrill Lynch's counsel advance notice or a meaningful opportunity to speak, Ms. Pearce imposed sanctions on Merrill Lynch for failing to comply with supposed prior orders prohibiting the introduction of medical records—but without identifying the orders Merrill Lynch supposedly had violated. Ms. Pearce again refused to hear argument

[6] The timing of Claimants' negotiations with Morgan Stanley and the timing of their decisions to resign were relevant to Merrill Lynch's defense that Claimants did not resign "for Good Reason."

about the impeachment value of the document, the redacted nature of the document or concerning the propriety of sanctions. Indeed, she went so far as to direct Claimants' counsel to turn off the tape-recording of the hearing while Merrill Lynch's counsel was speaking.

45. As a sanction, the Panel ordered Merrill Lynch to pay Ms. Smolchek $10,000 by noon the following day, and further ordered that its defenses would be stricken if it did not do so. As a further sanction, Merrill Lynch was precluded from completing its cross-examination of Ms. Smolchek and she was excused as a witness. (The written order memorializing the sanctions imposed at the hearing is attached to the Homer Decl. as Exhibit 8).

46. Merrill Lynch paid the sanctions under protest and filed a motion for reconsideration the day after the sanctions were imposed. (The motion for reconsideration is attached to the Homer Decl. as Exhibit 9).

47. The Panel denied the motion, citing Merrill Lynch's purported "clear[ ] and blatant[ ] violat[ion] ... of clear and unequivocal Orders regarding the injection of medical records into this arbitration whatsoever." (The order is attached to Homer Decl. as Exhibit 10). However, no such order providing that medical record documents could not be used at the hearing—let alone a clear or unequivocal one—had been entered. Apparently, the Panel was referring to an oral statement made in connection with a pre-hearing telephone conference on discovery motions, including Merrill Lynch's motion to compel an independent medical examination ("IME") of Ms. Smolchek because she had put her medical condition at issue by alleging that she sustained personal injuries and disabilities as a result of Merrill Lynch's conduct. When denying Merrill Lynch's request for an IME, Ms. Pearce said something to the effect of "we are not going to go there" (referring to Ms. Smolchek's medical condition) and that she (the Panel Chair) was not comfortable assessing medical issues. That statement, however,

did not provide clear notice that medical records could not be used at the hearing, particularly when Ms. Smolchek signed an authorization for disclosure of these records and they were properly obtained in discovery. And, more fundamentally, nothing in the document Merrill Lynch sought to use solely for impeachment purposes related to Ms. Smolchek's medical condition; indeed, all such information had been redacted.

48. Prior to the testimony of the Claimants, the Panel "clarified" the scope of its previous ruling on the introduction of evidence of Ms. Smolchek's medical condition. The Chair stated, "[W]e will not allow any probing into medical diagnoses of either of claimant—or of the other witnesses, for that matter, because we are not, we are not physicians." (Transcript of Hearing February 13, 2012 at p. 20, line 11 to p. 25 line 10, a copy of which is attached to the Homer Decl. as Exhibit 11). The Panel Chair went on to say that the scope of permissible examination was not clear and that "we are going to have to test the waters here." (*Id.*) The Panel Chair recognized that the examination would need to be conducted on a "question-by-question basis," and that the permissible scope of the examination was not "black and white" but rather a "very gray area." (*Id.*).

49. Contrary to the Panel Chair's later efforts to characterize the prior orders as covering any and all records that happened to be contained within the files of Ms. Smolchek's medical providers, her "clarification" of that ruling demonstrated that it was not so encompassing. Nothing in the redacted page of notes that Merrill Lynch attempted to introduce was within the scope of the prior order, and the Chair's view of that prior ruling is a clear example of evident partiality that prejudiced Merrill Lynch's ability to receive a fair hearing.

50. In its order denying Merrill Lynch's reconsideration motion, the Panel modified its sanction prohibiting further cross examination of Ms. Smolchek and provided Merrill Lynch further time to cross-examine Ms. Smolchek—but limited that time to only two hours.

4. The Panel Chair Precluded Merrill Lynch's From Introducing Evidence In Defense Of Claimants' Claims

51. Ms. Pearce's various rulings unfairly and materially prejudiced Merrill Lynch's ability to present its defense at the hearing. For instance:

52. Merrill Lynch's cross-examination of Ms. Smolchek was limited to a little more than two hours.

53. Merrill Lynch was not permitted to present a defense to Claimants' assertion that they lost business because certain of their clients did not follow them to Morgan Stanley supposedly as a result of statements Merrill Lynch purportedly made to clients. In support of their claims on direct examination, Claimants made several general and conclusory statements that they lost customers as a result of Merrill Lynch's conduct. On cross examination, Merrill Lynch attempted to test Claimants' general statements by asking for specific information as to the identities of the customers to demonstrate to the panel that Claimants could not prove causation as to their purported injury. Merrill Lynch argued that unless Claimants specifically identified the customers who did not follow them to Morgan Stanley as a consequence of Merrill Lynch's supposed wrongful conduct that Merrill Lynch could not test Claimants' conclusory assertions. Ms. Pearce, however, ruled that Claimants did not need to identify the clients and that Merrill Lynch's counsel was not to cross-examine Claimants on this issue.

54. Ms. Pearce denied Merrill Lynch's request for an IME of Ms. Smolchek, stating that her medical condition would not be part of the case. Nonetheless, the Panel Chair permitted

Ms. Smolchek to testify about purported personal injuries, disabilities, and mental anguish, but also ruled that Merrill Lynch was not permitted to cross-examine Ms. Smolchek on these issues.

55. Merrill Lynch attempted to offer into evidence a Morgan Stanley document showing disability benefits paid to Ms. Smolchek, which was relevant to the issue of Ms. Smolchek's damages because it rebutted Claimants' damages calculation and supported Merrill Lynch's expert's testimony on damages. Invoking her earlier ruling that no medical records could be used at trial, Ms. Pearce ruled that, even though it was a Morgan Stanley document, it could not be introduced because it came from a file produced in discovery by Ms. Smolchek's physician.

5. The Panel Chair Strikes Merrill Lynch's Corporate Representatives

56. During a January 17, 2012 telephone conference between counsel, Merrill Lynch's counsel identified Jeffrey Ransdell as Merrill Lynch's corporate representative. Claimants' lawyers did not voice any objection, or concern regarding this designation. Nevertheless, just a few days after the telephone conference and a few days before the hearing began, however, Claimants filed a supposed emergency motion asking the panel to disqualify Mr. Ransdell from serving as Merrill Lynch's corporate representative on the grounds that Claimants would be upset and intimidated by his presence. Merrill Lynch responded that the Claimants' accusations about Mr. Ransdell were false and that it would be unfair to exclude Mr. Ransdell without making a factual finding as to the truth of those accusations. Ms. Pearce nevertheless granted Claimants' motion the day after it was filed. Then, on Claimants' oral motion made on the first day of the hearing, the Panel excluded Merrill Lynch's second designated corporate representative because she was a fact witness. FINRA Rule 13602 provides that "the parties and their representative are entitled to attend all hearings." There is no provision in the FINRA rules that authorizes one party to dictate who the other party's corporate representative will be. Nor

does any FINRA rule authorize a panel to interfere with or reject a party's designation of its corporate representative. Claimants themselves were fact witnesses, yet they were allowed to be present for the entire hearing.

6. The Panel Chair Made Inconsistent Rulings On Nearly Identical Issues That Treated Claimants More Favorably

57. As the transcript of the hearing will reflect, throughout the course of the hearing Ms. Pearce utilized a double-standard in making various rulings during trial. For instance:

58. Ms. Pearce consistently overruled Merrill Lynch's objections to Claimants' counsel's leading questions and allowed Claimants' counsel to lead their witnesses, including Claimants themselves. By contrast, Merrill Lynch's counsel was not permitted to lead witnesses, not even on cross-examination.

59. While Claimants were afforded 13 days to present their case and were permitted unlimited time for cross-examination of Merrill Lynch's witness, Merrill Lynch was afforded only four days to put in its defense and its cross-examination of Claimants' witnesses was severely limited.

60. Ms. Pearce's conduct reflected markedly different attitudes toward Merrill Lynch and Claimants. She repeatedly admonished (and even sanctioned) Merrill Lynch for conduct that can only be characterized as proper attempts to present a defense—for instance, repeatedly interrupting Merrill Lynch's counsels' examination and telling them to "move along," refusing to allow Merrill Lynch's lawyers to provide a basis for their objections, and sanctioning Merrill Lynch for attempting to lay a foundation for the use of a document as proper impeachment. By contrast, Ms. Pearce tolerated Claimants' counsel's outbursts—including abrupt standing and raised-voice complaints, slamming his hand on counsel table, leaving the hearing room and

slamming the door, hostile and intimidating conduct toward witnesses, Merrill Lynch's counsel, and the Panel.

61. At the conclusion of Claimants' case in chief, Merrill Lynch attempted to submit a written motion seeking dismissal of certain of Claimants' claims, a motion that FINRA Code of Arbitration Procedure Rule 13504(b) expressly authorizes. The Panel refused to accept Merrill Lynch's motion to dismiss, notwithstanding that it had accepted Claimants' pre-hearing brief on the first day of the hearing—more than a month after deadline established for such briefs in the pre-hearing scheduling order.

D. The Award

62. On April 3, 2012, the Panel entered an award of $10,250,000. (The award is attached to the Homer Decl. as Exhibit 12.

GROUNDS RELIED ON FOR VACATUR OF AWARD

A. Vacatur Is Warranted Under Section 10(a)(2) Due To Evident Partiality On The Part Of The Arbitrators

63. The FINRA arbitration award entered against Merrill Lynch should be vacated under Section 10(a)(2) because "there was evident partiality … in the arbitrators." 9 U.S.C. § 10(a)(2).

64. A party need not show that an arbitrator labored under an actual conflict of interest or that the arbitrator was in fact biased in order to establish that vacatur under Section 10(a)(2) is warranted. Instead, evident partiality under Section (a)(2) exists where "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists"—that is, where the facts would "create a reasonable impression of partiality." *Univ. Commons–Urbana*, 304 F.3d at 1339 (internal quotations and citation omitted).

65. The rule mandating vacatur due to evident partiality of an arbitrator is applied "stringently" because "[a]s the Supreme Court emphasized … courts 'should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.'" *Univ. Commons-Urbana*, 304 F.3d at 1338 (quoting *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145, 149 (1968)); *see also Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982) ("The *Commonwealth Coatings* holding has been interpreted as somewhat analogous to a *per se* rule or irrebuttable presumption requiring the award to be set aside once it is established that the arbitrator actually knew of, yet failed to disclose potentially prejudicial facts which could impair his judgment.") (internal quotation marks and citations omitted).

66. The evident partiality standard is met here. Ms. Pearce failed to disclose facts that would "create an impression of possible bias." *University Commons-Urbana*, 304 F.3d at 1338. The fact that Ms. Pearce's husband regularly represents individuals adverse to financial services institution, including Merrill Lynch itself, and identifies a victory against Merrill Lynch as the highlight of his career—stating that it was a "sweet victory" to "put[ ] [Merrill Lynch] down" because of its "attitude"—would give any objective observer a reason to doubt Ms. Pearce's impartiality. Indeed, Mr. Pearce's past adverse relationships to Merrill Lynch and other financial institutions are exactly the type of relationships that would give any reasonable person the impression of "possible bias" or "potential conflict" and which the FINRA Rules and ABA Code of Ethics for Arbitrations, therefore, require potential arbitrators to disclose. Disclosure of those facts would have caused Merrill Lynch to strike Ms. Pearce as an arbitrator during the arbitrator selection process.

67. Merrill Lynch had no duty investigate the veracity and completeness of Ms. Pearce's disclosures. The law is clear that parties may trust that potential arbitrators have made the required disclosures and have no duty to investigate whether a would-be panel member has provided an incomplete, incorrect or misleading disclosure because the burden is on the arbitrator to disclose. *See Middlesex Mutual Insurance*, 675 F.2d at 1204 ("By positing that appellants have the duty to inquire into the background of the arbitrator, appellant attempts to shift to the parties to the arbitration the burden of determining and disclosing bias or the reasonable appearance thereof. Neither federal nor Florida law supports such a result. … [F]or the arbitration process to work successfully, the onus must be placed on the arbitrator to reveal potential bias ….") (holding that district court properly vacated arbitration award on the ground of evident arbitrator partiality).

68. And, while Ms. Pearce's failure to disclose information that would create an appearance of partiality alone would provide a basis for vacatur under Section 10(a)(2), her rulings provide further well-founded reasons to doubt her impartiality.

69. On the facts here, where the potential for bias or an appearance of partiality exists, vacatur is required. *See Commonwealth Coatings*, 393 U.S. at 149-50 (explaining that integrity of arbitral process depends on the avoidance of "even the appearance of bias" and (vacating arbitration award because the arbitrator's failure make a disclosure created "an inference of bias").

B. Vacatur Is Also Warranted Under Section 10(a)(3) Due To Misconduct On The Part Of The Arbitrators That Prejudiced The Rights Of Merrill Lynch

70. The FINRA arbitration award entered against Merrill Lynch also should be vacated under Section 10(a)(3) because "arbitrators were guilty of misconduct … in refusing to hear

evidence pertinent and material to the controversy [and] other misbehavior … by which the rights of [Merrill Lynch] were prejudiced." 9 U.S.C. § 10(a)(3).

71. Although "[i]n making evidentiary determinations, arbitrators are not required to follow all the niceties observed by the federal courts, … they must give the parties a fundamentally fair hearing." *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (internal quotations and citations omitted). Accordingly, vacatur under Section 10(a)(3) is warranted where the arbitrators rendered fundamentally unfair evidentiary or procedural rulings that harmed the challenging party. *Id.* at 1336; *see also Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (exclusion of evidence made arbitration proceedings "fundamentally unfair"); *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (holding that vacatur of arbitration award was warranted where "evidence effectively excluded by the arbitrator was both 'central and decisive' to [a party's] position [and] therefore, the arbitrator's refusal to consider this evidence was … destructive of [a party's] right to present [its] case").

72. The rulings outlined in paragraphs 30-61 above provide ample reason to conclude that the arbitration award against Merrill Lynch was the result of a fundamentally unfair hearing.

C. Vacatur Of The Sanctions Awards Is Warranted Under Section 10(a)(4) Because The Arbitrators Acted In Excess of Their Powers

73. The sanctions awards entered against Merrill Lynch should be vacated under Section 10(a)(4) because the arbitrators "exceeded their power" in imposing sanctions without providing the required clear notice and opportunity to be heard. 9 U.S.C. § 10(a)(4).

74. As the United States Supreme Court has explained, an arbitrator's decision is unenforceable "when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice.'" *Stolt-Nielsen*, 130 S. Ct. at

1767 (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (internal citation marks omitted, alteration in original)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. *Id.* (vacating arbitration award where "what the arbitration panel did was simply impose its own view of sound policy").

75. The Panel imposed sanctions on Merrill Lynch for supposedly violating a prohibition against the introduction of "medical records" as evidence, despite the fact that no prior order included any such prohibition and without giving Merrill Lynch an opportunity to explain why it had not acted in violation any prior orders. (*See* paragraphs 37-50, *supra*). Although the Panel predicated its sanctions on supposed "prior orders," no prior rulings of the Panel prevented Merrill Lynch from seeking to introduce Dr. Starr's redacted notes and thus Merrill Lynch did not have notice that sanctions could be imposed if attempted to impeach Ms. Smolchek with those notes.

76. Under these circumstances, the sanctions awards amount to public policy rulings rather than sanctions properly entered pursuant to governing law. Accordingly, the Panel exceeded its power in imposing sanctions on Merrill Lynch—and thus vacatur of the sanctions award is warranted under Section 10(a)(4).

NOTICE OF PROCEEDINGS

77. Under 9 U.S.C. §12, this Petition was served on Claimants' attorneys within three months after the arbitration panel issued the award.

78. Service on Claimants' attorneys will be made as provided by statute in the same fashion as provided by law as a notice of motion in an action in this Court.

PRAYER FOR RELIEF

79. Merrill Lynch respectfully requests that the Court enter an order:

a. Staying the enforcement of the award until the resolution of this Petition;

b. Vacating the award; and

c. Granting such other relief as the Court deems proper.

Dated: April 3, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2012, a true and correct copy of the foregoing in electronic form was filed with the Court, and served by email and US mail on:

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/s/Peter W. Homer
Peter W. Homer