

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Name of Claimant

Ak-Chin Indian Community

No. 91-01700

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Gerald D. Thornton

REPRESENTATION OF PARTIES

For Claimant: Frank Lewis, Esq. of Begam, Lewis and Marks, P.A. and Burton Bently, Esq., Phoenix, Arizona.

For Respondents: Dennis M. Pape, Esq. and V. James Mann, Esq., Merrill Lynch Litigation Department, New York, New York.

CASE INFORMATION

Statement of Claim filed: June 3, 1991.

Claimant's Submission Agreement signed: May 31, 1991.

Joint Statement of Answer filed by Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald D. Thornton on: October 7, 1991.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed: October 7, 1991.

The NASD does not have a record of Gerald D. Thornton having filed a Submission to Arbitration.

Respondents' Motion to Dismiss dated April 7, 1992, and amplification of their position dated November 18, 1992.

Claimant's Responses to the Motion to Dismiss dated: June 4, 1992, and November 25, 1992.

HEARING INFORMATION

Pre-hearing conference: December 4, 1992. One (1) session.

Hearing Dates: March 31, 1993. Two (2) sessions.
April 1, 1993. Two (2) sessions.
April 2, 1993. Three (3) sessions.
April 14, 1993. Two (2) sessions.
April 15, 1993. Three (3) sessions.
April 16, 1993. Two (2) sessions.

Hearing Location: Scottsdale, Arizona.

CASE SUMMARY

Claimant, the Ak-Chin Indian Community ("Claimant") alleged: Misrepresentations and omissions; churning; unsuitability; mismanagement of accounts; intentional misstatement of the value of the limited partnerships ("LP"), listed below, for the express purpose of encouraging the Claimant to make further investments in LPs by hiding the losses sustained by the community to the date of each report; violation of ARS Section 44-1521; violations of 18 U.S.C. Section 1961 et seq., and ARS Section 13-2301 et seq. ("RICO"); and violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated under the Act, 15 U.S.C. Section 78(j)b, and Chapter 12, Article 13 ARS Section 44-1991 by Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("ML") and Gerald D. Thornton ("Thornton") (or collectively referred to as "Respondents"). The allegations arose out of transactions in Claimant's ML accounts in the following securities: The Futures Advantage Fund LP; Medical Imaging Partners LP; ML Media Partners, LP; Burger King Investments Master LP; The Futures Dimension Fund; ML Venture Partners II LP; ML/EQ Real Estate Portfolio, LP; The Growth and Guarantee Fund, LP; ML Lee Acquisition Fund, LP; ML Media Opportunity Partners; Equitable Capital Partners; Equitable Partners, LP; and Equitable Capital Partners (Retirement Fund) LP. Claimant also alleged that despite the specific requirements of Claimant's Resolution No. A-38-84, Respondents broadened Claimant's investment portfolio by purchasing unsuitable stocks and securities prohibited by the Resolution. Lastly, Claimant alleged that in order to cover up Respondents' breach of fiduciary duties to the Claimant, successfully and fraudulently urging Claimant to rescind all prior investment limitations of Resolution A-38-84, and to adopt instead Resolution A-49-85, prepared specifically by the Respondents for adoption by the Claimant. Resolution A-49-85 permitted Claimant's investment committee and Claimant to invest in any and all types of investments proposed by Respondents.

In their joint Answer, Respondents denied each and every allegation of wrongdoing and liability set forth and implied in the Statement of Claim. In addition, Respondents asserted the following defenses:

1. The underlying claims set forth in the Statement of Claim

are barred by the applicable statute of limitation.

2. Respondents did not in any way violate Section 10(b) or Rule 10b-5 thereunder of the Securities and Exchange Act of 1934 or the Arizona Blue Sky Statute, Section 44-1991, or the Arizona Consumer Fraud Statute, Section 44-1521, in their dealings with Claimant.

3. Respondents in no way violated either the Federal or State of Arizona RICO Statutes regarding the handling of Claimant's accounts.

4. Respondents breached no contract or duty in their dealings with the Claimant.

5. The Claimant's accounts have no losses. The accounts have been profitable and the limited partnership investments that have been sold have also generated a profit.

6.

a. The arbitrators hearing this matter do not have the authority to award punitive damages.

b. Even if they had the authority, the facts of this case do not warrant the imposition of an award of punitive damages.

c. Claimant has waived any rights to punitive damages.

d. The law of the State of New York prohibits, as a matter of public policy, the awarding of punitive damages in arbitration proceedings.

RELIEF REQUESTED

Claimant requested:

1. Rescission of all trades affecting the purchase and sale by the Claimant of all Units of interest in all LPs.

2. Compensatory damages; exemplary/punitive damages; treble damages; attorneys' fees; and costs incurred in connection with all trades effected by Thornton that resulted in losses, which trades were either unsuitable or otherwise violated applicable laws, statutes, rules or regulations.

3. Compensatory or general damages are calculated to be in excess of \$4,000,000.00.

Respondents requested that the arbitrators dismiss in full Claimant's claim and assess costs against Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Gerald D. Thornton did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section Eight (8) of the NASD Code of Arbitration Procedure (the "Code"), and having answered the claim, appeared and testified at the hearing, and is bound by the determination of the undersigned arbitrators on all issues submitted.

By way of correspondence dated April 7, 1992, Respondents made a Motion to Dismiss predicated on the allegation that Claimant had failed to Respond to Respondents' discovery requests in a timely fashion. Respondents also requested a pre-hearing conference on the Motion. Claimant made response to the Motion to Dismiss on June 4, 1992, and again on November 25, 1992. Respondents sent an amplification to their Motion on November 18, 1992. Pursuant to Respondents' request, a pre-hearing conference was held on December 4, 1992. After hearing argument made on behalf of all parties, and deliberation, the arbitrators Ordered as follows:

1. Respondents' Motion to Dismiss was denied. However, the panel would reconsider the Motion subject to compliance with the terms set forth in their order.

2. Claimant was ordered to provide Respondents with transcripts of all tapes in its possession or in the possession of its counsel and/or its investment committee.

3. In the event that any tapes had been destroyed, Claimant was ordered to provide a summary of those tapes and the related time records of any attorneys, paralegals or support staff who had listened to the tapes, and indices as to how those individuals referenced and/or recorded what they had heard via the tapes.

4. Forum fees and the costs associated with the pre-hearing conference were assessed against the Claimant.

5. The Claimant was ordered to pay to Respondents attorneys' fees in the sum of \$8,000.00.

6. Compliance with the Order was to have been made by the earlier of sixty (60) days from the date the Order had been received by the parties, or February 4, 1993.

On April 14, 1993, at the close of Claimant's case, Respondents made a Motion to Dismiss all of Claimant's Federal Securities Law and Arizona State Statutory and Common Law claims. After hearing argument from all parties, and deliberation, the panel took Respondents' Motion under advisement, and at the completion of testimony would take up any additional arguments and briefs from

the parties.

On April 14, 1993, Claimant made a Motion to Strike the testimony of the first expert witness called in Respondents' case-in-chief. The basis for the Motion was asserted to be the fact that Claimant's counsel had not previously been allowed to review the documents relied upon by the expert to base his testimony. After hearing argument from all parties, and deliberation, the panel ordered Respondents to provide Claimant's counsel with the requested documents, and would reconsider the Motion should Respondents fail to produce the aforementioned documents.

The parties have agreed that the Award in this matter may be executed by 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 original(s) remain on file with the NASD.

AWARD

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

1. Respondents Motion to Dismiss these claims based on applicable statutes of limitation is hereby denied.
2. Respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc. and Gerald D. Thornton are jointly and severally liable for, and shall pay to Claimant, the Ak-Chin Indian Community the sum of \$30,000.00 as satisfaction for its claims herein.
3. Claimant's claims for exemplary/punitive damages are hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall pay its own costs expenses, and attorneys' fees associated with this arbitration, except as set forth more fully below.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 pre-hearing conference session * \$300.00 = \$300.00

14 hearing sessions * \$1,500 = \$21,000.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$300.00, and shall refund the hearing session deposit in the amount of \$1,500.00 previously paid to the NASD by the Claimant.

Pursuant to Section 43(c) of the Code, and the Order of the undersigned arbitrators, the Claimant is assessed \$300.00 for the pre-hearing conference session held on December 4, 1992.

Additional forum fees in the amount of \$21,000.00 are assessed against Respondents.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING ARBITRATORS

Dated:

<u>April 17, 1993</u>	S/S <u>Thomas F. Tobin</u> Thomas F. Tobin Presiding Chairman Public Arbitrator
<u>April 17, 1993</u>	S/S <u>Ted R. Pickett</u> Ted R. Pickett Public Arbitrator
<u>April 17, 1993</u>	S/S <u>James Kaiser</u> James Kaiser Industry Arbitrator

Date of Service by the NASD: April 28, 1993