

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)	
<u>Name of Claimant(s)</u>)	
John J. and Bernadette Bergen)	
)	
<u>Name of Respondent(s)</u>)	Case No. 91-01996
Merrill Lynch Pierce Fenner & Smith Inc)	
)	

REPRESENTATION

For Claimants, John J. and Bernadette Bergen ("Bergen"): John P. Graves, Jr., Esq. of the Law offices of John P. Graves, Jr.

For Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"): Michael E. Olney, Esq. of Merrill Lynch Pierce Fenner & Smith, Inc.

CASE INFORMATION

Statement of Claim filed: June 26, 1991. Claimant's Submission Agreement signed: June 10, 1991.

Respondent's Statement of Answer filed: September 6, 1991. Respondent's Submission Agreement signed: September 5, 1991.

HEARING INFORMATION

On June 1, 1992, in Fort Lauderdale, Florida, a Pre-Hearing Conference lasting one (1) session was conducted via telephone conference call with an arbitrator.

On June 23, and 24, 1992, in Tampa, Florida, hearings lasting three (3) sessions were conducted.

CASE SUMMARY

Claimants, husband and wife, John and Bernadette Bergen, alleged that the husband is retired and in poor health and that they are unsophisticated investors who relied entirely upon Respondent to invest their retirement principal in accordance with their stated investment objectives of: security and safety, regularity of investment income; absence of risk or loss of invested principal and high level liquidity.

Claimants alleged that despite their stated investment objectives Respondent liquidated a portion of their conservative investment portfolio consisting of bonds and similar securities and purchased a limited partnership known as Arvida/JMB Partners, L.P. ("Arvida"). Claimants alleged that in making such

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a recommendation Respondent's representative, acting with full authority of Respondent, indicated that Arvida was consistent with Claimants' investment objectives, Claimants further alleged that Respondent did not deliver a prospectus nor did it cause a prospectus to be delivered at a time prior to or contemporaneous with the sale of the partnership.

Claimants alleged that Respondent misrepresented Arvida to be consistent with their investment objectives in that it was safe and secure as to invested principal and would provide regularity of interest income, was risk free and highly liquid when in fact Arvida was a limited partnership organized under the laws of the state of Delaware and that such partnership investment was of substantial risk with respect to loss of invested principal, would not provide regular guaranteed distributions of interest or similar type income and was highly illiquid.

Claimants stated that the conduct of the Respondent was in violation of Sections 15 and 10(b) of the Securities Exchange Act of 1934, as amended, 15 USC 78a-78jj, as amended, and Rule 10b-5 thereunder and Sections 211 and 311 of the Florida Securities and Investor Protection Act (Chapter 517 Florida Statutes as amended). Additionally, the Respondent's conduct was also in violation of the prospectus delivery requirements required by Section 5 of the Securities Act of 1933, as amended (15 USC 77a-77aa) and the provisions of Section .07 of Chapter 517, Florida Statutes, the Florida Securities and Investor Protection Act.

Respondent, Merrill Lynch, denied all allegations of unsuitable trading, negligent misrepresentation, fraud and any other basis of liability set forth in Claimants' Claim and maintained that Claimant, John Bergen, is a retired successful entrepreneur with experience as an investor in the securities markets. Respondent alleged that during a meeting Claimants agreed to diversify their investment portfolio by investing in real estate and that Respondent suggested Arvida as an appropriate vehicle to achieve the desired type of diversification. Respondent stated that Claimants were fully apprised, during said meeting, of the fact that Arvida would not be liquid and that it offered the potential for long-term capital gains and that following the meeting, Claimants sold bonds to raise cash to pay for their purchase of Arvida and that a copy of the Arvida prospectus was enclosed with their purchase confirmation. Respondent stated that Claimants received cash distributions in the amount of \$43,352.74 and that due to deteriorating business conditions, the management of Arvida suspended cash distributions effective with the third quarter of 1990. Respondent maintained that Claimants were financially qualified to invest in Arvida and that Respondent is not liable to Claimants in any amount because at all times relevant it acted properly, in good faith and in a commercially reasonable manner with respect to Claimants' account.

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RELIEF REQUESTED

Claimants requested:

- (a) compensatory and rescissory damages in the amount of \$125,000.00;
- (b) Interest at the legal rate provided by Florida law with respect to such award of compensatory and rescissory damages calculated from the time of Claimants' investment in the Partnership Investment;
- (c) Costs and attorney's fees as provided by the Florida Securities and Investor Protection Act;
- (d) Punitive damages as a result of the intentional fraudulent acts of the Respondent in an amount which the Arbitration Panel deems appropriate.

Respondent requested that the instant Claim be denied in all respects, that Respondent be awarded its reasonable attorneys' fees, costs and expenses incurred in the defense of the instant Claim together with such other and further relief as is deemed just and proper.

OTHER ISSUES CONSIDERED & DECIDED

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.

AWARD

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

1. Respondent, Merrill Lynch, is found liable and shall pay to Claimants the amount of One Hundred Fifty Three Thousand Dollars and No Cents (\$153,000.00) which amount includes interest computed on an annual basis;
2. The panel directs that interest at the legal rate of 12% per annum commence on the compensatory damages of \$153,000.00, effective the date of the entry of the award and continue until the award has been paid in full;
3. Claimants are directed to tender an assignment without recourse of all right, title, and interest in the subject units of the limited partnership to Respondent as a condition to the receipt of the payment of the above damages;

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4. Respondent, Merrill Lynch is also found liable and shall pay to Claimants attorneys' fees, as provided by the Florida Securities and Investor Protection Act, the amount of which shall be determined by a court of competent jurisdiction;

5. Claimants' Claim for punitive damages is hereby denied.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$2,550.00 (one Pre-Hearing Conference x \$300.00 plus three hearing sessions x \$750.00);

2. Respondent, Merrill Lynch is hereby assessed \$2,550.00, \$750.00 payable directly to the Claimants (representing a refund of the hearing session deposit previously deposited by Claimants and retained by the NASD) and \$1,800.00 payable to the National Association of Securities Dealers, Inc;

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

/s/

Richard Reeves, Esq.

Public

/s/

Bruce A. Beary

Public

/s/

Kathleen Baggett Church

Industry

Date of Decision September 11, 1992