

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Bernard Miller, as trustee  
Vivian Miller, as trustee

Case No. 92-02591

Name of Respondents

Prudential-Bache Securities Inc.  
Russell Kerr  
Mace B. Tamse

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**REPRESENTATION**

For Claimants, Bernard Miller as Trustee of the Bernard Miller Trust ("B. Miller") and Vivian Miller as Trustee of the Vivian Miller Trust ("V. Miller"); Jim Scutti, Esq. of the law firm of Jim Scutti, P.A.

For Respondents, Prudential Securities, Inc. ("Prudential"), Russell Kerr ("Kerr") and Mace Tamse ("Tamse"); Delmer Gowing III, Esq. of Honigman Miller Schwartz & Cohn.

**CASE INFORMATION**

Statement of Claim filed: August 4, 1992 and amended October 7, 1992.

Claimants Submission Agreements signed on: October 28, 1992 by B. Miller and V. Miller.

Respondents' Statement of Answer filed January 19, 1993. Respondents' Submission Agreements signed January 11, 1993 by Tamse and November 29, 1993 by Kerr and on January 11, 1993 by Kathy Klock on behalf of Prudential.

**HEARING INFORMATION**

On October 1, 1993, in Fort Lauderdale, Florida, a pre-hearing conference

lasting 1 session was conducted via telephone conference call with an arbitrator.

On November 29, 30 and December 1, 1993 in Fort Lauderdale, Florida hearings lasting 6 sessions were conducted.

### **CASE SUMMARY**

Claimants alleged that Respondents are liable for: violation of Section 517.301 of the Florida Statutes (Count I); common law fraud (Count II); and Constructive Fraud (Count III). Claimants alleged that Respondents misrepresented the safety and risks of investing in certain limited partnerships; made material false statements of fact and omitted to state material facts and fraudulently concealed the value of the investments; and otherwise fraudulently induced Claimants into purchasing unsuitable limited partnerships.

Respondents denied all allegations of wrongdoing and alleged that Claimants were not unsophisticated investors; Kerr did not misrepresent the safety or liquidity of the investments; Claimants were advised of the risks and were provided with a prospectus; Claimants had previously invested in limited partnerships; and, the investments were suitable for Claimants.

Respondents alleged the affirmative defenses of: good faith; Claimants were advised of, and knew the risks involved; market conditions caused any losses; ratification; waiver; estoppel; contributory negligence; laches; statute of limitations; failure to exercise due diligence; tort claims for economic loss are barred as a matter of law; and, failure to state a cause of action.

### **RELIEF REQUESTED**

Claimants requested damages in the amount of \$132,400 plus interest, attorney's fees, costs and such other relief as the panel deems just and proper.

Respondents requested dismissal of the Claim.

### **OTHER ISSUES CONSIDERED & DECIDED**

1. At the hearing, Respondents made a Motion to Dismiss or for Directed Verdict. This panel granted Respondents' Motion to Dismiss but only as to Counts I and II of the Amended Statement of Claim.
2. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award 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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Prudential, Kerr and Tamse, are found liable, jointly and severally as to Count III of the Amended statement of Claim and shall pay to the Claimants the amount of \$25,000 inclusive of interest and costs.
2. Claimants' request for attorney's fees is denied.

### **OTHER COSTS**

The parties shall each bear all other costs and expense 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 \$4,800 (1 pre-hearing conference x \$300 plus 6 sessions x \$750 per session).
2. Respondents, Prudential, Kerr and Tamse are hereby assessed \$4,800, jointly and severally, \$750 of which shall be paid directly to the Claimants, and \$4,050 of which shall be paid to the National Association of Securities Dealers, Inc.
3. The NASD shall retain the non-refundable filing fee of \$200 paid by the Claimants.
4. Respondents, jointly and severally, are directed to reimburse the Claimants \$200 for the non-refundable filing fee.

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

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Concurring Arbitrators' Signatures

Name

Public/Industry

/S/  
Ronald Thomas Spann, Esq.

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/S/  
Allen J. Kaplan, Esq.

/S/  
David P. Wardwell

Date of Decision: 1/10/94