

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between**

**Name of Claimant**

**Milton F. Bain**

**92-02937**

**Name of Respondents**

**First of Michigan Corporation;  
David A. Pendleton**

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**REPRESENTATION**

**For Claimant: Milton F. Bain ("Bain") appeared pro se.**

**For Respondent: First of Michigan Corporation ("First of Michigan") and David A. Pendleton ("Pendleton") were represented by Thomas R. Cox, Esq. of Miller, Canfield, Paddock and Stone, P.L.C., located in Detroit, Michigan.**

**CASE INFORMATION**

**Statement of Claim filed: September 1, 1992.**

**Claimant's Submission Agreement signed on: October 7, 1992.**

**Statement of Answer filed by Respondents on: November 9, 1992.**

**Respondent First of Michigan's Submission Agreement signed on: John G. Martin, President and CEO, First of Michigan Corporation.**

**Respondent Pendleton's Submission Agreement signed on: November 5, 1992.**

**Respondents' Motion to Dismiss filed: June 7, 1993.**

**Claimant's Reply filed: October 29, 1993.**

**Respondents' Renewed Request to Dismiss filed: September 19, 1994.**

**Claimant's Reply filed: September 22, 1994.**

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### HEARING INFORMATION

Pre-Hearing Conference: None Held  
Hearing Date/Sessions: October 20, 1994 for One (1) session.  
Hearing Location: Southfield, Michigan.

### CASE SUMMARY

Claimant Bain alleged that Respondent Pendleton, while employed by or acting as an agent for Respondent First of Michigan, misrepresented the safety of investments in certain limited partnerships. Bain specifically alleged that:

1. Bain is a 62 year old, unsophisticated retiree, who had never invested in the equity market prior to the transaction in question;
2. In 1983, Bain asked Respondents to invest his resources in a safe, income producing investment which would not result in loss of capital;
3. Respondents recommended and purchased investments in ENEX Oil and Gas Limited Partnership, Krupp Cash Plus Partnership and Krupp Cash Plus II Partnership;
4. Respondents constantly assured Bain that these were guaranteed safe partnerships which would protect Bain's capital, persuading him from taking action when values declined; and
5. Bain eventually attempted to liquidate the partnerships and found that there were "no bids", resulting in the investments being virtually worthless.

Based upon these allegations, Bain asserted claims for common law fraud; unsuitability; intentional misrepresentation of fact; violation of NYSE and NASD rules; breach of fiduciary duty; negligent misrepresentation; and breach of the implied covenant of good faith and fair dealing.

Respondents denied the material allegations of the Statement of Claim, alleging that:

1. The investments made were reasonable choices at the time they were made and met Claimant's stated investment objectives of safe investments offering preservation of capital while providing a steady stream of income at a higher rate of return;

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2. Bain has received cash distributions of approximately \$7,000.00 and tax benefits from the investments at issue;
3. Pendleton provided Bain with a prospectus, thoroughly discussed the investments with Claimant and left the decision to invest to Bain;
4. Pendleton did not give constant assurances regarding investments. In fact, Bain had no contact with Pendleton in over 5 years. However, Bain was fully informed and aware of all facts concerning the investments; and
5. There is no private right of action for alleged violations of NYSE and NASD rules.

In addition, Respondents asserted several affirmative defenses, including the following:

1. The Statement of Claim failed to state a claim upon which relief can be granted;
2. The Statement of Claim is barred because of the applicable statute of limitations;
3. The claims are barred by reason of Claimant's and/or third parties' negligence, comparative negligence and contributory negligence;
4. The claims are barred by the doctrines of waiver, estoppel, laches, ratification and relief; and
5. The claims are barred because the alleged actions of Respondents were not the proximate cause of the alleged injury and Claimant exercised active control over his accounts with Respondents.

#### **RELIEF REQUESTED**

Claimant requested entry of an award against Respondents for compensatory damages of \$14,000.00; pre and post-award interest as allowed by law; and costs of arbitration including reasonable fees, expert witness fees and any other costs deemed reasonable.

Respondents requested that the claims be denied in their entirety and that Respondents be awarded their costs and attorneys' fees.

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### OTHER ISSUES CONSIDERED & DECIDED

On November 15, 1993, the Arbitrator determined that Respondents' Motion to Dismiss filed June 7, 1993 would be denied.

on October 1, 1994, the Arbitrator determined that Respondents' Renewed Request to Dismiss filed September 19, 1994 would be denied.

The Arbitrator finds that the Claimant did have full knowledge of the investments purchased and acknowledged discussing same with his Registered Representative on more than one occasion, wherein they discussed the volatility of the securities purchased, although the Arbitrator does have particular difficulty with the securities purchased, in that the Claimant is a retiree not in the need of substantial tax deduction/deferment type programs, however, the Arbitrator finds that the claims were filed more than six (6) years after the date of investments and the Claimant was unable to overcome the burden of proving that the statute of limitations had not run and therefore, the Respondents' Motion to Dismiss the Statement of Claim is granted.

The parties have agreed that a handwritten, signed Award may be entered. In this case, the parties have agreed to receive a conformed copy of the Award while the original remains on file with the NASD.

### AWARD

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

1. The Respondents' Motion to Dismiss the Statement of Claim be and is hereby granted and a judgment of no cause of action shall be entered against the Claimant, Milton F. Bain;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically granted is hereby denied.

### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) hearing session x \$300.00 per session = \$300.00.

The National Association of Securities Dealers, Inc. shall retain the \$100.00 claim filing fee and

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STATE OF *new* S.S.:  
COUNTY OF *727*

On this *23<sup>rd</sup>* day of August, 1993, before me personally appeared Joseph A. Schubert known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

*Florence Weisfeld*

FLORENCE WEISEL FELD  
Notary Public, State of New York  
No. 24-739048  
Qualified in Kings County  
Commission expires ~~March 30, 1994~~  
*Jan 31, 1994*

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the \$300.00 hearing session deposit previously deposited by the Claimant, Milton F. Bain. Respondents First of Michigan Corporation and David A. Pendleton are jointly and severally liable for and shall pay to Claimant Milton F. Bain the sum of \$400.00 as reimbursement of the claim filing fee and hearing session deposit.

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

Arbitrator's Signature

Name

Date

/s/ Robert E. Parker, Esq.

December 13, 1994

Robert E. Parker, Esq.

Public Arbitrator

For NASD Use Only

Date of Decision: December 20, 1994