

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Nella K. Brainis

93-02067

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Edward Joseph Carney, III

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on May 20, 1993, Claimant Nella K. Brainis, who was represented by Barry H. Alper of Securities Arbitration Consultants, Inc., alleged that Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Edward Joseph Carney, III failed to fully disclose investment risks and omitted material facts necessary for her to fully understand the investment risks of limited partnerships such as ML MEDIA PARTNERS LP 86, MLH INCM RLTY PTNRS V LP, and JMB INCM PPTYS XIII LP 86. The Claimant further alleged that the Respondents recommended unsuitable investments in light of her investment objectives and made fraudulent misrepresentations to induce her to enter into these unsuitable investments. The Claimant maintained that the Respondents failed to exercise due diligence to learn her particular investment needs and that they breached the fiduciary duty owed to her. Further, the Claimant contended, by reason of their misrepresentations, omissions, and breach of fiduciary duty, the Respondents violated an implied covenant of good faith since the Respondents were in a superior position to the Claimant regarding the purchase and sale of the investments and that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. failed to diligently supervise their account, for which it should also be held liable.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Edward Joseph Carney, III, through their in-house counsel, Christopher D. Cavuoti, Esq., maintained that the limited partnerships recommended to the Claimant were not high risk investments and that the Claimant met the minimum financial suitability standards for each investment. The Respondents further maintained that the risks associated with these investments were fully explained to the Claimant and that she knowingly, willingly, and voluntarily assumed them. The Respondents further maintained that they acted in good faith and in a commercially reasonable manner consistent with their obligations and responsibilities toward the Claimant.

RELIEF REQUESTED

Claimant Nella K. Brainis requested \$10,000.00 in actual damages, plus interest, costs, and an unspecified amount of punitive damages.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Edward Joseph Carney, III requested that the claims of the Claimant be dismissed and that costs be assessed against the Claimant.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Daniel Eugene Bivens, III, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on April 16, 1993, by Respondent Edward Joseph Carney, III on August 16, 1993 and by the Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on August 23, 1993.

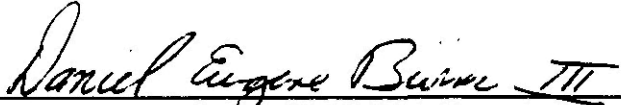
And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of the Claimant Nella K. Brainis against the Respondents Edward Joseph Carney, III and Merrill Lynch, Pierce, Fenner & Smith, Inc. are dismissed in their entirety.
2. The Claimant's request for interest is denied.
3. The Claimant's request for punitive damages is denied.
4. The parties shall bear their respective costs.
5. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc. Respondents Edward Joseph Carney, III and Merrill Lynch, Pierce, Fenner & Smith, Inc. are jointly and severally liable and shall pay to the Claimant Nella K. Brainis \$150.00 as reimbursement of the filing fee.

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AFFIRMATION

I, **DANIEL EUGENE BIVENS, III**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

DATE OF DECISION: **May 5, 1994**