

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Marilyn Herlin

93-03623

Name of Respondents

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Rocio M. Gell

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on September 15, 1993, Claimant Marilyn Herlin, who appeared Pro Se, alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. and Rocio M. Gell made misrepresentations to her, breached their fiduciary duty to her and sold to her an unsuitable investment. The Claimant further alleged that in September, 1987, she sought the services of Respondent Rocio M. Gell ("Gell") who was a registered representative for Respondent MLPFS. The Claimant contended that she invested \$5,000.00 in ARVIDA/JMB Partners (the "Partnership") after Respondent Gell assured her that the investment was not a high risk, speculative nature. The Claimant further contended that she repeatedly emphasized that she was not in a position to assume high risk. The Claimant alleged that she lost the entire principal amount invested in the Partnership.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Rocio M. Gell, through their in-house counsel, Christopher D. Cavuoti, Esq., maintained that when the Partnership was offered to investors in September, 1987, Respondent Gell spoke with the Claimant and explained the material elements of the offering, including the investment objectives, risk factors, illiquidity, and the history of the sponsors. Respondents further maintained that Claimant received a prospectus for the Partnership which made specific disclosures regarding risks associated with this type of investment. Respondents contended that the \$5,000.00 invested in the Partnership was fully consistent with Claimant's stated investment objective of the generation of income with a risk tolerance of up to speculative. Respondents further contended that the Partnership offered investors an attractive opportunity to take advantage of the experience and expertise of two of America's real estate leaders, Arvida Company and JMB Realty Corporation. Respondents maintained that Claimant received \$1,654.11 in quarterly cash distributions from this investment

since 1987 which represent an approximate average yield of 4.7% annually over a 6 year period. Respondents further maintained that the general Partners of the Partnership decided in November, 1990 to suspend future distributions due to the severe recession in the real estate market and that this was a prudent management decision. Respondents contended that Claimant's allegation that Respondents breached their fiduciary duty is unfounded because Claimant, at all times, had the sole authority to make decisions as it affected her account and at no time were Respondents acting in a fiduciary capacity. Respondents further contended that Claimant's allegation of misrepresentation is without merit, as all material facts concerning the Partnership were disclosed to Claimant. Furthermore, Respondents maintained that Claimant's allegation that her investment was a "total loss" is false, as Claimant still owns her units which have value.

In Respondents' letter dated December 7, 1993, it maintained that Claimant had prior experience in limited partnership investments, having purchased 16 units of Balcor Pension Investors on October 26, 1986.

RELIEF REQUESTED

Claimant Marilyn Herlin requested \$7,346.00 in actual damages plus reimbursement of the costs of this proceeding.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Rocio M. Gell requested that the claims of the Claimant be dismissed plus reimbursement of the costs of this proceeding.

AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, William Friedman, Esq., was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on October 1, 1993 and by the Respondents on November 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. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimant Marilyn Herlin \$2,746.00 in actual damages.
2. The claims of the Claimant Marilyn Herlin against Respondent Rocio M. Gell are dismissed in their entirety.

3. The parties shall bear their respective costs.
4. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Marilyn Herlin shall be retained by the NASD, Inc. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay \$150.00 to the Claimant as reimbursement of the filing fee.

AFFIRMATION

I, **WILLIAM FRIEDMAN, ESQ.**, 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

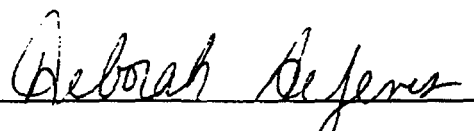
DATE OF DECISION: December 6, 1994

STATE OF: *New York*

SS:

COUNTY OF: *New York*

On this 5 day of December 1994, before me personally appeared William Friedman, Esq. to me known and known before me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



DEBORAH A. DEJESUS
Notary Public, State of New York
No. 02DE5022979
Qualified in New York County
Commission Expires January 24, 1996