

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Richard B. McCarten

93-03750

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on September 22, 1993, Claimant Richard B. McCarten ("Claimant"), through her representative, Jill Levi, Esq., of Feltman, Karesh, Major & Farbman, located in New York, NY., alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent"), breached its fiduciary duty to Claimant, omitted material facts, breached contractual duties, and sold unsuitable securities. Claimant further alleged that on or after September 22, 1987, he purchased from Respondent \$5,000.00 worth of Arvida/JMB Partners, L.P. I ("Arvida I"), and on or after November 21, 1989, he purchased from Respondent \$5,000.00 worth of Arvida/JMB Partners, LLP II ("Arvida II"). Claimant contended Respondent began offering Arvida I interests to the public in September of 1987 and, in October of 1989, interests in Arvida II, and that Respondent served as both underwriter and selling agent for this offering. Claimant further contended that the prospectuses were extremely difficult to understand and were written in such a way as to obfuscate rather than communicate the information. Claimant further contended that Respondent took advantage of the incomprehensibility of the prospectuses and knew that the audience to which it was pitching relied completely upon the sales presentation. Claimant further alleged that a significant portion of the real property acquired by the Arvida I partnership consisted of undeveloped land which is considered speculative. Claimant contended that a large front-end load increased the risk for investors in Arvida I. Claimant further contended that cash distributions to the limited partners in Arvida I totalled \$320.00 for each interest owned and were paid through mid-1990. Claimant alleged that Respondent made no real effort to inform existing or potential investors that the distributions were in fact "managed distributions". Claimant further alleged that by artificially maintaining these high distributions, Respondent concealed from investors and potential investors the failure of the partnership to achieve its touted goals and enabled Respondent to tout the "track record" of Arvida I, which was perhaps the single most important factor in the selling to the public of Arvida II in 1989. Claimant contended that the "tales in the Arvida II prospectus which deal with the Arvida I track record are confusing at best". Claimant further contended that the effect of distributions in Arvida I totalling approximately \$139,000.00 was to materially reduce the available capital of the partnership.

Claimant alleged that through December of 1991, Respondent advised its customers in its monthly statements that the market value and estimated market value of each unit of Arvida I and Arvida II was \$1,000.00, the amount the investor paid. Claimant further alleged that by consistently reporting the market value at the original cost and by making managed distributions, Respondent concealed the failure of the Arvida I partnership and should be held liable for Claimant's loss.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., through its representatives, Dominick Evangelista, Esq., and Brian F. Amery, Esq., of Bressler, Amery & Ross, located in Morristown, NJ., maintained in its initial answer and supplemental answer that the Arvida I offering represented a high quality, reasonable investment made through a comprehensive prospectus which disclosed the reasonably foreseeable risks and lost value only because of a severe, nationwide real estate recession. Respondent further maintained that pursuant to its standard practice, the Arvida I and Arvida II prospectuses describing the investments were forwarded to Claimant and disclosed the nature of the investments, as well as the risks attendant thereto. Respondent contended that the existing and reasonably foreseeable conditions at the time of the Arvida I offering indicated that it was a sound venture. Respondent further contended that the Claimant has failed to explain how Respondent's involvement in various aspects of the Arvida I offering operated to the detriment of Claimant's interest in the partnership. Respondent maintained that the facts clearly indicating that it would receive selling commissions and re-numeration of underwriting, due diligence investigation and marketing expenses are disclosed throughout the prospectus. Respondent further maintained that Claimant was provided full and fair disclosure of the various roles Respondent was to perform in connection with the Arvida I offering. Respondent contended that although the prospectus did not predict the recession of 1990, it did fully and fairly caution that real estate investments would adversely suffer if adverse national or local economic conditions were to occur. Respondent further contended that Claimant's equation of undeveloped land with raw land is in error. Respondent maintained that the prospectus specifically described each real estate holding and the state of development of each particular holding at the time of the offering, and a review of the prospectus easily confirms that Arvida I was not involved in raw land holdings. Respondent further maintained that the prospectus contained full disclosure of the use of the proceeds of the Arvida I offering, including fees to be paid to Respondent, the general partner, and others. Respondent contended that it notified all of its customers that the limited partnership prices contained on the monthly statements reflected the original cost and did not represent current market value. Respondent further contended that Arvida I represented an offering of high quality real estate properties which lost value because of the severe, nationwide real estate recession beginning three years after the offering, and accordingly, it should not be held liable for the Claimant's loss.

RELIEF REQUESTED

Claimant Richard B. McCarten requested \$10,000.00 in actual damages, plus interest, costs, and attorneys' fees.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested that the claims of the Claimant be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

The Arbitrator has reviewed and considered all documentation regarding Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Request for a Hearing and Motion to Strike various portions of Claimant's supplemental submission and Request for a hearing in the above matter. The Arbitrator denied the Request for a Hearing. The Arbitrator also denied Respondent's Motion to Strike various portions of Claimant's supplemental submission.

The Arbitrator reviewed and considered the supplemental documentary submissions filed on November 1, 1995 by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. and November 7, 1995 by Claimant.

AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Michael Weitzman, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Richard B. McCarten, on September 15, 1993, and by the Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., on November 20, 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 Richard B. McCarten, against the Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., are dismissed in their entirety.
2. The parties shall bear their respective costs.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Richard B. McCarten, shall be retained by the NASD, Inc.

AFFIRMATION

I, **MICHAEL WEITZMAN**., do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my oath and award.



MICHAEL WEITZMAN

DATE OF DECISION: April 24, 1996