

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Eugene Francis Kallman

93-03941

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith Inc

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers Regulation, Inc. on September 29, 1993, Claimant Eugene Francis Kallman ("Claimant"), through his representative, Adam M. Cohen, Esq., of the law firm Feldman, Karesh, Major & Farbman, located in New York., alleged that on or after September 29, 1987, he purchased \$10,000.00 worth of Arvida/JMB Partners, L.P.I, ("Arvida I") from Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent"). Claimant further alleged that Darryl L. Wong was a broker employed by Respondent who dealt with him within the course and scope of his employment. Claimant alleged that Respondent breached contractual and other legal duties, sold unsuitable securities, engaged in false and fraudulent misrepresentation, omitted material facts and breached its fiduciary duty to Claimant.

Claimant, in his Statement of Claim and supplemental pleadings also alleged that Respondent began offering Arvida I interests to the public in mid-September 1987 and placed itself in a position whereby it owed conflicting duties to the customers, general partner and stockholders. Claimant contended that Respondent served as underwriter and selling agent for the Arvida offering and participated in structuring the partnership, preparing the registration statement and prospectus. Claimant further contended that the prospectus was extremely difficult to understand and was written in such a way as to obfuscate rather than communicate the information. Claimant also contended that Respondents led investors to believe that they were buying a piece of the Arvida Corporation and minimized the risk of the investment. Claimant alleged that a significant portion of the real property acquired by the Arvida I partnership consisted of undeveloped land which is considered speculative. Claimant further alleged that a large front-end load increased the risk for investors in Arvida I. Claimant also alleged that Respondent was required to use due diligence to determine whether a security meets the representations of the firm and is suitable for the investor. Claimant asserted that Respondent made no real effort to inform existing or potential investors that the distributions were in fact "managed distributions". Claimant further asserted 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.

Claimant also asserted 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 Respondent concealed the truth about Arvida I from its customers by consistently, through 1991, reporting the market value of Arvida I at the original cost and should be held liable for the loss.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., through its representatives Dominick F. Evangelista, Esq., and Brian F. Amery, Esq., of the law firm, Bressler, Amery & Ross located in Morristown, New Jersey, maintained that on or about September 29, 1987 Claimant purchased 10 units of a real estate investment in Arvida/JMB Partners, L.P. at a cost of \$10,000.00. Respondent further maintained that at the time of the transaction at issue, Darryl L. Wong was the financial consultant who serviced Claimant's account. Respondent specifically denied the following allegations of the Claimant and requested that the Statement of Claim be dismissed with prejudice: (i) that the security at issue was unsuitable for claimant; (ii) that it fraudulently induced Claimant to purchase said security; (iii) that it and its financial consultant made material misrepresentations or omissions of fact in connection with the sale of said security; (iv) that it fraudulently concealed the value of the investment at issue as reflected in their monthly account statements; (v) that it breached its fiduciary or other alleged legal duties toward Claimant; (vi) that it wilfully ignored its obligation to perform adequate due diligence relating to the investment at issue; (vii) and that it handled Claimant's account in a negligent and/or grossly negligent manner. Respondent also maintained that pursuant to its standard practice, a trade confirmation for the Arvida transaction was forwarded to Claimant, together with a prospectus describing the investment. Respondent contended that the prospectus disclosed the nature of the investment as well as the risks attendant thereto.

Respondent, in its supplemental pleadings maintained that the Arvida I offering represented a high quality, reasonable investment made through a comprehensive prospectus which disclosed the reasonable foreseeable risks. Respondent further maintained that Claimant's suggestion of an overall fraud from the outset is unsupportable and that the investment lost value because of a severe, nationwide real estate recession. Respondent contended that Claimant fails 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 further contended that due diligence investigation, marketing expenses, selling commissions and remuneration of underwriting are disclosed in the prospectus. Respondent also contended that although the prospectus contained a responsible discussion of the then reasonably foreseeable risks of the investment and that although it 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 contended that Claimant's equation of undeveloped land with raw land is in error and that the prospectus easily confirms that Arvida I was not involved in undeveloped land. Respondent further 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 maintained that as a matter of law and reason, the brokerage firm's responsibility is to provide information to enable the investor to evaluate the investment and that was done in the Arvida I offering.

RELIEF REQUESTED

Claimant Eugene Francis Kallman requested compensatory damages in the amount of his investment plus the amount the investment would have earned had it been in a well managed account, less the amount of distributions received by Claimant, plus consequential damages, in an amount not exceeding \$10,000.00; interest on the foregoing (Compensatory damages not to exceed \$10,000.00 and interest aggregating \$24,360.00); costs and fees of this proceeding, including fees and costs for expert witnesses; reasonable counsel fees; and other, further and different relief as the arbitrators find appropriate under the circumstances.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. requested that the NASD dismiss Claimant Eugene Kallman's Statement of Claim with prejudice, and with costs being assessed against Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

The arbitrator reviewed and considered the submissions from all parties regarding Respondent's: (i) Motion to Strike various portions of Claimant's supplemental submission, or in the alternative, to obtain permission to file a response to certain aspects of the supplemental submission. The arbitrator denied the motion.

(ii) Motion to order a full hearing to the extent the amount at issue exceeds the simplified jurisdictional limit. The arbitrator denied the motion.

(iii) Request for a telephonic pre-hearing conference to address the motions. The arbitrator denied the request.

The arbitrator reviewed and considered all submissions from the parties except Respondent's January 22, 1997 as it was not submitted in a timely manner.

AWARD

Pursuant to Rule 10302 of NASD Regulation, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Aaron J. Fenton, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Eugene Francis Kallman on September 14, 1993 and by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on November 22, 1993.

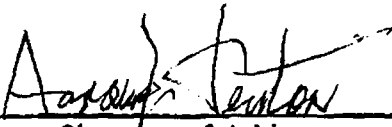
And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to the Claimant Eugene Francis Kallman \$10,000.00 in actual damages, less any monies paid to Claimant by and on behalf of Respondent for Arvida/JMB Partners, L.P. I.

2. Claimant Eugene Francis Kallman shall transfer to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., or its assignee, all of its rights and interest in the ten units of Arvida/JMB Partners, L.P. I that are the subject of this arbitration.
3. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to the Claimant Eugene Francis Kallman interest at the rate of 7% per annum from September 29, 1987 to the date of the award.
4. The parties shall bear their respective costs.
5. The \$150.00 filing fee previously deposited with National Association of Securities Dealers Regulation, Inc. by Claimant Eugene Francis Kallman shall be retained by NASD Regulation, Inc. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimant Eugene Francis Kallman \$75.00 as reimbursement for one half of the filing fee.
6. All other relief requests are denied.

AFFIRMATION

I, **AARON J. FENTON**, 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 12, 1997