

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

David and Susan Kelly

93-04058

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on October 5, 1993 Claimants David and Susan Kelly ("Claimants"), through their representative, Donald F. Schneider, Esq., of Feltman, Karesh, Major & Farbman, in New York, N.Y., alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Respondent"), breached its fiduciary duty to Claimants, omitted material facts, breached contractual duties, and sold unsuitable securities. Claimants further alleged that on or after September 29, 1987, they purchased from Respondent \$10,000.00 worth of Arvida/JMB Partners, L.P. I ("Arvida I"). Claimants contended that Respondent began offering Arvida I interests to the public in September of 1987, and that Respondent served as both underwriter and selling agent for this offering. Claimants 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. Claimants alleged that Respondent took advantage of the incomprehensibility of the prospectus and knew that the audience to which it was pitching relied completely upon its presentation. Claimants further alleged that a significant portion of the real property acquired by the Arvida I partnership consisted of undeveloped land which is considered speculative. Claimants contended that a large front-end load increased the risk for investors in Arvida I. Claimants further contended that cash distributions to the limited partners in Arvida I totaled \$320.00 for each interest owned and were paid through mid-1990. Claimants alleged that Respondent made no real effort to inform existing or potential investors that the distributions were in fact "managed distributions". Claimants 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. Claimants contended that the effect of distributions in Arvida I totalling approximately \$139,000,000.00 was to materially reduce the available capital of the partnership. Claimants further contended

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 was \$1,000.00, the amount the investor paid. Claimants 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 Claimants' loss.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., through its representative, Dominick F. Evangelista, Esq., of Bressler, Amery & Ross, in Morristown, N.J., maintained 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 prospectus describing the investment was forwarded to Claimants and disclosed the nature of the investment, 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 Claimants' have 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 facts clearly indicating that it would receive selling commissions and remuneration of underwriting, due diligence investigation and marketing expenses are disclosed throughout the prospectus. Respondent further maintained that Claimants were 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 Claimants' equation of undeveloped land with raw land is in error. Respondent maintained that the prospectus specifically described each real estate holding and the stage 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 Claimants' loss.

RELIEF REQUESTED

Claimants David and Susan Kelly, requested \$10,000.00 in actual damages, plus interest, costs and attorney's fees.

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

OTHER ISSUES CONSIDERED AND DECIDED

The arbitrator reviewed and considered all documentation regarding Respondent's request for a telephonic pre-hearing conference and Respondent's Motion to Strike in the above matter. The arbitrator denied these requests.

Respondent's November 1, 1995 submission was not considered by the arbitrator in this matter.

AWARD

Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Anne Cugliani, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimants on September 24, 1993 and by the Respondent on February 7, 1994.

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 Claimants David Kelly and Susan Kelly \$6,836.50 in actual damages.
2. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimants David Kelly and Susan Kelly simple interest at the rate of 9% per annum from October 15, 1987 to October 15, 1994.
3. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable and shall pay to Claimants David Kelly and Susan Kelly \$1,000.00 in attorneys' fees pursuant to Section 43(e) of the Code of Arbitration Procedure.
4. Claimants David Kelly and Susan Kelly's interest in the Arvida/JMB Partners, L.P. I shall be returned to Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.
5. The parties shall bear their respective costs.
6. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimants David and Susan Kelly, shall be retained by the NASD, Inc. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., is liable and shall pay to the Claimants \$150.00 as reimbursement of the filing fee.

Affirmation

STATE OF New York SS:

COUNTY OF Suffolk

I, De Anne Cagle, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my oath and award.

Date

Anne Cagle
Signature of Arbitrator

Karen E. Chimenti
Notary Public
State of New York
County of Suffolk

KAREN E. CHIMENTI
Notary Public, State of New York
No 4874120
Qualified in Suffolk County
Commission Expires Dec. 15, 1996

Date of Decision: December 6, 1995