

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Joseph P. and Mabel J. van Daalen

94-02093

Name of Respondents

Merrill Lynch Pierce Fenner & Smith, Inc.
Bruce Vivino
Wayne Sammartino
Brian Dillon

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on June 6, 1994, Claimants Joseph P. and Mabel J. van Daalen, who appeared Pro Se, alleged that Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), Wayne Sammartino ("Sammartino"), Bruce Vivino ("Vivino") and Brian Dillon ("Dillon") withheld material information from them in a bond purchase and executed several unauthorized transactions. Claimants further alleged that on March 30, 1994 they contacted Respondent Sammartino regarding the purchase of certain New York City bonds with a 6% coupon maturing in 2008 and pursuant to Respondent Sammartino's advice, purchased \$35,000.00 worth of the bonds. Claimants contended that on April 2, 1994 they received a confirmation of their order and learned, to their surprise, that the bonds they had ordered had not yet been issued and on April 4, 1994 they informed Respondent Sammartino that this was unacceptable and they wanted the order cancelled. Claimants further contended that after several other instances of correspondence with the Respondents the bonds were sold out of his account, without authorization, five days before the settlement date, at a loss of \$879.38. As a result of the above, Claimants alleged that they have suffered damages for which the Respondents should be held liable.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Wayne Sammartino, Bruce Vivino and Brian Dillon, through their representative Christopher Cavuoti, Esq., New York, NY, maintained that Claimant contacted Respondent Sammartino on March 30, 1994 to inquire about the availability of New York City Series H Subseries H-1 6% General Obligation Bonds due August 1, 2008 and Respondent Sammartino informed Claimants the bonds were available "as

part of a new deal done last week" and provided Claimants with a price of 99. Respondents further maintained that Claimants called for a quotation on the bonds the morning of March 31, 1994 and was provided with a quote of 98.515 after which they placed an unsolicited order for 35 bonds. Respondents contended that Claimants called Respondent Sammartino on April 4, 1994 to ask why they were not informed that the bonds in question "did not exist" and Respondent Sammartino explained that the bonds did indeed exist as they were trading on a "when issued" basis and were approved for trading. Respondents further contended that Claimants faxed a letter to Respondents on April 5, 1994 stating that he wanted the bond purchase cancelled and stating that he refused to pay and in response to this, Respondents wrote to Claimants on April 7, 1994 demanding payment by April 11, 1994. Respondents maintained that after a one day grace period, Respondent MLPFS sold the bonds on April 13, 1994, notified Claimants of the sale, and demanded payment of Claimants' \$879.38 debit balance. Respondents further maintained that Claimants deposited \$34,515.25, the bonds purchase price, on April 18, 1994 and Respondent MLPFS applied \$879.38 to the debit balance in Claimants' account and mailed the remainder to the Claimants. As a result of the above, Respondents contended that they should not be held liable in this matter.

In their reply, Claimants alleged that Respondents' answer was not served upon them in a timely manner. Claimants further alleged that Respondents Vivino & Dillon should not be dismissed from this arbitration proceeding.

In their response to Claimants' reply, Respondents maintained that their answer was timely served upon Claimants. Respondents further maintained that had Respondent MLPFS waited until April 18, 1994 for payment from Claimants they would have exposed Claimants to the possibility of a greater loss and that Claimants refused to pay for a legitimate unsolicited order.

RELIEF REQUESTED

Claimants Joseph P. and Mabel J. van Daalen requested \$880.00 in actual damages, \$1,000.00 in punitive damages, \$125.00 for reimbursement of an account transfer fee, interest, and costs of this arbitration proceeding.

Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Wayne Sammartino, Bruce Vivino and Brian Dillon requested that the claims of the Claimants be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

The Arbitrator reviewed and considered the Motion to Dismiss of Respondents Bruce Vivino and Brian Dillon together with all related documents. The Motion to Dismiss is granted.

AWARD


Pursuant to Section 13 of the NASD, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Marian S. Hertz, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimants on May 30, 1994 and by the Respondents on October 7, 1994 and October 11, 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. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Wayne Sammartino are jointly and severally liable and shall pay to Claimants Joseph P. and Mabel J. van Daalen \$879.38 in actual damages.
2. The Claimants' request for Punitive damages is denied.
3. The parties shall bear their respective costs.
- 4. The \$50.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimants shall be retained by the NASD, Inc. Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Wayne Sammartino are jointly and severally liable and shall pay to Claimants \$50.00 as reimbursement of the filing fee.

AFFIRMATION

I, **MARIAN S. HERTZ**, 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

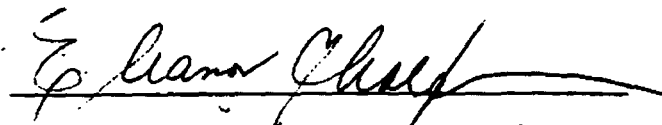
DATE OF DECISION: March 28, 1995

STATE OF:

SS:

COUNTY OF:

On this 8th day of March 1995, before me personally appeared **MARIAN S. HERTZ** to me known and known before me to be the individual described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.



ELEANOR CHALFIN

NOTARY PUBLIC, State of New York
No. 24-4803774
Qualified in Kings County

Commission Expires 10/31/96