

NASD REGULATION, INC.  
AWARD

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In the Matter of the Arbitration Between

Name of Claimants

Mirta Sosa and Juan Del Conte

vs.

Case No.  
94-02617

Name of Respondents

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

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**REPRESENTATION**

For Claimants Mirta Sosa ("Sosa") and Juan Del Conte ("Del Conte") (collectively "Claimants"), appeared Malcolm Taub, Esq. of the firm Bizar Martin & Taub, LLP, located in New York, New York.

For Respondents Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch") and Rocia M. Gell ("Gell"), appeared Edwin A. Zipf, Esq., of the firm Bressler, Amery & Ross, located in Morristown, New Jersey.

**CASE INFORMATION**

Claimant's Statement of Claim was filed on June 14, 1994.  
Claimant's Submission Agreement was signed on January 18, 1995.

Respondent's Joint Statement of Answer was filed on October 10, 1994.

Respondent Merrill Lynch's Submission Agreement was signed on October 7, 1994.  
Respondent Gell's Submission Agreement was signed on August 30, 1994.

**HEARING INFORMATION**

Pre-Hearing Conferences:	August 8, 1996	-	1 session
	February 10, 1997	-	1 session
	November 18, 1997	-	1 session

	March 17, 1998	-	1 session
Hearing Dates/Sessions:	March 13, 1998	-	1 session
	July 23, 1998	-	2 sessions
	July 24, 1998	-	2 sessions
	July 27, 1998	-	2 sessions
	August 26, 1998	-	2 sessions
	October 7, 1998	-	2 sessions

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

### CASE SUMMARY

Claimants state that they sought to invest for the purpose of conservative investments for capital appreciation and income. Claimants allege that Gell recommended investments in AMFAC/JMB Hawaii, Inc. ("AMFAC") Certificates of Land Appreciate ("COLA") notes, and also a limited partnership known as Equitable Capital Partners, L.P. ("Equitable"). Claimants aver that Gell made material misrepresentations regarding the nature and quality of the AMFAC COLA Notes and Equitable partnership units, by representing to Claimants that the investments would produce 13 to 15% annual returns with little or no risk and that the investments would be easy to liquidate.

Claimant Sosa states that, as a result of Gell's representations, she invested \$100,000.00 in AMFAC COLA notes on July 15, 1988 and she and her husband jointly invested \$50,000.00 in Equitable on December 1, 1988. Claimants aver that, since Respondents never sent a prospectus for either investment until after the investments were made, they were unable to make truly informed investment decisions. Claimants contend that the investment decisions were based solely on Gell's investment advice. Claimants further contend that these investments were improper and inappropriate considering Claimants' investment objectives and requirements. Claimants assert that Gell breached her fiduciary duty to them by failing to inform Claimants of the risks inherent in the investments.

Claimants maintain that both the AMFAC and Equitable investments were not liquid as Claimants had required, the investments were not traded on any market, nor did the investments return the 13 to 15% annually as Gell had represented. Claimants assert that Gell's conduct in making these negligent misrepresentations was extreme and outrageous. Claimants further assert that while Respondents were maintaining their account, debits were inexplicably taken from the account. Claimants maintain that Merrill Lynch, as employers of Gell at the time in controversy, are jointly responsible for Gell's conduct under the principles of *respondeat superior*.

Respondents assert that Gell personally gave Claimants a prospectus during a July, 1988 meeting held at Merrill Lynch's Forest Hills office. Respondents further assert that Gell informed Claimants of the limited liquidity of the investments, as well as the structure of the investment. Respondents also assert that Gell informed Claimants that the projected rate of return was not

assured and that the duration of the partnership was expected to operate at least ten years. Respondents aver that Claimants had prior investment experience in securities which entailed higher levels of risk and, therefore, Claimants acted with full knowledge and notice of the facts. Respondent contends that they acted properly and in good faith, in accordance with the applicable Exchange rules and regulations. Respondents further contend that they investigated the Claimants' allegations of improperly debiting Claimants' account and found that all charges and credits were properly assessed.

Respondents allege that, on November 25, 1988, Claimant Sosa sought to transfer all the jointly held assets to herself, but did not reveal the reason why until January 26, 1991. Respondents allege that Claimant Sosa stated that she wanted to transfer assets between herself and Del Corte, as well between Claimants and third parties. Respondents state that Sosa and Gell discussed several ideas suggested by Claimants in order for Sosa to protect her assets from possible seizure. Respondents contend that Claimants unilaterally decided when to purchase and when to hold such securities and accepted the acts complained of in the Statement of Claim. Respondents further contend that Claimants are barred from any recovery due to the equitable doctrine of unclean hands. Additionally, Respondents allege that Claimants failed to mitigate their damages. Respondents also allege that New York law prevents an award of punitive damages. Respondents state that even if such damages can be awarded, punitive damages are uncalled for in this action.

#### **RELIEF REQUESTED**

Claimants request at least \$300,000.00 in compensatory damages, including attorney's fees and the cost of arbitration to be assessed against Respondents. Claimants also request \$20,000.00, together with attorney's fees and the costs of arbitration to be assessed against Respondents for unjustified debts taken from Claimants's account. Claimants further request at least \$1,000,000.00 in punitive damages to be assessed against both Respondent Gell and Respondent Merrill Lynch.

Respondent requests that the Statement of Claims be dismissed in its entirety and that Respondents be awarded any other such awards as deemed just and proper.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimants Mirta Sosa and Juan Del Contes' requests for relief are denied in their entirety;
2. Any claims of Respondents in this proceeding, including sanctions, are also denied;
3. Based upon the merits of this case, the panel hereby orders that all references to this arbitration be expunged from Gell's permanent CRD record by NASD Regulation, Inc.
4. All other claims for relief are denied.

### **OTHER COSTS**

Pursuant to Rule 10333 of the *Code of Arbitration Procedure* ("Code"), Merrill Lynch Pierce Fenner & Smith, Inc. has paid NASD Regulation, Inc. the \$200.00 member surcharge previously invoiced.

### **FORUM FEES**

Pursuant to Rule 10332(c) of the *NASD Regulation Code of Arbitration Procedure* ("Code"), the arbitrators have determined that the NASD will retain the \$250.00 non-refundable filing fee deposited by Claimants and have assessed the following Forum Fees:

4 Pre-Hearing Conferences	-	\$ 1,200.00	(@ \$300.00 per session)
11 Hearing Sessions	-	\$ 11,000.00	(@ \$1,000.00 per session)
Total Fees	-	\$ 12,200.00	

1. Claimants be and hereby are liable for the sum of \$6,100.00, representing one-half of the total forum fees assessed. Claimants previously deposited \$1,000.00 with NASD Regulation, Inc., therefore Claimants owe \$5,100.00.
2. Respondent Merrill Lynch be and hereby is liable for and shall pay the sum of \$6,100.00, representing one-half of the total forum fees assessed.

Fees are payable to NASD Regulation, Inc.

**ARBITRATION PANEL**


Robert Pincus, Esq.	-	Public Chairperson
James J. Fishman	-	Public Panelist
William E.S. Browning, Esq.	-	Industry Panelist

**CONCURRING ARBITRATOR'S SIGNATURE**

  
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Robert Pincus, Esq.

Date of decision: NOVEMBER 23, 1998

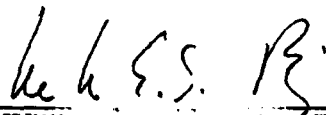
I, Robert Pincus, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Robert Pincus, Esq.

**ARBITRATION PANEL**

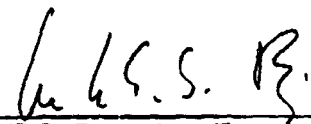
Robert Pincus, Esq.	-	Public Chairperson
James J. Fishman	-	Public Panelist
William E.S. Browning, Esq.	-	Industry Panelist

**CONCURRING ARBITRATOR'S SIGNATURE**

  
\_\_\_\_\_  
William E.S. Browning, Esq.

Date of decision: NOVEMBER 23, 1998

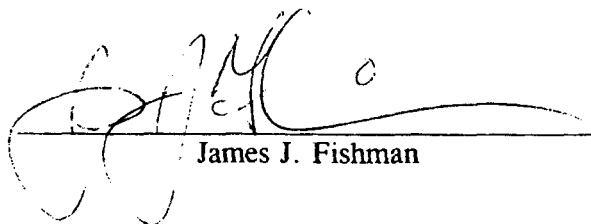
I, William E.S. Browning, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
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William E.S. Browning, Esq.

**ARBITRATION PANEL**

Robert Pincus, Esq.	-	Public Chairperson
James J. Fishman	-	Public Panelist
William E.S. Browning, Esq.	-	Industry Panelist

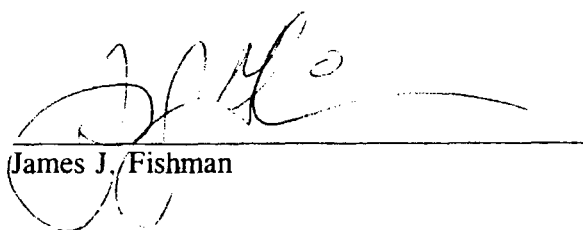
**CONCURRING ARBITRATOR'S SIGNATURE**



James J. Fishman

Date of decision: NOVEMBER 23, 1998

I, **James J. Fishman**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



James J. Fishman