

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Amada Carmen Garcia  
and Asia Garcia Duarte

95-00398

Name of Respondent/Third Party Claimant

Merrill Lynch Pierce Fenner & Smith Inc.

Name of Third Party Respondent

Juan Francisco Pena

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REPRESENTATION

For Claimants, Amada Carmen Garcia ("Garcia"), Asia Garcia Duarte ("Duarte") and Third Party Respondent, Juan Francisco Pena ("Pena"): Philip J. Snyderburn, Esq. and K. Michael Swann, Esq. of Snyderburn, Rishoi & Swann, Winter Park, Fl.

For Respondent/Third Party Claimant, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"): Alex J. Sabo, Esq. and Bennett Falk, Esq. of Morgan, Lewis & Bockius, Miami, Fl.

CASE INFORMATION

Statement of Claim filed January 24, 1995.

Claimants' Submission Agreement signed on January 18, 1995.

Statement of Answer filed by Respondent, Merrill Lynch, on March 30, 1995.

Amended Statement of Answer and Third Party Claim filed by Respondent, Merrill Lynch, on June 27, 1995.

Amended Third Party Claim filed by Respondent, Merrill Lynch, on September 14, 1995.  
Respondent, Merrill Lynch's Submission Agreement signed on April 18, 1995.

Statement of Answer filed by Third Party Respondent, Pena, on July 31, 1995.

## **HEARING INFORMATION**

On February 16, 1996, a telephonic pre-hearing conference lasting one (1) session was conducted with the Chairperson.

On March 11, 12, and 13, 1996 and July 8, 9, and 10, 1996, in Tampa, FL. hearings lasting 14 sessions were conducted.

## **CASE SUMMARY**

Claimants are two elderly Venezuelan sisters who purchased collateralized mortgage obligations ("CMOs") from Merrill Lynch on margin. Merrill Lynch recommended the use of margin. Upon liquidation of the account, the sisters accounts lost \$780,000. Claimants seek compensatory damages and pre-judgement interest in the amount of \$1,271,000.

Respondent Merrill Lynch denied all allegations of wrongdoing and asked the panel to dismiss the Statement of Claim in its entirety. In addition, Respondent, as Third Party Claimant, brought a claim against Third Party Respondent Juan Francisco Pena, Claimant Amada Garcia's son and Claimant Asia Duarte's nephew, for fraud and breach of warranty. Respondent alleged that Claimants had executed a general power of attorney in favor of Third Party Respondent, that it had relied upon the general power of attorney, that it had relied upon the representations made by Third Party Respondent in connection with the investments and transactions at issue, including representations relating to suitability, investment objectives and risk tolerance, and that if it were liable to Claimants, then Third Party Respondent was liable to it. Respondent alleged that the investments and transactions at issue were authorized by Claimants or Third Party Respondent, acting under the general power of attorney, and that they were suitable. Additionally, Respondent alleged that Claimants had executed and had received numerous disclosure documents, which fully described the investments and strategy at issue and the risks attendant to them. Respondent also alleged that Claimants and Third Party Respondent, with full knowledge of such risks, authorized and approved such investments and strategy. Further, Respondent alleged that Claimants and Third Party Respondent had invested in the same types of securities without complaint for more than two years and that they only complained after the market value of the securities declined as the result of the Federal Reserve Board's decision in 1994 to raise interest rates. Finally, Respondent alleged that any losses suffered by Claimants resulted from their decision, or the decision of Third Party Respondent, to liquidate the investments at a loss, notwithstanding advice from Respondent to hold the investments until redemption, as they had agreed when they implemented the strategy at issue.

Third Party Respondent denied all the allegations of the Third Party Claim.

## **RELIEF REQUESTED**

Claimants requested compensatory damages and pre-judgement interest in the amount of \$1,271,000.00, all costs of this proceeding and punitive damages pursuant to Florida Statute.

Respondent asks the arbitrators to deny the Statement of Claim in its entirety.

Third Party Claimant, Merrill Lynch, demands judgement for damages against Third Party Respondent, Pena.

Third Party Respondent, Pena, seeks to recover costs and attorneys' fees in defending this claim.

### **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 originals remain 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) Respondent, Merrill Lynch is found liable and shall pay the Claimants the amount of \$757,850.00, plus interest in the amount of \$101,046.67 for a total due to Claimants of \$858,896.67.
- 2) Respondent, Merrill Lynch is also found liable and shall pay to the Claimants the further amount of \$75,000.00 for attorneys' fees.
- 3) Claimants' request for punitive damages is denied.
- 4) Third Party Claimant's request for damages against Pena is denied.
- 5) Third Party Respondent Pena's request for costs and attorneys' fees are denied.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$14,300.00 ( 1 pre-hearing conference x \$300.00 plus 14 hearing sessions x \$1,000.00.

- 1) Respondent, Merrill Lynch, is hereby assessed \$14,300.00 of which \$1,000.00 is payable to the Claimants and \$12,700.00 (\$13,300 - \$600 previously deposited) is payable to the National Association of Securities Dealers, Inc.
- 2) The NASD shall retain both the non-refundable filing fees of \$250 and \$500 respectively paid by Claimant and Third Party Claimant.
- 3) Respondent, Merrill Lynch, is owing the Section 45 fee of \$500.00.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

/s/

Public

Lewis J. Levey, Esq.

/s/

Industry

James A. DeRiso

/s/

Public

John F. Geraci

Date of Decision: August 13, 1996