

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Martin and Marcia Kepecs

96-04039

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc  
John C. Varricchio

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**CASE SUMMARY**

In a case filed with the National Association of Securities Dealers Regulation, Inc. on September 10, 1996, claimants Martin and Marcia Kepecs ("claimants"), who appeared Pro Se, alleged that respondents Merrill Lynch Pierce, Fenner & Smith ("Merrill Lynch") and John Varricchio ("Varricchio") sold them securities without full disclosure, removed funds without their authorization, and charged fee for services not performed. Claimants further alleged that Mr. Kepecs has been a Merrill Lynch customer for over 20 years. Claimants also alleged that Mr. Kepecs was sold an annuity by Varricchio, which became due in August 1994. Claimants asserted that Varricchio suggested reinvesting the money at a better rate of interest, so he sold the annuity on August 19, 1994. Claimants further asserted that Varricchio never mentioned any tax penalties for selling an annuity before age 59. Claimants also asserted that since Mr. Kepecs date of birth are spread all over Merrill Lynch's records, Varricchio was fully aware that he was 55 years old, at the time. Claimants contended that they informed Varricchio of this tax liability and he said he would look into it. Claimants further contended that at the end of January 1996, Varricchio acknowledged his error and issued a letter waiving annual account fees on his CMA and both of their IRA accounts. Claimants also contended that Varricchio recommended the sale of a security unsuitable to Mr. Kepecs age.

Claimants alleged that in February, they were billed for annual fees, so they sent Merrill Lynch a copy of Varricchio's letter. Claimants further alleged that this letter was ignored and in February, Mr. Kepecs CMA account was charges and securities were sold without his permission from both their IRA accounts. Claimants also alleged that besides not fulfilling the obligation of Varricchio's letter, Merrill Lynch removed funds or securities from a customer's account without the customers prior authorization.

Claimants asserted that in late August, early September 1995, Mr. Kepecs started investigating retirement plans. Claimants further asserted that Varricchio informed Mr. Kepecs that Merrill Lynch had a retirement plan and that it required filing out a questionnaire, which would be analyzed to determine a retirement scheme. Claimants also asserted that Varricchio told Mr. Kepecs that there was a \$175.00 fee customarily charged with this service, but because he was a long standing customer there would be no fee. Claimants contended that he had an initial meeting with a Merrill Lynch representative as well as representatives from other firms. Claimants further contended that Mr. Kepecs called Varricchio and informed him that no other brokerage was charging a fee, and if there was going to be a fee charged by

Merrill Lynch, he did not want to proceed. Claimants also contended that Varricchio assured Mr. Kepecs that their would be no fee. Claimants alleged that on their October 1995 statement, there was a fee charged. Claimants further alleged that Mr. Kepecs was told it was procedure to place a fee and that it would be removed. Claimants also alleged that they told Varricchio that they did not want to proceed, as no service was rendered yet. Claimants asserted that they tried to get the fee removed for services they had not received, but to no avail.

Claimants further asserted that more than 10 years ago, Mr. Kepecs invested \$5,000.00 in a Merrill Lynch limited real estate partnership ("MLH"), that was to come to maturity in five years. Claimants also asserted that the risk of the partnership and this investment yields were misrepresented to Mr. Kepecs. Claimants contended that Merrill Lynch has since, after the fact, changed how the investment is listed and now the value is less than originally stated.

Respondents Merrill Lynch and Varricchio (collectively referred to as "respondents") through their representative and in-house counsel Christopher Cavuoti maintained that Mr. Kepecs is an experienced business owner and investor who understands business and investment risks. Respondents further maintained that in the summer of 1994, Mr. Kepecs called Varricchio and expressed his dissatisfaction regarding the performance of his MLLICNY Alternative 2 Annuity, (the "Annuity"). Respondents also maintained that Mr. Kepecs informed Varricchio that his accountant had advised him to liquidate the Annuity. Respondents contended that Mr. Kepecs made an unsolicited sale of the Annuity.

Respondents further contended that in 1995, Mr. Kepecs informed Varricchio that his accountant had advised him to invest in growth, because there was little growth with the tax-free investment made in 1994. Respondents also contended that as a result of claimants changing their investment objective, Varricchio recommended the Merrill Lynch Financial Foundation Service (the "service"). Respondents maintained that Varricchio discussed with Mr. Kepecs how the service worked and that there would be a \$175.00 fee. Respondents further maintained that Mr. Kepecs agreed to the service and after the plan was completed, Varricchio called claimants to review the plan. Respondents also maintained that Mr. Kepecs did not want to review the plan and complained about the \$175.00 fee. Respondents contended that Mr. Kepecs called at a later time and stated he was pleased with Varricchio's ideas, however if they wanted to keep his account they would have to refund the \$800.00 IRS penalty and the \$175.00 service charge. Respondents further contended that because claimants were valued customers, Varricchio agreed to waive claimants' CMA and IRA fee for 2 1/2 years. Respondents also contended that when claimants advised Varricchio that they would be transferring their account out of Merrill Lynch, Varricchio informed them he was no longer able to waive his fees.

Respondents maintained that all fees charged in claimants accounts were done in accordance with the CMA and IRA agreements signed by claimants. Respondents further maintained that the MLH was not recommended by or purchased through Varricchio, nor was he claimants' consultant at the time of the purchase. Respondents also maintained that claimants received a prospectus along with a trade confirmation notice prior to settlement date of the trade. Respondents contended that the prospectus disclosed in detail the objectives and risks of the MLH. Respondents further contended that the prospectus specifically conveyed that there was not assurance that the objectives of the partnership would be attained. Respondents also contended that on a total return claimants' investment in MLH was profitable.