

N.A.S.D. FINAL ORDER

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of
Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, N.Y. 10004
FAX (212) 858-4389

In the Matter of the Arbitration Between

Name of Claimants

Medical Horizons LP - Talbot Trust et al

90-00892

Name of Respondents

Fiduciary Services, Inc.
Fiduciary Planning, Inc.
Robert Johnston

REPRESENTATION

For Claimants: James Steffl, Esq. of Kemp, Klein, Endelman & Umphrey, P.C.

For Respondents: Richard P. Saslow, Esq. and Phillip C. Korovesis, Esq. of Butzel Long.

CASE INFORMATION

Statement of Claim filed: March 26, 1990.

Submission Agreements signed:

John Rossetto Trust by John Rossetto, Trustee: March 22, 1990.
RBM Investment, by Roger S. Harris, Partner: August 14, 1990.
Charles F. Talbot Trust by Charles F. Talbot, Jr., Trustee: July 30, 1990.
William Bull: August 6, 1990.
Thomas C. Chwalik: August 6, 1990.
Gary E. Dewel and Margaret S. Dewel: August 3, 1990.
Thomas L. Saydak: July 20, 1990.
George S. Matick: July 25, 1990.
Wayne M. Brehob and Marie Brehob: July 24, 1990.
Frank B. Couture Trust by Frank B. Couture Jr., Trustee: July 24, 1990.
James S. Perzyk and Lucille Perzyk: July 25, 1990.
Glen W. Holiday and June Holiday: signed but not notarized.

Statement of Answer filed by Respondents. Fiduciary Planning, Inc. and Robert Johnston:
December 21, 1990.

Respondent, Fiduciary Planning, Inc.'s Submission Agreement signed on December 11, 1990.

Respondent, Robert Johnston's Submission Agreement signed on December 11, 1990.

HEARING INFORMATION

Pre-hearing conference: May 27, 1992 - One Session.

Hearing Dates/Sessions: November 13, 1991 - One Session.
July 21, 1992 - One Session.

Hearing Location: Berkshire Inn - Southfield, MI.
Kemp, Klein Endleman & Umphrey - Troy, MI

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following forum fees are assessed:

Non-refundable filing fee:	200.00
Pre-hearing Conference:	300.00
Hearing Fees:	2,250.00 (3 sessions x \$750)

- 1) Forum fees in the amount of \$2,750.00 are hereby assessed equally among the Claimants and Respondents.
- 2) Accordingly, Claimants are hereby assessed the amount of \$1,375.00. Claimants are entitled to offset this amount with the \$200.00 previously deposited with the NASD. Claimants are directed to pay the balance of \$1,175.00 to the NASD, Inc.
- 3) Respondents are hereby assessed the amount of \$1,375.00. Respondents are directed to pay this amount to the NASD, Inc.

ORDER

See attached Opinion.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

ARBITRATION

CHARLES F. TALBOT TRUST, et al.,

Claimants,

-vs-

NASD Arbitration No.
90-00892

FIDUCIARY SERVICES, INC., a
Michigan corporation, et al.,

Respondents.

OPINION

The legal question presented to this Panel by Respondents' Motion To Dismiss is whether section 15 of the National Association of Securities Dealers' (hereinafter "NASD") Code of Arbitration Procedure (hereinafter the "Code") bars the NASD's jurisdiction to arbitrate the issues presented by Claimants' Demand For Arbitration.

Section 15 of the Code provides, as follows:

No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

This section, according to section 18 of the Code, can be tolled only after the submission to the NASD of a "duly executed Submission Agreement" or while a "court of competent jurisdiction" retains jurisdiction over the matter submitted.¹

1. Section 18 of Code states as follows:

(a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.

I. Background.

Claimants are the limited partners of Medical Horizons Limited Partnership (hereinafter "MHLF"), a Michigan limited partnership formed in 1983. Demand For Arbitration ¶ 1, hereinafter "Demand." MHLF was formed to lease and then sublease to doctors and other health professionals a computerized health and nutrition system known as "The Perfect You" system. Demand ¶¶ 1, 5.

MHLF issued a private placement memorandum for the purpose of raising money to finance its marketing of the system. Id. By its terms, the private placement offering terminated on December 15, 1983. Demand, Exhibit A at 1.

Respondent Fiduciary Services, Inc., (hereinafter "FS") is MHLF's general partner and the only limited partner who is not a claimant. Demand ¶ 2. The "securities underwriter" for the investment was Respondent Fiduciary Planning, Inc. (hereinafter "FPI"). Demand ¶ 3. The sole shareholder and president of FS and FPI is Respondent Robert Johnston. Demand ¶ 4. The Respondents reside and do business in Birmingham, Michigan.

Claimants' Demand For Arbitration sets forth in detail the way the investment was established and marketed. Demand ¶¶ 8-12. The central allegations, however, concern Respondents' fraud and deceit in failing to disclose to Claimants, prior to their purchase: the involvement of Joseph Steingold, an allegedly notorious swindler; the criminal background and involvement in other fraudulent investment schemes by Joseph Steingold and Earl Serap; and the viability of the tax shelter given the inflated valuation of the system. Demand ¶¶ 42, 44, 49-50, and 58.

Claimants also allege that the Respondents went to considerable efforts to conceal from Claimants the involvement of Mr. Steingold and the baseless valuation of the system. Demand ¶¶ 23-24, 29, 42. Moreover, the Internal Revenue Service challenged the tax deductions taken by Claimants based on a valuation of \$198,000 per system. Demand ¶ 37. The Service held that Claimants' investment was without a profit motive and the valuation per system was substantially overstated. Demand ¶ 38.

(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim, or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

Claimants assert that MHLF's general partner, FS, merely furthered the conspiracy to conceal by advising and, indeed, persuading, Claimants not to challenge the determination by the Service. Demand ¶ 39-40.²

It is undisputed that the Claimants were sold their limited partnership shares in MHLF during "Mid-Late 1983."³ It is also undisputed that Claimants filed their Demand For Arbitration with the NASD on March 26, 1990.⁴ Claimants seek, in effect, rescission, the return of their investment, consequential damages arising from the baseless valuation, and exemplary damages. Demand ¶¶ 61-64.⁵

II. Discussion.

This Panel is persuaded a recent decision of the United States Court of Appeals for the Seventh Circuit. See Edward D. Jones & Co v Sorrells, 957 F2d 509 (7th Cir 1992); see also PaineWebber v Hartmann, 921 F2d 507 (3d Cir 1990). In Sorrells, the claimant filed their claim before the NASD on August 29, 1988. 957 F2d at 510. The last in a series of investments made by claimants was purchased on August 18, 1982. 957 F2d at 511 n3, 512.

Although the arbitration panel in Sorrells did not dismiss the action, after an award was entered for claimants, the respondent appealed to the federal district court. 957 F2d at 511. It argued that section 15 of the Code barred any consideration of the claimants' action and that the arbitrators

2. Claimants did, on their own, appeal the Service's determination. Shortly thereafter, FSI filed an appeal on behalf of MHLF. Demand ¶ 40. Claimants did obtain some relief on the issue of a profit motive, but not as to valuation. Demand ¶ 41.

3. See Claimants' Reply To Motion To Dismiss at 4 (3/4/91). Claimants' Demand For Arbitration does not set forth the dates that each Claimant purchased his share in MHLF, but its Reply does set forth a chronology of events which includes this information. The offering, according to its terms, terminated on December 15, 1983. Demand, Exhibit A at 1.

4. Respondents do argue, with some force, that the Demand For Arbitration was not "filed" within the meaning of the Code until October 29, 1990, when all of Claimants' Submission Agreements were properly signed and received by the NASD. For purposes of this decision, however, we consider the date of filing to be March 26, 1990.

5. Claimants inadvertently numbered paragraph 64 as "61."

had no jurisdiction to rule on the claims. The federal district court judge agreed and vacated the award. 957 F2d at 511. The Seventh Circuit upheld the decision. 957 F2d at 514.

In upholding the district court, the Seventh Circuit stated

that Section 15 "is an eligibility requirement that must be met in order for a claim to be arbitrable before the NASD. It goes to the very power (i.e., subject matter jurisdiction) of the NASD. It is not a statute of limitations Thus, the arbitrators exceeded their authority by considering claims which could not properly be brought before the arbitrators." Although the September 11th district court order makes no explicit mention of the federal Arbitration Act, it is clear from a reading of the order that the court vacated the award pursuant to its authority under § 10(d) of the Act. That provision authorizes district courts to vacate arbitration awards "[w]here the arbitrators exceeded their powers" 9 U.S.C. § 10(d).

957 F2d at 512, quoting 1990 WL 133457 (ND Ill 1990) (the district court opinion was not reported in the Federal Supplement). As in Sorrells, the Claimants have filed their claim outside the six year period set forth in section 15 of the Code. Claimants filed with the NASD, at the earliest, on March 26, 1990. Sales of the private offering terminated on December 15, 1983. Claimants purchased their limited partnership shares in "Mid-Late 1983."

Claimants here, as did the claimants in Sorrells, raised questions regarding fraudulent concealment' The

6. Claimants in this case characterize the fraudulent concealment as a "continuing wrong." However, the concepts are different. See Zenith Radio Corp v Hazeltine Research, Inc, 401 US 321, 338-39 (1971); Fontana Aviation, Inc v Baldinelli, 418 F Supp 464 (WD Mich 1976), aff'd, 575 F2d 1194 (6th Cir), cert denied, 439 US 911 (1978). It is noted that, in this matter, all of the "wrongs" alleged by Claimants took place prior to or at the time of sale, e.g., failure to disclose the baseless method of valuation, failure to disclose the involvement of Steingold, and failure to disclose the backgrounds of Steingold and Serap. After the sale, Respondents are alleged to have taken steps to conceal these facts from Claimants. We see no new "wrongs" that occurred after the sale other than the alleged fraudulent concealment. In this connection, we reject Claimants' argument

allegations of fraudulent concealment would appear to raise substantial questions of fact regarding the efforts of Respondents to conceal their alleged wrong doing.

However, Sorrells characterizes Section 15--not as a statute of limitations subject to tolling in such an event--but, rather, as an "eligibility requirement" not subject to tolling:

This [fraudulent concealment] argument assumes that Section 15 operates as a statute of limitations and is thus subject to tolling. In PaineWebber [v Farnam, 870 F2d 1286 (7th Cir 1989)], however, we explicitly held that Section 15, which defines which claims "shall be eligible for submission for arbitration" (emphasis added), is an eligibility requirement and not a statute of limitations and thus cannot be tolled. 870 F.2d at 1292.

957 F2d at 512-13 (emphasis in original).

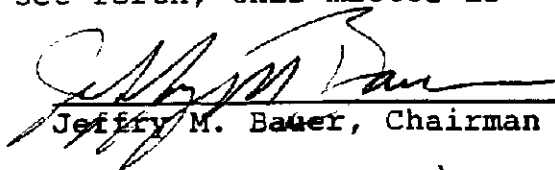
On this basis, therefore, we find that Claimants have not met the eligibility requirements of section 15 of the Code and we are without jurisdiction to hear this matter.'

that any period of limitations would begin running only after the last act constituting the fraudulent concealment. For example, the fact that Respondents may have discouraged and advised against any appeal of the Service's determination on value and profit motive as part of their continuing efforts to conceal their fraud (i.e., the baseless valuation of the system), is merely derivative to--not independent from--that fraud. As such it is less a "continuing wrong" and more properly part of the fraudulent effort to conceal the wrong.

7. We note that securities disputes are, for the most part, subject to arbitration before various self-regulatory agencies like the NASD and, indeed, there exists a federal policy favoring the arbitration of these claims. Shearson/American Express, Inc v McMahon, 482 US 220, 226 (1987). In most instances, the prospective claimant has no choice because, in order to open a brokerage account or purchase an investment, he must accept the standard industry practice of agreeing to arbitrate disputes. It is, indeed, repugnant to us that, had Claimants in this matter been able to take this dispute to a court of competent jurisdiction, that court would have been able to determine questions of fact regarding fraudulent concealment; but in this forum, which they are, for all practical purposes, compelled to entertain, they are barred from asserting such a defense in the context of section 15 of the Code. Such a result seems harsh,

III. Decision.

For the reasons herein set forth, this matter is dismissed.


Jeffrey M. Bauer, Chairman


John R. Main


Marc E. Thomas

Dated: September 29, 1992

unjust, and inconsistent with the goals and aims of arbitration. It is also inconsistent with the United States Supreme Court's impression that the arbitration of securities disputes does "not entail any consequential restriction on substantive rights." 482 US at 232.