

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Downers Grove National Bank, as
Trustee of the Schuham Hardware Co., Inc.
Profit Sharing Plan

No. 90-02762

Name of Respondents

Geneva Securities Inc.
Roland K. Kaeser

REPRESENTATION

For Claimant: James Adduci, Esq. and Michael Roche, Esq. of Schryler, Roche & Zwirner, Chicago, IL.

For Respondent Geneva Securities: Paul Donahue, Esq. and Carolyn Knecht, Esq. of Seyfarth, Shaw, Fairweather & Geraldson, Chicago, IL.

For Respondent Kaeser: Renan Sugarman, Esq. of Fishman & Merrick, Chicago, IL.

CASE INFORMATION

Statement of Claim filed on or about September 28, 1990.

Claimant's Submission Agreement signed on: September 28, 1990.

Joint Statement of Answer filed by Respondent, Geneva Securities, Inc. and Roland K. Kaeser on or about January 11, 1991.

Respondent, Geneva Securities, Inc., 's Submission Agreement signed on: January 7, 1991.

Respondent Roland K. Kaeser's Submission Agreement signed on: February 5, 1991.

Amended Statement of Claim filed: July 3, 1991.

Answer of Geneva Securities, Inc. to Amended Statement of Claim filed on or about January 20, 1992.

Amendment to Geneva Securities, Inc. Answer to Amended Statement of Claim
filed on: April 2, 1992.

HEARING INFORMATION

Hearing date: April 6, 1992. 2 sessions.
April 7, 1992. 2 sessions.
April 27, 1992. 2 sessions.
April 28, 1992. 2 sessions.
April 29, 1992. 2 sessions.
June 9, 1992. 2 sessions.
June 10, 1992. 2 sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Downers Grove Bank, as Trustee of the Schuham Hardware Co., Inc. Profit Sharing Plan ("Claimant") alleged common law fraud, violation of Rule 10b-5; breach of fiduciary duty, negligence, willful and wanton misconduct, breach of contract, and violation of NASD Rules by Respondents Geneva Securities, Inc. ("GSI") and Roland K. Kaiser ("Kaiser"). The allegations arose out of transactions in: VMS Strategic Land Fund II, a real estate investment trust; Recorp Percy-Priest Associates Limited Partnership; and Capital Housing, and Mortgage Partners, Inc., a real estate investment trust which occurred over a period from August of 1987 to March of 1990. The above-listed securities had been purchased for the Schuham Hardware Co., Inc. Profit Sharing Plan by Kaiser, who had been a broker with GSI during all relevant times herein.

In their Joint Statement of Answer, GSI and Kaiser denied each and every material allegations contained in the Statement of Claim. Respondents GSI and Kaiser alleged that the former trustees of the Profit Sharing Plan were, or had held themselves out to be, sophisticated and experienced with respect to business, financial and investment matters. Respondents GSI and Kaiser further alleged that the former trustees had an objective of generating a higher rate of return on the plan assets, and also alleged that the trustees had full knowledge about the proposed investments, and understood the nature of the investments. In addition, Respondents GSI and Kaiser asserted the following affirmative defenses:

1. Any award of punitive damages based on vague and undefined standards of liability would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Process Clause of the Illinois Constitution.

2. The amount of punitive damages sought is unconstitutionally excessive and disproportionate to Respondents' alleged conduct, and thus violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Due Process Clause of the Illinois Constitution.
3. Any award of punitive damages based upon any standard of proof less than "clear and convincing" evidence would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Due Process Clause of the Illinois Constitution.

For its Amended Statement of Answer, Claimant added a claim against Respondents GSI and Kaeser for breach of fiduciary duty under Section 404 of the Employee Retirement Income Securities Act ("ERISA"), as well as listing additional investments on which to base their allegations. These investments are: Equity line's "Accelerated" High Yield Institutional Fund I, Ltd., a limited partnership; Equity line's "Accelerated" High Yield Institutional Investors Ltd., a limited partnership; John Hancock Realty Income Fund, a real estate limited partnership; Equus Investments II, L.P.; Datronics Equipment Fund XVI, L.P.; and Datronics Equipment Fund XVII, L.P.

In its Answer to the Amended Statement of Claim, Respondent GSI denied each and every material allegation contained therein. In addition, GSI set forth the three affirmative defenses as raised in their original Answer. GSI also asserted the following affirmative defense:

4. Since the Plan is a pension plan within the meaning of ERISA, Claimant's claims of common law fraud, breach of fiduciary duty, negligence, willful and wanton misconduct, and breach of contract are preempted by ERISA under the Preemption Clause of the United States Constitution and must be dismissed. This preemption is effective despite the fact that GSI and Kaeser are not fiduciaries of the Plan within the meaning of ERISA.

For his Answer to the Amended Statement of Claim, Kaeser adopted the Answer of GSI dated January 20, 1992.

On April 2, 1992, Respondent GSI Amended its Amended Statement of Answer to include the additional affirmative defenses of:

5. Claimant's action for damages for the alleged violation of Rule 10b-5 is barred by the Statute of limitations because it had not been brought within one year after the discovery of the facts constituting the violation.
6. Claimant's actions for damages for the alleged breach of an alleged fiduciary duty under ERISA was not brought within three years after the earliest date on which the former trustees had actual knowledge

of the alleged breach. Claimant's action is therefore barred by ERISA's three year of statute of limitations.

7. The former trustees were fully aware of what investments the Plan made through Kaeser and GSI. They received confirmations of the Plan's purchases, as well as quarterly and annual reports from the partnerships and other securities they purchased. In addition, the Plan, and the former trustees (with the exception of Kenneth Schuham) as beneficiaries under the Plan, accepted benefits from those partnerships and other entities when said partnership and other entities made periodic and other payments to the Plan. The Plan, therefore, has ratified the actions taken by Kaeser and GSI, and has waived its Right to Object to the transactions.

RELIEF REQUESTED

For Count I Claimant requested: actual damages in the amount of \$41,095.13 or such other amount as determined by the arbitration hearing; exemplary and/or punitive damages in the amount of \$150,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the Arbitration Panel deemed just and proper.

For Count II Claimant requested: actual damages of \$41,095.13 or such other amount as determined at the arbitration hearing; pre-award interest, arbitration costs and reasonable attorney's fees; and such other further relief as the arbitration panel deemed trust and proper.

For Counts III, V and VII of its Statement of Claim, Claimant requested: actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; exemplary and/or punitive damages in the amount of \$500,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deemed just and proper.

For Counts IV, VI of its Statement of Claim, Claimant requested: actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deemed just and proper.

Respondents GSI and Kaeser requested that the Statement of Claim be dismissed.

For Counts I, IV of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; an order directing GSI and Kaeser to repurchase the units in Equityline Fund; Equityline Investors, Hancock Realty, Equus, Datronics XVI and Datronics XVII for \$295,000.00, or actual damages in the amount of \$295,000.00 or such other amount as determined at

the arbitration hearing; actual damages in an amount to be determined at the arbitration hearing for the prudent rate of return the Plan was prevented from earning by GSI's and Kaeser's breaches of fiduciary duty; exemplary and/or punitive damages in the amount of \$500,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deems just and proper.

For Count II of the Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$41,095.13 or such other amount as determined at the arbitration hearing; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deemed just and proper.

For Count III of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$41,095.13 or such other amount as determined at the arbitration hearing; exemplary and/or punitive damages in the amount of \$150,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deems just and proper.

For Count V of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; an order directing GSI and Kaeser to repurchase the units in Equityline Fund; Equityline Investors, Hancock Realty, Equus, Datronics XVI and Datronics XVII for \$295,000.00, or actual damages in the amount of \$295,000.00 or such other amount as determined at the arbitration hearing; actual damages in an amount to be determined at the arbitration hearing for the prudent rate of return the Plan was prevented from earning by GSI's and Kaeser's negligence; exemplary and/or punitive damages in the amount of \$500,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deems just and proper.

For Count VI of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; an order directing GSI and Kaeser to repurchase the units in Equityline Fund; Equityline Investors, Hancock Realty, Equus, Datronics XVI and Datronics XVII for \$295,000.00, or actual damages in the amount of \$295,000.00 or such other amount as determined at the arbitration hearing; actual damages in an amount to be determined at the arbitration hearing for the prudent rate of return the Plan was prevented from earning by GSI's and Kaeser's wilful and wanton misconduct; exemplary and/or punitive damages in the amount of \$500,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deems just and proper.

For Count VII of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; an order directing GSI and Kaeser to repurchase the units in Equityline Fund, Equityline Investors, Hancock Realty, Equus,

Datronics XVI and Datronics XVII for \$295,000.00, or actual damages in the amount of \$295,000.00 or such other amount as determined at the arbitration hearing; actual damages on an amount to be determined at the arbitration hearing for the prudent rate of return the Plan had been prevented from earning by GSI's and Kaeser's breaches of contract; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deemed just and proper.

For Count VIII of its Amended Statement of Claim, Claimant requested: Actual damages in the amount of \$156,163.29 or such other amount as determined at the arbitration hearing; an order directing GSI and Kaeser to repurchase the units in Equityline Fund; Equityline Investors, Hancock Realty, Equus, Datronics XVI and Datronics XVII for \$295,000.00, or actual damages in the amount of \$295,000.00 or such other amount as determined at the arbitration hearing; actual damages in an amount to be determined at the arbitration hearing for the prudent rate of return the Plan was prevented from earning by GSI's and Kaeser's violation of NASD Rules; exemplary and/or punitive damages in the amount of \$500,000.00; pre-award interest, arbitration costs and reasonable attorney's fees; and such other and further relief as the arbitration panel deems just and proper.

Respondents GSI and Kaeser requested that the Amended Statement of Claim be denied.

OTHER ISSUES CONSIDERED & DECIDED

On June 9, 1992, after having reviewed Claimant's Motion in limine and response, hearing argument from all parties present at the hearing, and deliberation, the panel ruled to deny the motion. However, the panel went on to state that if the panel deemed attorney's fees appropriate, the hearing would be reopened to allow submission of evidence on the matter.

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. Claimant's, Downers Grove National Bank, as trustee of the Schuham Hardware Co., Inc. Profit Sharing Plan, claim is hereby denied and dismissed, in its entirety, with prejudice.

2. Claimant, Downers Grove National Bank, as trustee of the Schuham Hardware Co., Inc. Profit Sharing Plan, is hereby assessed all forum fees, as set forth more fully below.
3. Claimant, Downers Grove National Bank, as trustee of the Schuham Hardware Co., Inc. Profit Sharing Plan, is liable for and shall reimburse the Respondents for any hearing session deposit made to the NASD.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

14 sessions X \$1,000.00 = \$14,000.00 less (Hearing session deposit \$1,000.00 and Interim hearing session deposit \$2,250.00) net due = \$10,750.00

Pursuant to Section 43(c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00 and shall retain the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant. The NASD shall also retain the interim hearing session deposit in the amount of \$2,250.00 previously paid by Claimant.

Additional forum fees in the amount of \$10,750.00 are assessed against Claimant.

Pursuant to Sections 43(c) and 30(b) of the Code of Arbitration, the NASD shall retain \$1,000.00 of the \$1,250.00 postponement fee paid by Claimant. The remaining \$250.00 shall be refunded to the Claimant.

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

Concurring Arbitrators' Signatures

September 23, 1992

/s/Henry X. Dietch
Henry X. Dietch
Presiding Chair
Public Arbitrator

September 21, 1992

/s/Jonathon P. Tones
Jonathon P. Tones
Public Arbitrator

September 21, 1992

/s/Thomas Sargent
Thomas Sargent
Industry Arbitrator

Date of Service by the NASD:

Sept 30, 1992