

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Franklin G. Allen

No. 91-01024

Name of Respondents

The Chicago Corporation  
Roger B. Winship

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REPRESENTATION OF PARTIES

For Claimants: Franklin G. Allen, Esq. appeared pro se.

For Respondents: Brian Martin, Esq. and Carol Genis, Esq. of Bell Boyd & Lloyd, and Joy Schulruff, Esq. ACC of the Chicago Corporation.

CASE INFORMATION

Statement of Claim and Supplement filed: April 3, 1991.

Claimant's Submission Agreement signed on: March 28, 1991.

Joint Statement of Answer filed by Respondents The Chicago Corporation and Roger Winship on: July 28, 1991.

Respondent Roger B. Winship's Submission Agreement signed on:  
June 20, 1991.

Respondent The Chicago Corporation's Submission Agreement signed on: June 20, 1991.

Reply to Respondent's Answer filed: September 6, 1991.

Respondents Answer to Claimant's Revised Statement of Claim filed: October 29, 1991.

Claimant's Amendment to paragraph 15A of the Statement of Claim filed: February 7, 1992.

Respondents Response to Claimant's Amendment to paragraph 15A of

the Statement of Claim filed: on or about February 14, 1992.

Respondents Counterclaim filed: on or about February 14, 1992.

Claimant's Response to Respondents' Counterclaim filed: February 19, 1992.

#### HEARING INFORMATION

Pre-Hearing conference held: January 21, 1992. One Session.

Hearing dates: February 24, 1992. Two Sessions.  
February 25, 1992. Two Sessions.

Hearing Location: Chicago, Illinois.

#### CASE SUMMARY

Claimant Franklin G. Allen ("Claimant") alleged violation of the anti-fraud provision of Section 10b of the Securities and Exchange Act of 1934, 15 U.S.C. Section 78j and S.E.C. Rule 10b promulgated pursuant thereto and California Corporations Code Section 25401, breach of fiduciary duty; violation of Article III, Section 2 of the NASD rules of Fair Practice; a unsuitability by Respondents the Chicago Corporation ("TCC") a Roger B. Winship ("Winship") arising out of a transaction involving Hazelhurst Associates LP ("Hazelhurst"). Claimant alleged that he was at his California location during the time each communication between TCC and Winship during the period between July 1987, and April of 1988. At the time of contact with Winship, Claimant alleged informing Winship that he was retired and was no longer able to tolerate any significant risk or illiquidity. Claimant purchased a one-half unit Hazelhurst for \$50,000, allegedly based solely on Winship recommendations. Claimant alleged receiving monthly payments from April of 1988 until September of 1990. Claimant went on to allege that the statements made by Winship were false and misleading, and were known by Winship to be false, and that statements omitted to include material facts necessary to make the statements not misleading. Claimant went on to allege that each of these statements were material in persuading Claimant to invest in Hazelhurst. Claimant further alleged that Respondent's failure to disclose to Claimant the true merits and demerits of the Hazelhurst offering breached Respondents' fiduciary duty to Claimant. Lastly, Claimant alleged that Hazelhurst did not comply with Claimant's investment objectives and needs as Claimant defined them to Respondents' and that Respondent deceived him into believing that it did.

In their Statement of Answer, TCC and Winship denied each and every allegation of wrongful improper or actionable conduct on their part, denied that TCC and Winship are liable to Claimant and denied that Claimant is entitled to damages in any amount from TCC and Winship. In addition, TCC and Winship asserted

following affirmative defenses:

A. California law does not apply to Allen's claims since at the time of his purchase of an interest in Hazelhurst, Allen was an Illinois resident. In connection with Allen's execution of a Subscription Agreement for the purchase of 1/2 Unit of Hazelhurst, Allen completed and executed a confidential Questionnaire wherein he represented in writing that his residence address is "1321 W. Berwyn Ave., Cook County, Chicago, Ill. 60604" and that his business address is "30 S. Wacker Dr. Chicago Ill. 60606." Allen executed a check made payable to Hazelhurst Associates LP in the amount of \$50,000.00 for the purchase of 1/2 Unit of Hazelhurst. Said check was drawn on Allen's general account at American National Bank & Trust Company of Chicago.

B. In the Subscription Agreement executed by Allen and Questionnaire completed and executed by Allen in connection with his investment in Hazelhurst, Allen represented to TCC that he had the knowledge, financial background and investment experience to make the investment in Hazelhurst, and further Allen represented that he understood the investment to be "illiquid" and verified that he "would have no need for liquidity" of the investment. TCC relied upon these representations as well as on Allen's representation that he read and understood the provisions of the Subscription Agreement and had received a copy of the Hazelhurst Offering Memorandum. If there is any injury or damage to Allen as a result of his alleged lack of suitability, it is solely as a result of the misrepresentations and omissions of Allen in these documents and other communications with TCC, and Allen is therefore barred and estopped from asserting any claims against TCC as a result of his own misconduct and unclean hands.

C. Prior to Allen's purchase of an interest in Hazelhurst, TCC delivered to Allen the Hazelhurst Offering Memorandum and other disclosure documents on the general partner, Kenbee, and Wal-Mart, as well as including Kenbee's 1987 Annual Report. In addition, TCC arranged a conference call with Allen and Roger Stern of Kenbee in which Allen was given an opportunity to ask any questions about Hazelhurst or Kenbee prior to investing. In light of this, Allen did not and could not have justifiably relied upon any alleged oral misrepresentations concerning Hazelhurst. Moreover, the offering materials gave him accurate information. Furthermore, Allen failed to exercise due diligence in allegedly determining his suitability for the investment. Allen's claims based on alleged oral misrepresentations concerning his investment are thus barred.

D. For over two years, Allen accepted monthly payments of \$354.17 from Hazelhurst without objection. Allen engaged in a course of conduct which demonstrated that he was satisfied and that he approved of his investment in Hazelhurst. Allen thus knowingly ratified his investment and ratified the manner in which his investment was handled. Allen's claims are barred under the doctrine of ratification.

E. For over two years, Allen accepted monthly payments of \$354.17 from Hazelhurst without objection. Allen engaged in a course of conduct which demonstrated that he was satisfied and

that he approved of his investment in Hazelhurst. Allen's failure to object and his actions or inactions prevented TCC from taking action to stop further alleged losses. Allen's claims are thus barred under the doctrine of estoppel.

F. For over two years, Allen accepted monthly payments of \$354.17 from Hazelhurst without objection. Allen engaged in a course of conduct which demonstrated that he was satisfied and that he approved of his investment in Hazelhurst. Allen thus intentionally relinquished any claim with respect to his investment in Hazelhurst or with respect to the handling of his investment. His claims are barred under the doctrine of waiver.

G. For over two years, Allen accepted monthly payments of \$354.17 from Hazelhurst. Allen failed to object and failed to take action to avoid or mitigate any alleged losses and he is thus barred from recovering those alleged losses which he would have avoided through the exercise of due diligence under the doctrine of mitigation.

H. Allen's claims are barred under the doctrine of in pari delicto in that Allen's fault was at least equal to or greater than TCC's alleged fault.

I. Allen has failed to exercise the degree of care over his affairs and investments which an ordinary, prudent investor would exercise, and caused or contributed to cause the alleged damages of which Allen complains herein and is thus barred by his own contributory negligence from recovering damages from TCC.

J. Allen's substantial delay in asserting his claims has severely prejudiced TCC's substantive rights and, accordingly, his claims are barred by the doctrine of laches.

K. Allen was aware from the onset of the risks of profit and loss associated with investing in real estate and voluntarily assumed such risk. In the Subscription Agreement, which Allen agreed is not cancellable, terminable or revocable, Allen acknowledged and recognized that "an investment in the Partnership involves certain risks" and that he had "taken full cognizance of" and "understood all of the risk factors related to the purchase of the Unit(s)." Allen's knowing and voluntary assumption of such risk was the sole and proximate cause of his alleged damages.

L. Allen has failed adequately to state a claim upon which relief can be granted with respect to each of the alleged claims he asserts in his Statement of Claim.

M. Any losses sustained by Allen were caused by market forces, his own acts or omissions, or the acts or omissions of others and not by any act or omission of TCC.

N. Allen is not entitled to recover punitive or treble damages or attorneys' fees since these are not recoverable in arbitration under the Uniform Arbitration Code or under relevant case law.

In his reply, and revised reply, to the Statement of Answer, Claimant admitted signing the Subscription Agreement and Questionnaire and admitted that the Hazelhurst investment was suitable for him based on his experience, net worth and education. Claimant asserted that Hazelhurst was unsuitable

because it was not in accordance with his investment objective. Claimant also admitted to having both Chicago and California addresses, and only allegedly inserted the Chicago address in the Questionnaire at the insistence of Winship. Lastly, Claimant alleged that California law applied due to the fact that all communications to him or from him were sent to or from him at his residence in California.

For his revised Statement of Claim, Claimant amended his allegations to include violations of California Corporations Code Section 25401 and 25501; and violations of California Civil Code Sections 1709 and 1710. He also reasserted the allegations as contained in his original Statement of Claim.

For their Answer to Claimant's Revised Statement of Claim, TCC and Winship denied each and every allegation of wrongful, improper or actionable conduct on their part, denied that TCC and Winship are liable to Claimant, and denied that Claimant is entitled to damages in any amount from TCC and Winship. In addition, TCC and Winship reasserted the allegations and affirmative defenses contained in their original Statement of Answer.

In his Amendment to Paragraph 15 of the Statement of Claim, Claimant added allegations of unauthorized trades; and misrepresentations relating to a transaction in June of 1990, involving Hawaiian Gardens California Revenue Bonds ("bonds"). Claimant asserted that he again had been contacted by Winship who had falsely represented that the principal and interest of the bonds were secured by escrowed U.S. treasuries. Claimant further alleged that he had instructed Winship not to purchase the bonds unless the representations made to Claimant were true. In January of 1991, Claimant alleged that he later learned that the bonds were not secure and that he had ordered the bonds to be sold at the best obtainable price.

For their Answer to the Amendment to Paragraph 15A of the Statement of Claim, TCC and Winship admitted that Claimant purchased the bonds and further that at the time of the sale to the best of Respondents' knowledge and belief the principal and interest in said bonds were fully secured by escrowed federal treasuries. Respondents further stated that they would be willing to buy Claimant's bonds back at a higher price than Claimant's broker at Bear Sterns had offered Claimant. Lastly, Respondents denied all of the remaining allegations contained in the Amendment to Paragraph 15A of the Statement of Claim.

In their Counterclaim against Claimant, TCC and Winship alleged breach of warranty, negligent misrepresentation, and violation of Section 11(e) of the Securities Act of 1933 (15 U.S.C. Section 77k(e)). Respondents TCC and Winship asserted that each claim in the Counterclaim arises out of the same series of transactions and events, as does Claimant's alleged causes of action against TCC. TCC and Winship alleged that they relied on

all statements made by Claimant in his Subscription Agreement and Questionnaire in determining whether Claimant was eligible to be an investor in Hazelhurst. TCC and Winship stated that the representations made by Claimant were untrue and misleading, and also that TCC and Winship had no knowledge of the misrepresentations.

#### RELIEF REQUESTED

Claimant requested:

1. Compensatory damages in the amount of \$50,000 plus interest at the rate of 10% per annum from April 7, 1988 until the date of recovery of damages by Claimant, less the amount of the eighteen monthly payments of \$354.17, each received by Claimant. Claimant tendered to Respondents the 1/2 Unit of Hazelhurst which Claimant believes to be of no value.
2. Punitive damages in the amount of \$400,000 for the sake of example and by way of punishing Respondents if it is proven by clear and convincing evidence that Respondents intentionally and callously made fraudulent representations to Claimant to Claimant's damage and for Respondents' gain.
3. Costs of this arbitration including filing fee and forum fees.
4. Ten Thousand Dollars (\$10,000.00) in lieu of attorney's fees as compensation for Claimant's effort and expense in preparing this claim and representing himself.

In his revised Statement of Claim, Claimant additionally requested:

1. If Claimant still owns the Hazelhurst investment on the date of the hearing:  
Claimant requests rescission and an award in the amount of \$50,000 plus interest at the rate of 10% per annum from April 7, 1988 until the date Respondents pay the award, less the amount of the eighteen monthly payments of \$354.17 each received by Claimant.

- 1A. If Claimant does not still own the Hazelhurst investment on the date of the hearing:

Claimant requests compensatory damages equal to the amount specified in the foregoing paragraph less the fair market value of the one-half Unit of Hazelhurst at the time of the disposition by Claimant. If such disposition is an arms-length sale, then Claimant requests a determination that the price set in the sale represents fair market value:

2. Punitive damages as requested in Claimant's original Statement of Claim.

3. Costs and fees as requested in Claimant's original Statement of Claim.

4. Attorney's fees in an amount to be determined by the arbitration panel if the Claimant is represented by counsel, and, if not, for an appropriate award in an amount to be determined by the panel in lieu of attorney's fees.

In his Amendment to Paragraph 15A of the Statement of Claim, Claimant requested:

1. An award of \$8,000 for compensatory damages.
2. Punitive damages as specified on page fourteen of the Revised Claim.

Respondents requested that Claimant's Claim be dismissed in its entirety and that Respondents be awarded costs, expenses and attorney's fees for having to defend said Claim.

In their Counterclaim Respondents requested:

- A. Judgement be entered on their behalf and against Claimant on all of Claimant's claims in the Amended Statement of Claim;
- B. TCC and Winship be awarded their costs of suit, attorney's fees and such other costs incurred in the defense of Claimant's claims and in prosecuting this Counterclaim, together with such other relief as may be just.

#### OTHER ISSUES CONSIDERED & DECIDED

At the hearing held on February 24, 1992, the motion to Amend Paragraph 15A of the Statement of Claim and allow Respondents TCC and Winship's Counterclaim were heard. After reviewing the Amendment, the Counterclaim, the responses, argument from both parties, and deliberation, the panel, with the agreement of the parties, ruled to allow all documents to be admitted as part of the pleadings.

The parties have agreed that the Award in this matter may be executed by a counterpart copy 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 and the post-hearing submissions, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's, Franklin Allen, Claims are hereby dismissed and denied with prejudice;
2. Respondents', The Chicago Corporation and Roger B. Winship, Counterclaim is hereby denied and dismissed with prejudice; and
3. Each party shall bear his or its own costs of this arbitration, except as set forth below.

#### FORUM FEES

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

one pre-hearing conference sessions X \$ 300.00 = \$ 300.00

four hearing sessions X \$ 750.00 = \$ 3,000.00

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 \$ 750.00 previously paid to the NASD by the Claimant.

Additional forum fees in the amount of \$2,550.00 are assessed jointly and severally against Respondents the Chicago Corporation and Roger B. Winship.

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

Dated:

April 27, 1992

/s/Samuel Weisbard  
Samuel Weisbard  
Presiding Chair  
Public Arbitrator

April 30, 1992

/s/William R. Jackson  
William R. Jackson  
Public Arbitrator

April 27, 1992

/s/Maureen A. Boyle  
Maureen A. Boyle  
Industry Arbitrator