

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Theodore S. Tobison

No. 91-02586

Name of Respondents

Creative Equity Resources, Inc.  
Roger A. Sexter

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REPRESENTATION OF PARTIES

For Claimant: Mark Briol, Esq. and Gregory Wilmes, Esq. of Briol and Wilmes.

For Respondent, Creative Equity Resources, Inc.: Richard Pogin appeared.

For Respondent, Roger A. Sexter: James Kelly, Esq. and Connie Hall, Esq. of

CASE INFORMATION

Statement of Claim filed: on or about August 15, 1991.

Claimant's Submission Agreement signed on: July 31, 1991.

Statement of Answer filed by Respondent, Creative Equity Resources, Inc. on: October 28, 1991.

Respondent Creative Equity Resources, Inc. Submission Agreement signed on: October 23, 1991.

Respondent Roger A. Sexter's Submission Agreement signed on: November 20, 1991.

Statement of Answer filed by Respondent Roger A. Sexter on: November 22, 1991.

### HEARING INFORMATION

Hearing date: March 9, 1992. Two Sessions.  
March 11, 1992. Two Sessions.

Hearing Location: Minneapolis, Minnesota.

### CASE SUMMARY

Claimant Theodore S. Tobison ("Claimant") alleged: Common Law breach of fiduciary duty; breach of fiduciary duty found in Minnesota Statute Section 45.026; violation of Federal Securities Fraud Section 10 (b) and Rule 10b-5; violation of Section 27 of the NASD Rules of Fair Practice; violation of Minnesota Rule 2875.0910; violation of Section 20 (a) of the Securities and Exchange Act of 1934; violations of the Minnesota Statute Sections 80A.01 and 80A.03; and Common Law Fraud by Respondents Creative Equity Resources, Inc. ("CER") and Roger A. Sexter ("Sexter").

In October of 1984, Claimant alleged attending instructional courses given by Sexter. In March of 1985, Claimant hired Sexter as his financial planner. Claimant was not an experienced or knowledgeable as an investor, and alleged having made only one other investment in the 1960's. Claimant also alleged informing Sexter that Claimant did not want risky investments. Claimant then stated that Sexter had recommended that Claimant purchase a number of limited partnerships interests in: Consolidated Capital Equities; Sierra Capital Realty Trust IV; Southmark Syndication Group II; and Minikahda Ministorage IV. Sexter also assured him that the limited partnerships were good investments, that real estate was the most solid investment he could think of, and that Sexter did not see how Claimant could lose on such investments. Claimant then stated that the limited partnerships were worthless, or of reduced value.

In his Statement of Answer, CER denied every material allegation contained in the Statement of Claim. In addition, CER stated the following affirmation defenses:

1. Claimant's claims are barred by the applicable statutes of limitation;
2. Minnesota Statute Section 45.026 was enacted after the investments alleged in Claimant's Statement of Claim, and therefore does not form a basis of relief herein;
3. Claimant's Statement of Claim failed to state a claim for relief or cause of action against CER;

4. Claimant's claims are barred by the doctrines of estoppel, waiver and laches;

5. Claimant's claims for punitive damages are barred in that Claimant has failed to comply with any and all applicable laws before asserting such claims;

6. That Claimant's damages, if any, were caused by third parties over whom CER had no control, including, but not limited to, Claimant's accountant;

7. Sexter put Claimant into a diversified portfolio of investments, and the real estate investments recommended by Sexter were conservative and Claimant met all financial requirements of suitability for these investments. It was Claimant's own choice not to liquidate the investments;

8. Sexter handled Claimant's account in a prudent and reasonable manner under the circumstances and investment goals of Claimant.

For his Statement of Answer, Sexter denied each material allegation contained in the Statement of Claim. In addition, Sexter stated the following affirmative defenses:

1. Claimant's claims made under Federal and State Securities Laws and Common Law Fraud are barred by applicable statutes of limitations;

2. Claimant received a prospectus, private placement memoranda, or other disclosure documents before Claimant invested in any of the identified investment opportunities within the Statement of Claim. Claimant also completed a suitability questionnaire, and had indicated that he had knowledge and experience in financial and business matters and was capable of evaluating the merits and risks of investment;

3. At no time before or after the purchase of limited partnership investments did Claimant ever complain to Sexter that he considered the risks too high or the investment unsuitable, until March, 1990. Claimant's claims are, thus, barred by the doctrines of estoppel, waiver and laches;

4. Claimant's Statement of Claim fails to state a claim for relief or a cause of action against Sexter;

5. Claimant has failed to comply with Minnesota Statute Section 549.191 and 549.20 and is therefore barred from asserting such claims;

6. Claimant's account was handled by Sexter in a prudent and reasonable manner to achieve the investment goals of the Claimant. All investments were made pursuant to the direction of the Claimant. The Real Estate investments recommended by Sexter were conservative and Claimant met financial requirements and

suitability of these investments. Sexter also continually informed Claimant of the market status of real estate investments;

7. In 1987, Claimant made changes in his investment objectives. This included (1) income growth; (2) hedge against inflation; and (3) low-risk investments;

8. Claimant was informed at all times of the market conditions of his real estate investments and had control over investment decisions. For example, the Sierra Capital Realty Trust IV, which was marketable at all times, Claimant chose not to liquidate his investment despite his awareness of market conditions;

9. Sexter did not state that investments in real estate limited partnerships were "risk-free". Sexter did recommend such investments consistent with the Claimant's goals and Claimant's suitability for such investments.

#### RELIEF REQUESTED

Claimant requested that the arbitration panel issue an award in his favor and against Sexter and CERI, jointly and severally, as follows:

1. For an award of compensatory damages in the approximate amount of \$75,000, the exact amount to be determined by the arbitrators at the trial, or for the remedy of rescission, as Claimant may elect.

2. For an award of punitive damages, the amount as determined by the arbitrators, to send a message to Respondents and deter future abuses.

3. For an award of Claimant's attorney's fees, as required by the Minnesota securities laws.

4. For interest on all damages awarded.

5. For an award of Claimant's costs, disbursements and expenses incurred in pursuing this arbitration.

6. For such other relief as the arbitrators deem just and equitable in the premises.

Respondent CERI requested that the arbitration panel deny Claimant's claims in their entirety, dismiss the Statement of Claim which has been filed herein, and award said Respondent its costs, disbursements and reasonable attorney's fees in defending this arbitration proceeding pursuant to Minn. Stat. 549.21.

Respondent Sexter requested that the Arbitration panel:

1. Deny Claimant's Statement of Claim in its entirety.
2. Dismiss the Statement of Claim with prejudice and on the merits.
3. Award all costs and disbursements, including reasonable attorney's fees.
4. Award such other and further relief as is just and equitable.

#### OTHER ISSUES CONSIDERED & DECIDED

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. Respondent Creative Equity Resources, Inc. and Roger A. Sexter are jointly and severally liable for, and shall pay to Claimant, Theodore S. Tobison, the sum of \$25,000.00, plus prejudgement interest in the amount of \$13,000.00;
2. Claimant's, Theodore S. Tobison, claim for punitive damages on the merits is hereby denied and dismissed with prejudice;
3. The parties shall bear their costs and expenses, including attorney's fees, except that Claimant shall be awarded attorney's fees in the amount of \$7,500.00. The authority for the award of attorney's fees is found in Minnesota Statute Section 80A.23.

### FORUM FEES

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

four hearing sessions X \$500.00 = \$2,000.00

Pursuant to Section 43 (c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$150.00, and shall retain the hearing session deposit in the amount of \$500.00 previously paid to the NASD by the Claimant.

Pursuant to Section 43 (c) Respondents Creative Equity Resources, Inc. and Roger A. Sexter are jointly and severally assessed all additional hearing session fees in the amount of \$1,500.00.

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

Dated:

April 2, 1992

/s/George A. Beck  
George A. Beck  
Presiding Chair  
Public Arbitrator

April 2, 1992

/s/Howard J. Seesel, Jr.  
Howard J. Seesel, Jr.  
Public Arbitrator

April 2, 1992

/s/Brian L. Patterson  
Brian L. Patterson  
Industry Arbitrator