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N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Doris Tofel

91-02620

Name of Respondent(s)

Allan E. Rosen

REPRESENTATION

For Claimant: Doris Tofel appeared pro se.

For Respondent: Allan E. Rosen was represented by Robert C. Hackett, Esq. and John J. Nicgorski, Esq. of Mohr, Hackett, Pederson, Blakley, Randolph & Haga, P.C., located in Phoenix, Arizona.

CASE INFORMATION

Statement of Claim filed: August 23, 1991

Claimant's Submission Agreement signed on: September 16, 1991

Statement of Answer filed by Respondent on: November 8, 1991

Respondent's Submission Agreement signed on: October 15, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: April 13, 1992 for two (2) sessions

Hearing Location: Scottsdale, Arizona

CASE SUMMARY

Claimant Doris Tofel ("Tofel") alleged that Respondent Allan E. Rosen ("Rosen") misrepresented to her and purchased for her IRA account an unsuitable investment of promissory notes in the principal amount of \$10,000.00 issued by Cave Creek Properties Fund. Tofel further alleged that while she does not remember signing anything authorizing the investment, she received an "advice slip" from First Trust Corporation in July of 1986 showing the purchase of the investment, even though a prospectus was not received (Tofel did receive a "Summary of the Offering").

Tofel alleged that in December of 1990, Rosen informed her that the money, along with other investors' funds were "never properly invested", but were

"loaned against the property" as the manager never raised enough funds to open the project. Rosen further explained that the note became delinquent on January 15, 1991 and that he would tell the owner to refund the money or Rosen would lodge a complaint with the authorities. Rosen did not return Tofel's calls in January of 1991 and this claim was filed.

Respondent Rosen denied the material allegations of the Statement of Claim, alleging that:

1. Rosen had a number of meetings and telephone conversations with Tofel prior to her investment decisions, during which Rosen reviewed the Tofel's financial situation, investments, expertise objectives, and, in making the recommendation, considered all relevant factors, including suitability, risk, the Tofel's aversion/tolerance to risk, diversification, liquidity of the investments and the claimed real estate investment expertise of Mr. Tofel;
2. Rosen was familiar with the due diligence performed by his firm, which had approved the purchase of the notes, and had even conducted his own due diligence by discussing the investment with the successful real estate developer in the Phoenix area who developed the project;
3. Rosen explained to Tofel the risks inherent in the investment and Tofel accepted the risk because of the diversification of the other investments recommended by Rosen;
4. On July 2, 1986, Tofel signed an investment authorization to First Trust for her investment in Cave Creek, which acknowledged that before the trust would release the funds, a prospectus must be on file with the First Trust Compliance Department and in which Tofel verified that she had read all pertinent information relating to the investment and met the suitability requirements of the offering; and
5. In late 1986, the developer first indicated that there were problems with the Cave Creek investment and that investors consider accepting promissory notes in other real estate venture. This information was communicated to Tofel by Rosen.

As additional defenses, Rosen asserted that:

1. The claim was barred by applicable statutes of limitations for fraud in connection with the purchase and sale of securities, common law fraud and alleged negligent conduct by Rosen;
2. Tofel has presented no proof of damages as there is no competent evidence that the Cave Creek investment is worth less than \$10,000.00;
3. There has been a net gain in those investments made by Tofel in July of 1986 pursuant to Rosen's recommendations, even assuming the Cave Creek investment is worthless and consequently, Tofel has

suffered no loss;

4. Rosen's conduct was in full compliance with all obligations imposed upon him, including but not limited to, obligations under the NASD Rules of Fair Practice;

5. The investments recommended and purchased by Tofel were suitable, were in accordance with her investment objectives, were not overly risky and were diversified;

6. Rosen had a right to rely, and did so rely, upon the independent requirement of Tofel's IRA trustee (First Trust) that Tofel provide them with a copy of the Cave Creek PPM and in writing acknowledge that she had received and read it prior to First Trust advancing funds on her behalf; and

7. Rosen had a right to rely, and did so rely, upon the developer's representation that Tofel would not be permitted to make the investment until she had read the Cave Creek PPM and signed the subscription agreement.

#### RELIEF REQUESTED

Claimant Doris Tofel requested that the panel enter an award against Rosen for the sum of \$10,000.00, interest at the legal rate from July 11, 1986, the costs of arbitration and any other remedies the arbitrators felt was appropriate.

Respondent Allan E. Rosen requested that the Statement of Claim be dismissed and denied in its entirety.

#### OTHER ISSUES CONSIDERED & DECIDED

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. Respondent Allan E. Rosen is liable for and shall pay to Claimant Doris Tofel the sum of \$10,000.00;

2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Two (2) sessions x \$400.00 hearing session deposit = \$800.00.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee and refund the \$400.00 hearing session deposit previously deposited by the Claimant Doris Tofel. Respondent Allan E. Rosen is liable for and shall pay to the NASD forum fees in the sum of \$800.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Sidney W. Mandel, Esq.  
Sidney W. Mandel, Esq.  
Public Arbitrator  
Chairperson

June 27, 1992

Sara Jo Dew  
Sara Jo Dew  
Public Arbitrator

July 21, 1992

Harold A. Shapiro  
Harold A. Shapiro  
Industry Arbitrator

June 23, 1992

Date of Service on Parties: July 27, 1992