

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Mary Foster, as representative of the Estate of  
Leslie H. Smith

92-04292

Name of Respondents

Titan/Value Equities Group, Inc.;  
Alan Roget

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**REPRESENTATION**

For Claimant/Counter-Respondent: Mary Foster ("Foster"), as representative of the Estate of Leslie H. Smith ("Smith") was represented by Clinton W. Marrs, Esq. of Kemp, Smith, Duncan & Hammond, P.C., located at Albuquerque, New Mexico.

For Respondent/Cross Claimant: Titan/Value Equities Group, Inc. ("Titan/Value Equities") was represented by M. Eliza Stewart, Esq. of Madison, Harbour, Mroz & Puglisi, located at Albuquerque, New Mexico.

For Respondent/Cross-Respondent/Counter-Claimant: Alan Roget ("Roget") was represented by Robert M. Strumor, Esq. of Hughes & Strumor, Co., Ltd., located at Albuquerque, New Mexico.

**CASE INFORMATION**

Statement of Claim filed on or about December 23, 1992.

Claimant/Counter-Respondent's Submission Agreement signed on: January 15, 1993.

Statement of Answer and Cross-Claim filed by Respondent/Cross-Claimant Titan/Value Equities on: March 29, 1993.

Respondent/Cross-Claimant, Titan/Value Equities did not file an executed Submission Agreement.

Statement of Answer and Counter-Claim filed by Respondent/Cross-Respondent/Counter-Claimant Roget on or about: April 1, 1993.

Respondent/Cross-Respondent/Counter-Claimant Roget's Submission Agreement signed: March 29, 1993.

### **HEARING INFORMATION**

Pre-Hearing Conference:	None held.
Hearing Dates/Sessions:	September 19, 1994 for Two (2) sessions; September 20, 1994 for Two (2) sessions; March 7, 1995 for Two (2) sessions; March 8, 1995 for Two (2) sessions; March 9, 1995 for Two (2) sessions; April 18, 1995 for Two (2) sessions; May 16, 1995 for Two (2) sessions; May 17, 1995 for Two (2) sessions.

Hearing Location:	Albuquerque, New Mexico.
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### **CASE SUMMARY**

Claimant/Counter-Respondent Foster, personal representative of the Estate of Leslie H. Smith, alleged that Roget, while employed by or acting as an agent for Titan/Value Equities, defrauded Smith by inducing Smith to invest in speculative enterprises in which Roget had an interest. Foster alleged that these investments were unsuitable and Roget sold several of Smith's suitable investments to obtain the funds for the investments. Moreover, Smith was an unsophisticated investor and Roget failed to disclose the risks involved in these investments. Specifically Foster alleged that:

1. Smith invested conservatively through Swink & Co., which, at that time, employed Roget as Smith's broker. In May of 1987, Roget solicited Smith to open accounts at Titan/Value Equities, where Roget was currently employed;
2. In December of 1986, Roget organized the partnership known as Volcano Plaza Partnership, Ltd. Roget was a general partner in the partnership. On various occasions Roget solicited Smith to invest in and give unsecured loans to Volcano Plaza Partnership. Further, Roget has failed to repay the loans;
3. In September of 1988, Roget, as president of D.W. Falls & Co., organized the

Inman Model Homes Partnership. D.W. Falls & Co. was a general partner in the partnership. In September of 1988 and January of 1989, Roget solicited Smith to invest in the partnership;

4. Roget, as president of D.W. Falls & Co., organized the Montano Limited Partnership. D.W. Falls & Co. was a general partner in the partnership. In June of 1990, Roget solicited Smith to invest in the partnership;

5. Roget solicited and induced Smith to invest the sum of \$50,000 or more in Roget Investment Group, an organization in which Roget had a financial interest;

6. Roget solicited and induced Smith to invest the sum of \$10,000 or more in Falls & Roget, an organization in which Roget had a financial interest;

7. Roget solicited and induced Smith to invest the sum of \$15,000 or more in D.W. Falls & Co., an organization in which Roget had a financial interest; and

8. As a result of the speculative investments and unsecured loans, Smith has suffered a loss in principal of \$233,075.00.

Based on the above allegations, Foster alleged the following claims: fraudulent and deceptive securities practices; violations of New Mexico Securities Law; breach of fiduciary duty; negligence; violations of the Securities Exchange Act of 1934 and Rule 10(b)-10(b)(5); negligent hiring; and negligent supervision.

Respondent Titan/Value Equities denied any wrongdoing in the alleged misconduct contained in the Statement of Claim. Specifically, Titan/Value Equities denied that the Claimant suffered any damage as a result of any conduct or omissions of Titan/Value Equities. Titan/Value Equities asserted several affirmative defenses, which included:

1. Titan/Value Equities acted in good faith, and did not directly or indirectly induce any of the alleged wrongful acts;

2. Titan/Value Equities cannot be held liable under the doctrine of Respondeat Superior because the alleged wrongful acts occurred outside Roget's employment;

3. The claims are barred by the statute of limitations, and the doctrines of laches, waiver, estoppel, and ratification; and

4. The alleged damages, in whole or in part, are the result of Smith's own negligence.

In addition, Titan/Value Equities asserted a Cross-Claim against Roget under common law indemnity and contractual indemnity.

Respondent Roget denied engaging in any improper or illegal conduct regarding the activity in the Smith's account. Further, Roget alleged that all investments were suitable for Smith, and Smith was a knowledgeable and aggressive investor who had previously invested in limited partnerships. Specifically Roget alleged that:

1. Roget discussed with Smith the possible purchase in Volcano Plaza Partnership. Roget sent Smith a prospectus describing the Volcano Plaza Partnership. After Smith read the prospectus, Smith made the initial purchase. All subsequent purchases in the Volcano Plaza Partnership were initiated by Smith. Further, Smith chose to lend Volcano Plaza Partnership money rather than invest in additional units. Roget repaid this loan;
2. Smith initiated the purchases in both the Inman Model Homes Partnership and the Roget Investment Group;
3. Roget discussed Montano Limited Partnership with Smith, but Smith invested after making three personal visits to the partnership property;
4. No funds went to the benefit of Falls & Roget; and
5. Smith maintained control over his account. Roget did not have any discretion.

Moreover, Roget asserted several affirmative defenses, which included:

1. Failure to state a claim upon which relief may be granted;
2. The losses sustained were a result of Smith's own negligence;
3. Roget did not have a duty, contractual or otherwise, to disclose to Smith any facts other than those which were disclosed; and
4. The claims are barred by the doctrines of waiver, estoppel, ratification, and laches.

In addition, Roget asserted a Counter-Claim alleging that the Statement of Claim is frivolous and brought solely for the purposes of harassing Roget.

### **RELIEF REQUESTED**

Claimant/Counter-Respondent Foster requested an entry of an award against Titan/Value Equities and Roget in the minimum amount of \$233,075.00; plus lost value in the Smith's account; punitive damages; interest; and costs.

Respondent/Cross-Claimant Titan/Value Equities requested that the Claimant/Counter-Respondent Foster be awarded no relief; that Titan/Value Equities be awarded its costs and attorneys' fees; and that Titan/Value Equities be allowed indemnification from Alan Roget.

Respondent/Cross-Respondent/Counter-Claimant Roget requested that the Statement of Claim be denied in its entirety, and that attorneys' fees and costs be assessed against Foster.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent Titan/Value Equities did not file an executed submission agreement, but answered, appeared and testified at hearing, and is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

In October, 1994, Respondents filed Motions to Dismiss based on several theories. After review of the Motions and all responses, the Panel determined that the Motions would be denied.

The Arbitrators specifically find that with regard to the Statement of Claim made by Foster and the Cross-Claim made by Titan/Value Equities that liability arises by virtue of the anti-fraud provisions of the New Mexico Securities Act of 1986 among other theories presented to the panel.

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 and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Titan/Value Equities Group, Inc. and Alan Roget are jointly and severally liable for and shall pay to the Claimant Mary Foster, as representative of the estate of Leslie H. Smith, the sum of \$180,000.00 in actual damages;

2. In addition, Respondent Alan Roget is individually liable for and shall pay to Claimant Mary Foster, as representative of the estate of Leslie H. Smith, the sum of \$70,000.00 in actual damages;
3. Respondent/Cross-Respondent/Counter-Claimant Alan Roget is liable for and shall pay to Respondent/Cross-Claimant Titan/Value Equities, Inc. the sum of \$250,000.00 on the cross-claim;
4. The counterclaim filed by Respondent/Cross-Respondent/Counter-Claimant Alan Roget is dismissed with prejudice and denied in its entirety;
5. The awards made above shall be paid within ten (10) days of receipt of this award. If not paid within ten days of receipt, the award of monies shall bear interest at the rate of twelve percent (12%) per annum until the sums are paid in full;
6. Upon payment of the award to Claimant, Claimant Mary Foster, as the representative of the estate of Leslie H. Smith, shall immediately transfer all title to the securities which were the subject of this arbitration, and which are still in the Claimant's possession, to Respondent/Cross-Claimant Titan/Value Equities Group, Inc. Respondent Titan/Value Equities, Inc. shall keep or liquidate the securities received. All net proceeds received from the securities shall be credited to Respondent/Cross-Respondent/Counter-Claimant Alan Roget in payment of the award made in Paragraph 3 above;
7. The claims for punitive damages are denied in their entirety;
8. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
9. Any relief not specifically awarded is hereby denied.

#### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Sixteen (16) hearing sessions x \$750.00 per session = \$12,000.00

The National Association of Securities Dealers, Inc. shall retain the \$200.00 filing fee and the \$750.00 hearing session deposit previously paid by Claimant Mary Foster. Respondent/Cross-Claimant Titan/Value Equities Group, Inc. is liable for and shall pay to Claimant Mary Foster the

sum of \$950.00 as reimbursement for the claim filing fee and hearing session deposit, payment to be made within ten (10) days after the receipt of this award. In addition, the NASD shall retain the \$250.00 claim filing fee and the \$600.00 hearing session deposit previously paid by Titan/Value Equities Group, Inc. Respondent/Cross-Claimant Titan/Value Equities Group, Inc. is liable for and shall pay to the NASD the sum of \$10,650.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Dated

/s/ Ross B. Perkal, Esq.

August 28, 1995

Ross B. Perkal, Esq.

Public Arbitrator

Chairperson

/s/ Barry H. Barnett, Esq.

August 28, 1995

Barry H. Barnett, Esq.

Public Arbitrator

/s/ Bernard E. Brummell

August 28, 1995

Bernard E. Brummell

Industry Arbitrator

For NASD Use Only

Date of Decision: August 29, 1995