

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Joseph W. Hoffman and Janice D. Hoffman

93-00723

Name of Respondent(s)

First Investors Corporation  
Daniel B. Turner

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**REPRESENTATION**

For Claimants, Joseph W. Hoffman and Janice D. Hoffman ("Hoffmans"): James Scutti, Esq. of Jim Scutti, P.A.

For Respondents, First Investors Corporation ("FIC") and Daniel B. Turner ("Turner"): Stephen G. Topetzes, Esq., of Kirkpatrick & Lockhart.

**CASE INFORMATION**

Statement of Claim filed: February 26, 1993.

Claimant's Submission Agreement signed: January 24, 1993.

Statement of Answer filed by Respondents, FIC and Turner: April 27, 1993.

Respondent, FIC's, Submission Agreement signed: April 6, 1993 by David Grayson as President of FIC.

Respondent, Turner's, Submission Agreement signed: April 26, 1993.

## HEARING INFORMATION

On February 9, 10, and 11 and March 2 and 23, 1994, in Fort Lauderdale, Florida hearings lasting 10 sessions were conducted.

## CASE SUMMARY

Claimants alleged that Respondents are liable for violations of Section 12(1) of the Securities Act of 1933 ("Securities Act") (Count I); violations of Section 12(2) of the Securities Act (Count II); violations of Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder (Count III); violations of Section 812.014, Florida Statutes ("civil theft") (Count VI); common law fraud (Count VII); breach of fiduciary duty (Count VIII); negligent misrepresentation (Count IX); and negligence (Count X); and that Turner is liable for violations of Section 517.07, Florida Statutes (Count V). The Claimants further allege that the Respondent, FIC, is liable for negligent supervision of Turner (Count XI); that Turner made misrepresentations of material fact and omitted to state material facts to induce them to invest on three separate occasions a total of \$115,000 in a private company; that the investments were in the form of capital stock or a loan which could be converted into capital stock at the option of the Claimants; that the investments in the private company were not suitable for the Claimants in light of their investment objectives, financial condition and needs; and, that the Claimants' theories of recovery against FIC are control person liability under Sections 15 of the Securities Act and 20(a) of the Exchange Act; negligent supervision; and respondeat superior on the civil theft, common law fraud, breach of fiduciary duty, negligent misrepresentation and negligence counts.

Respondents denied all allegations of wrongdoing and alleged that the Statement of Claim is barred by the Claimants' failure to state a claim; the transactions set forth in the Statement of Claim sound in contract and consequently, all of the claims are barred by operation of the Economic loss Rule under Florida law; the Claimants' state and federal securities law claims must fail because the transactions were not in connection with the offer or sale of a security; that any damages suffered by Claimants resulted from their own negligence, failure to exercise due diligence on their own behalf and/or the conduct of third parties not associated with or controlled by Respondents; that Claimants failed to allege facts sufficient to establish the existence of a fiduciary duty on the part of Respondents; that FIC is not secondarily or vicariously liable to Claimants as a result of Respondent Turner's alleged efforts on behalf of American Gourmet which occurred outside the course and scope of his affiliation with FIC; that Claimants' claims under Section 10(b) of the Securities Exchange Act of 1934, and Rule 10(b)5 thereunder, are inadequate because the Claimants have failed to plead

scienter; that the Claimants purported cause of action under the Florida Anti-Fencing Act - Civil Theft is unfounded; that Respondents may not be held liable for damages that may have resulted from alleged misrepresentations or misconduct by Michael Lang; and, the Statement of Claim is time-barred in whole or in part.

### **RELIEF REQUESTED**

Claimants requested actual damages of \$132,394, plus interest, treble damages or punitive damages, attorney's fees, costs and such other relief as the panel deems just and proper.

Respondents requested dismissal of all claims.

### **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, FIC is found liable and shall pay to the Claimants the amount of \$10,000.00, plus interest at the legal rate of 12% per annum from July, 1992 to present, in the amount of \$2,100.00 for a total due to the Claimants of \$12,100.00.
2. Respondent Turner is also found liable and shall pay to the Claimants the further amount of \$55,000.00 plus interest at the legal rate of 12% per annum from July, 1992 to present, in the amount of \$11,550.00 for a total due to the Claimants of \$66,550.00.
3. Claimants' requests for treble or punitive damages and attorney's fees are denied.

### OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including attorney's fees.

### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$7,500.00 (10 sessions x \$750.00).

1. Claimants are hereby assessed \$3,750.00 for which the NASD shall retain the \$3,750.00 previously deposited in full satisfaction thereof.
2. Respondent FIC is hereby assessed \$3,750.00 for which the NASD shall retain the \$3,750.00 previously deposited in full satisfaction thereof.

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

Concurring Arbitrators' Signatures

Public/Industry

151  
Gary M. Landau, Esq.

151  
Marvin L. Flack

151  
Bernard Finger

Date of Decision: 4/18/94