

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Names of Claimants**

Timothy J. Casey and Suzanne R. Casey

93-04239

**Names of Respondents**

Rose Securities Corporation  
Mitchell Arthur Witt  
William A. Goldsmith  
Allan S. Bird  
Jules Silver  
David Cohen

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**REPRESENTATION**

For Claimant: Timothy J. Casey and Suzanne R. Casey ("the Caseys"): Guy M. Burns, Esq. & Carol B. Robinson, Esq. of Johnson, Blakeley, Pope, et al., Clearwater, Florida.

For Respondents: Rose Securities Corporation ("Rose Sec."), Allan S. Bird ("Bird"), Jules Silver ("Silver"), David Cohen ("Cohen"): James L. Sanders, Esq. of Sheppard, Mullin, Richter & Hampton, Los Angeles, California.

For Respondent, Mitchell Arthur Witt ("Witt"): Peter H. Benzian, Esq., of Latham & Watkins, San Diego, California;

For Respondent, William A. Goldsmith ("Goldsmith"): Edward S. Gelfand, Esq., of The Law Offices of Edward S. Gelfand, Los Angeles, California.

**CASE INFORMATION**

Statement of Claim filed: 10/06/93.

An Amended Statement of Claim filed: 03/08/95.

Claimants' Submission Agreement signed on: 10/04/93.

Respondents, Rose Sec., Bird, Silver & Cohen's Joint Statement of Answer filed: 06/14/95.

Respondent, Rose Sec.'s Submission Agreement signed: 01/06/94 by William H. Goldsmith on

behalf of the Corporation.

Respondent, Witt's Submission Agreement signed on: 01/12/94.

Respondent, Goldsmith's Submission Agreement signed on: 06/01/95.

Respondents, Bird, Silver & Cohen, did not file executed Submission Agreements as required by Sections 12 and 25 of the Code.

### **HEARING INFORMATION**

On 9/06/95, 9/07/95 and 11/28/95, in Tampa, Florida a hearing lasting six (6) sessions was conducted.

### **CASE SUMMARY**

Claimants alleged that Respondents acted as a selling agent for a company issuing non-negotiable promissory notes that violated Securities and Exchange Commission rules in that the offering did not qualify for the Regulation "D" exemption from registration. Claimants further alleged that Respondents acted as a broker/dealer soliciting said non-negotiable promissory notes which were unsuitable investments. Claimants alleged that Respondents sold to Claimants two non-negotiable promissory notes in the amount of \$190,000.00 each. Claimants alleged the promissory notes were not suitable because 1) they did not meet the Claimants' expressed intention to keep their principal safe, and 2) the notes violated Regulation "D" in that they could only be sold to accredited investors and Respondents knew that Claimants were not accredited investors. Also, Claimants alleged that Respondents knew of previous problems and investigations at the issuing company and withheld information vital to making an informed decision and that eventually, the issuing company defaulted on their payments on the notes. Claimants alleged counts including fraud, breach of fiduciary duty, negligence, gross negligence, negligent supervision and violation of Federal and Florida securities law.

Respondents, Rose Sec., Bird, Silver and Cohen denied all allegations of wrongdoing contained in the Amended Claim and maintained that Rose Sec. acted only as a conduit for information that the issuing company prepared for distribution for investors; that Rose Sec. obtained legal opinions from the issuing company's counsel verifying that the notes could be sold pursuant to the Regulation "D" exemption.

Respondent, Goldsmith, alleged that he believed Rose Sec.'s due diligence was sufficient; he did not offer advise to the Claimants concerning their purchases of said promissory notes; he did not receive any commissions from the sale of said promissory notes; he did not prepare or disseminate any brochures, advertising, or other written information concerning the promissory notes.

Respondent, Witt, alleged that after Rose Sec.'s inspection of the issuing company's financial statements, he was advised by Rose Sec. personnel that the issuing company's financial condition

was as represented in their offering documents; as soon as Rose Sec. and Witt learned of an SEC investigation they discontinued their involvement with the distribution of the notes. Witt denied he made any material misrepresentations or omissions regarding the notes.

Respondent, Cohen, stated that he was not at the firm at the time of Claimants' investments.

### **RELIEF REQUESTED**

Claimants requested an Award of damages together with interest, attorney's fees and costs totaling approximately \$491,791.81 and such other and further relief as the arbitration panel may deem appropriate, including but not limited to a rescission of the investment transactions at issue.

Respondents requested that the claims be dismissed and that they be awarded all of their costs and expenses in defending this matter.

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

- 1) Prior to the hearing, the NASD was advised that Claimants had settled with Respondent, Witt.
- 2) During the hearing on November 28, 1995, the Panel was informed by Claimants' attorney that Claimants wished to dismiss their claims against Respondent, Goldsmith, with prejudice.
- 3) The Panel finds that Respondents, Bird, Silver and Cohen were required to sign Submission Agreements since jurisdiction exists with respect to these Respondents pursuant to Section 12 of the NASD Code of Arbitration Procedure and pursuant to the Form U-4 executed by Respondents, Bird, Silver and Cohen.

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 (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent, Cohen, is found not liable and, therefore, all claims against him are hereby dismissed.
- 2) Respondents, Rose Sec., Bird and Silver, are found liable, jointly and severally, and shall pay to the Claimants damages totaling \$404,050.00 including interest.
- 3) Respondents, Rose Sec., Bird and Silver, are found liable, jointly and severally, and shall pay to the Claimants a further amount for attorney's fees based upon the Panel's finding

of egregious behavior on the part of these Respondents, the amount of which shall be determined by a court of competent jurisdiction.

- 4) Respondents, Rose Sec., Bird and Silver, are found further liable, jointly and severally, and shall pay to the Claimants, costs, in the amount of \$6,000.00.
- 5) Respondents' requests for attorney's fees, costs and expenses are hereby denied.
- 6) All other claims are hereby denied.

#### **OTHER COSTS**

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

#### **FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the Panel has assessed Forum Fees in the amount of \$3,600.00 (six hearing sessions X \$600.00).

- 1) Respondents, Rose Sec., Bird and Silver are hereby assessed Forum Fees in the amount of \$3,600, jointly and severally, \$600.00 of which shall be paid directly to the Claimants. The remaining \$3,000.00 of which shall be paid to the National Association of Securities Dealers, Inc.
- 2) The NASD shall retain the non-refundable filing fee of \$250.00 paid by the Claimants.
- 3) The NASD shall retain the hearing session deposit of \$600.00 paid by the Claimants.

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

#### **ARBITRATION PANEL**

##### **Concurring Arbitrators' Signatures**

Name

Public/Industry

/s/

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Harold M. May

Public/Chairperson

/s/

\_\_\_\_\_  
George K. Beardsley

Industry/Panelist

/s/

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Stephen J. Freedman, Esq.

Public/Panelist

Date of Decision: February 5, 1996