

## NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

— In the Matter of the Arbitration Between

Name of Claimant

Walter L. Schmelzel

and

93-05034

Name of Respondent

Richard W. Rogers  
Multi-Financial Securities Corporation

### REPRESENTATION OF PARTIES

Walter L. Schmelzel ("Claimant") was represented by Jeffrey J. Scott, Esq., Krys Boyle Golz Reich Freeman & Scott, Denver, Colorado.

Richard W. Rogers ("Respondent Rogers") was represented by Martin M. Berliner, Esq., Berliner Zisser Walter & Gallegos, Denver, Colorado.

Multi-Financial Securities Corporation ("Respondent Multi-Financial") was represented by David Burlingame, Esq., Denver, Colorado.

### CASE INFORMATION

The Statement of Claim was filed on or about December 7, 1993. First Amended Statement of Claim was filed on or about April 18, 1994. Second Amended Statement of Claim was filed on or about August 9, 1994. Third Amended Statement of Claim was filed on or about September 22, 1995. Response to the Motions to Dismiss was filed on or about April 19, 1996. Submission Agreement of Claimant Walter L. Schmelzel was signed on November 29, 1993.

Statement of Answer was filed by Respondent Richard W. Rogers on or about March 4, 1994. Submission Agreement of Respondent Richard W. Rogers was signed on February 22, 1994.

Reply to Third Amended Statement of Claim was filed by Respondent Multi-Financial Securities Corporation on or about March 21, 1996. Submission Agreement of Respondent Multi-Financial Securities Corporation was signed on February 2, 1994 by Douglas Temple-Trujillo.

### **HEARING INFORMATION**

A telephonic hearing conference with all three arbitrators participating was held on February 28, 1996 for one (1) session.

The hearing on the outstanding Motions to Dismiss was held on June 11, 1996 in Denver, Colorado for one (1) session.

### **CASE SUMMARY**

In the Third Amended Statement of Claim, Claimant alleged that Respondent Rogers breached his fiduciary duty to him by recommending unsuitable securities and misrepresenting the income to be received on those securities. Claimant specifically alleged that Respondent Rogers:

- ▶ recommended that he sell his shares of Chevron stock and purchase units of six limited partnerships in January, 1987;
- ▶ misrepresented speculative, illiquid limited partnerships as safe, income producing investments, suitable for safety conscious and conservative investors; and
- ▶ misrepresented the future income to be received from the limited partnerships he recommended, and that Claimant relied upon those misrepresentations.

It was alleged that the actions of Respondent Rogers constituted: violations of the NASD Rules of Fair Practice; breached his fiduciary duty to the Claimant; negligence; misrepresentations; breach of contract; fraud; and that Respondent Multi-Financial failed to properly supervise Mr. Rogers.

Respondent Multi-Financial stated that Claimant was never a customer of it and that the claims asserted in this matter did not arise out of any business between the Claimant and Multi-Financial. The affirmative defenses that the claims asserted in this matter are barred pursuant to §§1 and 15 of the NASD Code of Arbitration Procedure were also asserted by Respondent Multi-Financial.

Respondent Rogers denied the allegations set forth in the Statement of Claim. Respondent Rogers also stated that each investment was unsolicited; the decision to invest was made by the Claimant after Rogers had carefully discussed the risks involved in each investment, specifically, the possibility that the Claimant might lose his principal investment. It was further stated by Respondent Rogers that the Claimant had rejected his recommendation to diversify his portfolio.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of actual damages to be proven at the hearing, punitive damages, and attorneys' fees and costs pursuant to the Colorado Securities Act.

Respondent Multi-Financial demanded judgment against Claimant and requested an award of the costs it incurred in defending this claim.

Respondent Rogers requested that the claims be dismissed and that he be awarded his attorneys' fees and costs incurred in defending this matter.

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

Respondents Multi-Financial and Rogers asserted separate Motions to Dismiss the claims asserted in this matter pursuant to §15 of the NASD Code of Arbitration Procedure. The arbitration panel heard arguments on the motions on June 11, 1996 and advised the parties of its decision to grant the motions.

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 original(s) remain on file with the NASD.

### **AWARD**

After considering the pleadings, and the arguments presented at the hearing on the Motions to Dismiss, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Motions to Dismiss shall be and hereby are granted. The claims asserted in this matter are dismissed without prejudice and the Claimants are therefore referred to their remedies under the applicable law.
2. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each prehearing conference, if any. There were two (2) sessions x \$600 = \$1,200 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with the NASD by the Claimant Walter L. Schmelzel.

The NASD shall assess as forum fees the postponement fee in the amount of \$600 due from Respondent Richard Wade Rogers. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ Daniel C. Himelspach, Esq.

June 12, 1996

Daniel C. Himelspach, Esq.  
Public Arbitrator, Presiding Chair

/s/ Irving Wolinsky, DDS

June 15, 1996

Irving Wolinsky, DDS  
Public Arbitrator

/s/ Jerome C. Zackroff

June 13, 1996

Jerome C. Zackroff  
Industry Arbitrator