

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Sidney P. Lifton; Carol Lifton;
Tami Lifton; Lifton Electric EMP
PP&T, Sidney P. Lifton Trustee

94-00694

Name of Respondents

First of Michigan Corporation;
Herman Schwartz

REPRESENTATION

For Claimants: Sidney P. Lifton, Carol Lifton, Tami Lifton and Sidney P. Lifton as Trustee of the Lifton Electric Emp PP&T were represented by Bruce E. Baldinger, Esq., of Somerville, New Jersey.

For Respondents: First of Michigan Corporation ("First of Michigan") and Herman Schwartz ("Schwartz") were represented by Michael P. Coakley, Esq. of Miller Canfield Paddock & Stone, P.L.C., located in Detroit, Michigan.

CASE INFORMATION

Statement of Claim filed: February 24, 1994.

Claimants' Submission Agreements signed on: March 22, 1994.

Statement of Answer filed by Respondents on: June 8, 1994.

Respondent First of Michigan's Submission Agreement signed on: May 6, 1994 by Conrad W. Koski, Executive Vice President & Treasurer, First of Michigan.

Respondent Schwartz's Submission Agreement signed: May 9, 1994.

HEARING INFORMATION

Pre-Hearing Conference: None Held
Hearing Date/Sessions: March 8, 1995 for One (1) session.
Hearing Location: Detroit, Michigan.

CASE SUMMARY

Claimants alleged that in March 1985 and June 1986, Respondents fraudulently induced the purchase of unsuitable investments in limited partnerships in direct contradiction to the Claimants' expressed investment objectives. Based upon the allegations of the Statement of Claim, the Claimants asserted claims for misrepresentation and omission; breach of fiduciary duty; inadequate supervision by First of Michigan; violation of the Antifraud provisions of the Securities and Exchange Act of 1934, as amended; breach of contract; negligence; and violation of the Michigan securities law.

Respondents denied the material allegations of the Statement of Claim, asserting that they sold the investments pursuant to a prospectus or other material which disclosed to Claimants the nature of the investments. In addition, Respondents asserted that their duties were transactional only and that they owed no fiduciary duty to the Claimants. Furthermore, the Claimants received information, including annual and quarterly reports, which kept them advised of their investments. Respondents also alleged that any alleged losses were the result of market conditions, changes in the tax laws and Claimants' own actions and inactions. Respondents asserted several additional defenses, including the following:

1. Claimants have failed to comply with Section 15 of the NASD Code of Arbitration Procedure;
2. The claims regarding Claimants' investment in the Granada 4 limited partnership are barred by court order;
3. The remaining claims should be dismissed as time-barred pursuant to state and federal law; and
4. The claims are barred because Claimants' ratified the Respondents' actions.

RELIEF REQUESTED

Claimants requested entry of an award against the Respondents for at least \$40,000.00 in compensatory damages; for punitive damages as permitted by state law; for legal fees, expert fees, and hearing expenses; and for such other relief as the Panel deemed just and proper.

Respondents requested that the Panel dismiss the claims with prejudice and in their entirety, and that they be awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The Granada 4 Limited Partnership claim was voluntarily withdrawn by Claimant due to a class action litigation entitled In re Granada Partnership's Securities Litigation, MDL Docket No. 837.

Respondents filed a Request to Dismiss Statement of Claim arguing, among other things, that Claimants were untimely in bringing their arbitration claims because of Section 15 of the NASD Code of Arbitration Procedure. At a telephonic hearing held on March 8, 1995, the Panel heard argument in regard to Respondents' Motion to Dismiss. After hearing the arguments presented by the parties, the Panel determined as follows:

1. Under the Code, a claim may be time barred by a statute of limitations or because it is ineligible for arbitration pursuant to the six year time period in Code Section 15;
2. The concept of the equitable tolling may extend the statute of limitation period of a claim that may be time barred in certain circumstances. Equitable tolling may apply where there has been fraudulent concealment of actions or inactions by one or more of the parties. In such cases, arbitrators may extend that statute of limitations period based upon equitable tolling due to fraudulent concealment;
3. As for a claim that may be time barred by ineligibility under Code Section 15, the parties agreed by contract to resolve their difference in accordance with the Code. Code Section 15 is a substantive eligibility requirement as opposed to a statute of limitations procedural rule. The Code provides that a claim is not "eligible" for arbitration where more than six years has elapsed from the act, dispute, claim or controversy complained of by a claimant, unless directed by a court of competent jurisdiction. The only acts complained of by Claimants in this matter are in connection with the sale of the above described limited partnerships which occurred more than six years prior to the date of Claimants' filing their

claim and there has been no court order filed in this matter.

4. Accordingly, this claim is not eligible for arbitration and this arbitration panel does not have subject matter jurisdiction over such acts which occurred more than six years prior to the filing of Claimant's claim. Further, the six year eligibility time period in Code Section 15 is not subject to equitable tolling on the grounds of fraudulent concealment. See Dean Witter Reynolds, Inc. v M.C. McCoy et al 835 F. Supp. 1023 (E.D. Tenn 1994). See also Edward D. Jones & Co. v Sorrells, 957 f.2d 509 (7th Cir. 1992);

5. The only exception to the bar on claims older than six years under Code Section 15 is where a court with competent jurisdiction over the claim orders the matter to be submitted to arbitration. See Jones, and PaineWebber Inc. v Farnam, 870F.2d 1286 (7th Cir. 1989). Review of this file discloses that has been no court order to arbitrate Claimant's claim in this matter; and

6. Code Section 35 provides this panel with the power to interpret and determine the applicability of all provisions under the Code and to take appropriate actions to obtain compliance. Pursuant to Section 35, the panel's interpretation of Section 15 of the NASD Code of Arbitration shall be final and binding upon the parties.

It is therefore ORDERED that this case be dismissed for the reasons set forth above.

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. The claims asserted by the Claimants are dismissed with prejudice and denied in their entirety;
2. The parties are responsible for their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are

assessed: One (1) hearing session x \$400.00 per session = \$400.00.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee and the \$400.00 hearing session deposit previously deposited by the Claimants. In addition, the NASD shall retain the \$200.00 surcharge paid by Respondent First of Michigan Corporation.

Concurring Arbitrators' Signatures

Name

Date

/s/ Lawrence M. Elkus, Esq.

July 25, 1995

Lawrence M. Elkus, Esq.

Public Arbitrator

Chairperson

/s/ Benjamin A. Kerner

July 28, 1995

Benjamin A. Kerner

Public Arbitrator

/s/ Miles D. Hart, Esq.

July 31, 1995

Miles D. Hart, Esq.

Industry Arbitrator

For NASD Use Only

Date of Decision: August 7, 1995