

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Gennaro and Diane Passante

94-01686

Name of Respondents

Leon Procopio
First Investors Corporation
First Associates
Schneider Securities, Inc.
Jonathan Alan & Co., Inc.

REPRESENTATION

For Claimants Gennaro and Diane Passante (hereinafter collectively referred to as "claimants") appeared Charles R. Goulding, Esq., Syosset, New York.

For Respondent Leon Procopio ("Procopio") appeared William J. Reilly, Esq., New York City, New York.

For Respondent First Investors Corporation ("First Investors") appeared Nicholas J. Donohue, Esq., Martin Van de Walle Donohue & McGahan, Great Neck, New York.

First Associates did not enter an appearance in this matter.

For Respondent Schneider Securities, Inc. ("Schneider Securities") appeared Maurice D. Wise, compliance officer for Schneider Securities, Denver, Colorado.

Jonathan Alan & Co, Inc. did not enter an appearance in this matter.

CASE INFORMATION

The Statement of Claim was filed on April 27, 1994. Claimants' Submission Agreement was signed by both claimants on April 26, 1994.

Respondent Leon Procopio's Statement of Answer was filed on September 17, 1994. Respondent Procopio's Submission Agreement was signed on September 8, 1994.

A Statement of Answer was filed on behalf of First Investors on September 20, 1994. A Submission Agreement was executed by Larry R. Lavoie, Esq., General Counsel with First Investors, on September 20, 1994.

First Associates did not file a Statement of Answer and did not file a Submission Agreement.

A Statement of Answer was filed on behalf of Schneider Securities on September 19, 1994. A Submission Agreement was executed by Maurice D. Wise, Compliance Officer with Schneider Securities, on September 19, 1994.

Jonathan Alan & Co., Inc. did not file a Statement of Answer and did not file a Submission Agreement.

HEARING INFORMATION

A hearing was held at the NASD, Inc. offices in New York City, New York on November 14, 1995 which lasted two sessions.

CASE SUMMARY

Claimants alleged that they commenced a client-broker relationship with respondent Procopio in 1983 subsequent to claimant Gennaro Passante retiring and receiving a lump sum pension distribution in the sum of \$64,000.00. At the time claimants' deposited their funds with respondent Procopio and Procopio's employer, during this time period, First Investors, claimants allegedly advised respondents of their desire to invest in a safe investment as these funds represented the total retirement benefit available from Gennaro Passante's entire career. In accordance with claimants' stated investment objectives, respondent Procopio allegedly assured claimants that the funds would be placed into a risk-free investment that would pay 15 % per year with a maturity of five to seven years.

Contrary to claimants' stated objectives, respondents allegedly invested the entire \$64,000.00 in speculative real estate limited partnerships. Specifically, respondent invested \$50,000.00 of claimants' funds in Centennial Pension Investors, Ltd., a real estate limited partnership, and \$14,000.00 in Centennial Group, Inc., an affiliate company in real estate partnerships.

Allegedly unaware that respondent Procopio had misrepresented the status of claimants' investments, claimants deposited an additional \$20,000.00 into his retirement investment account in 1986, while Procopio was employed by First Associates. Again, contrary to claimants' investment objectives, respondent Procopio allegedly invested \$15,000.00 in Real Mark Properties V., \$2,000.00 in Secured Investment Resources Fund, L.P. II and other speculative investments which could not be determined. The investments have since been deemed illiquid and can only be sold on a secondary market.

Further, during the time period of 1988 to 1992, respondent Procopio allegedly recommended claimants invest funds in a two-sided option assuring claimants that the investment was a safe-risk free option with no risk to principal. Claimants invested \$5,000.00 in such an investment. Shortly thereafter, claimants learned that the investment had declined in value to \$1,600.00. Respondent Procopio allegedly promised claimants that he would make up the difference between the initial investment of \$5,000.00 and the remaining balance of \$1,600.00 but failed to do so.

Moreover, in 1992 while employed by Schneider Securities, respondent Procopio recommended that claimants invest in a stock called Trinitech Systems, Inc. of which claimants purchased \$5,000.00 worth of stock at \$2.25 per share. Claimants allegedly instructed respondents to sell the stock at \$5 per share which respondents allegedly failed to do. Respondents eventually sold claimants' position at \$4.50 per share. Additionally, respondents invested Diane Passante's retirement funds in Destiny II, a load fund which incurred substantial fees.

Claimants further alleged that on or about September 30, 1993 both Centennial limited partnerships went bankrupt reducing the combined value of these investments to \$2,087.00. Claimants' attempts to withdraw this amount have been allegedly thwarted by respondent Procopio's assertion that these funds were illiquid and could not be redeemed or sold.

Claimants alleged that respondents are liable to the claimants based on the legal theories of unsuitability, fraud and misrepresentation, negligence, respondeat superior, breach of contract, and breach of fiduciary duty.

Respondent Procopio denied all allegations of wrongdoing as set forth in the claimants' statement of claim. Respondent Procopio maintained that in accordance with claimants' investment objectives, claimants' funds were placed in long term real estate investments after having provided claimants with the prospectus and risk disclosure documents for each limited partnership. In addition, respondent Procopio maintained that claimants executed the necessary risk disclosure statement with respect to the real estate limited partnership investments and returned them to respondent Procopio. Respondent Procopio further maintained that at the time the investment was made the investment was suitable for the investment purposes of the claimants. Respondent Procopio maintained that the subsequent liquidity problems of real estate limited partnerships occurred as a result of changes in tax laws as well as the recession in the real estate market which could not have been reasonably foreseen by respondents. Further, respondent Procopio maintained that the alleged "two-sided option" was actually an investment in futures contracts which are not within the purview of the NASD's jurisdiction.

Respondent Procopio denied that the investments recommended to claimants were unsuitable for long-term retirement account investment objectives; that any statements made by him were the result of fraudulent conduct or misrepresentations; that he engaged in negligent conduct; and that he breached any fiduciary obligation with respect to the claimants' account.

Respondent First Investors denied all allegations of wrongdoing asserted in the statement of claim as they related to First Investors. Respondent First Investors maintained that the only account claimants' maintained with First Investors was a mutual fund account which was allegedly profitable. Respondent First Investors maintained that claimants invested \$48,432.00

in First Investors Bond Appreciation Fund, Inc. which was liquidated approximately two years after for \$64,584.42.

Further, respondent First Investors maintained that it had no record of selling interests in Centennial Pension Investors, Ltd. and Centennial Group, Inc. to any of its clients. Respondent First Investors maintained that the only investment claimants' made with First Investors involved the purchase of mutual fund shares which was profitable.

Respondent Schneider Securities, Inc., allegedly the successor firm to Jonathan Alan & Co., Inc. denied the allegations of wrongdoing as they related to respondent Schneider Securities, Inc. Respondent Schneider Securities maintained that the only securities transactions effected for claimants at Schneider Securities were a buy of 2,000 shares of Trinitech Systems, Inc. at \$2.50 per share for a total of \$5,008.00 and a sale of 2,000 shares of Trinitech Systems, Inc. at \$4.50 per share for a total of \$8,667.00. Further, respondent Schneider Securities, Inc. maintained that this investment was deemed suitable based upon the customer suitability statement executed by claimant Passante who maintained an individual account with this respondent. Respondent Schneider denied that claimant Diane Passante maintained any account with respondent Schneider Securities.

RELIEF REQUESTED

Claimants requested an award of approximately \$240,000.00. In addition to compensatory damages, claimants sought punitive damages of \$240,000.00 because of the wilful, wanton and malicious conduct of respondents Procopio, First Investors, First Associates, Jonathan Alan & Co., and Schneider Securities, Inc. In addition, claimants sought an award of attorneys' fees and experts' fees together with the costs of this action and pre-award interest.

Respondent Procopio denied any liability for investment losses incurred by claimants. Procopio requested that claimants request for attorneys' fees be denied maintaining that awarding attorney's fees are not within the jurisdiction of this proceeding.

Respondent First Investors requested that the statement of claim be dismissed and claimants awarded zero damages. Moreover, respondent First Investors requested that First Investors be awarded the costs it has incurred in defending against these claims.

Respondent Schneider Securities, Inc. requested that it be dismissed from this action.

OTHER ISSUES CONSIDERED AND DECIDED

Claimants entered into stipulations with respondents First Investors Corporation and Schneider Securities, Inc. withdrawing their claims against these respondents.

The arbitration panel made the following rulings as to respondents First Associates and Jonathan Alan who failed to file an answer in this arbitration, and failed to file and present properly executed Submission of the dispute to NASD Arbitration (i.e. Submission Agreement) and failed to appear at the New York Evidentiary hearings conducted in this matter without obtaining any

adjournment/ postponement thereof:

1. Pursuant to Section 1 of the NASD Code of Arbitration Procedure ("Code") the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that First Associates was an NASD member at the time this controversy arose. Consequently, the panel found personal jurisdiction over First Associates pursuant to Section 12 (a) of the Code which required First Associates to arbitrate at this forum upon demand of the customer claimants.
3. The panel found that Jonathan Alan & Co., Inc. was an NASD member at the time this controversy arose. Consequently, the panel found personal jurisdiction over Jonathan Alan & Co., Inc. pursuant to Section 12 (a) of the Code which required Jonathan Alan & Co., Inc. to arbitrate at this forum upon demand of the customer claimants.
4. In view of (2) and (3) above, respondents were required to execute and file with the NASD a submission agreement pursuant to Section 25 (b) of the Code. However, the panel found that the NASD had not effected service of the claim upon respondents First Associates and Jonathan Alan & Co. as required pursuant to Section 25 (a) of the Code.
5. The panel also found that the NASD pursuant to Sections 21, 26 and 29 of the Code, did not provide respondents First Associates and Jonathan Alan & Co., Inc. with "due notice" of all hearings conducted in this matter by regular and certified mail. The panel, therefore, determined to dismiss, without prejudice, respondents First Associates and Jonathan Alan & Co., Inc. as respondents in this matter and proceed only as to the other named respondents.

The arbitration panel also made the following rulings as to respondent Leon Procopio who filed an answer in this arbitration and filed a properly executed submission of the dispute to NASD Arbitration (i.e. Submission Agreement), but failed to appear at the New York Evidentiary hearing conducted in this matter without obtaining any adjournment/postponement thereof:

1. Pursuant to Section 1 of the NASD Code of Arbitration Procedure ("Code") the panel found subject matter jurisdiction over this entire controversy and specifically as it related to Procopio.
2. The panel found that Procopio was a person associated with an NASD member at the time this controversy arose. Consequently, the panel found personal jurisdiction over Procopio pursuant to Section 12 (a) of the Code. Additionally, Procopio executed a Form U-4 requiring him to arbitrate at this forum upon demand of the customer claimants.
3. Finally, the panel found that the NASD, pursuant to Sections 21, 26 and 29 of the code, provided Procopio with "due notice" of all hearings conducted in this matter by regular and certified mail. The panel, therefore, determined to proceed with these hearings without Procopio whose absence was, as stated previously, unexcused.

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 Procopio be and hereby is liable and shall pay to claimants the sum of \$2,523.00, interest specifically excluded.
2. All claims for punitive damages be and hereby are denied.
3. All claims for attorneys' fees be and hereby are denied.
4. All claims for expert witness fees be and hereby are denied.
5. Each party shall bear their respective costs, except that respondent Procopio is hereby directed to reimburse claimant the sum of \$750.00, representing the hearing session deposit previously submitted by the claimants to the NASD.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 non-refundable filing fee previously paid to the NASD by claimants and have assessed the following forum fees:


2 hearing sessions x \$750.00 = \$1,500.00 - \$750.00 hearing session deposit = \$750.00

Respondent Procopio be and hereby is liable and shall pay to the NASD the sum of \$750.00 representing outstanding forum fees assessed by the arbitration panel.

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

ARBITRATORS' SIGNATURES

Marilyn J. Salzman, Esq.
Chairperson- Public Arbitrator


Madelon M. Rosenfeld, Esq.
Public Arbitrator

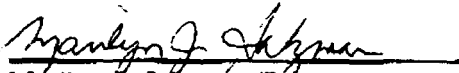
Frank G. Piazza
Industry Arbitrator

Date of decision: March 7, 1996

I, **Madelon M. Rosenfeld, Esq.**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.


Madelon M. Rosenfeld, Esq.

ARBITRATORS' SIGNATURES



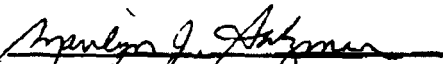
Marilyn J. Salzman, Esq.
Chairperson- Public Arbitrator

Madelon M. Rosenfeld, Esq.
Public Arbitrator

Frank G. Piazza
Industry Arbitrator

Date of decision: March 7, 1996

I, Marilyn J. Salzman, Esq., do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.




Marilyn J. Salzman, Esq.

ARBITRATORS' SIGNATURES

Marilyn J. Salzman, Esq.
Chairperson- Public Arbitrator

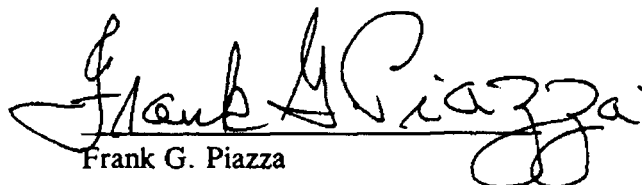
Madelon M. Rosenfeld, Esq.
Public Arbitrator



Frank G. Piazza
Industry Arbitrator

Date of decision: March 7, 1996

I, **Frank G. Piazza**, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.



Frank G. Piazza