

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Wayne Saker

vs.

Case No.
94-01971

Name of Respondents

James Peter Minsky
Irv Freiberg
Westfield Financial Corp.
Paul Peter Alessandrini, Jr.
Salvatore Mazzeo

REPRESENTATION

For Claimant Wayne Saker ("Saker") appeared Victor F. Mustelier Esq. of David M. Perlmutter & Associates located in New York City, New York.

For Respondent James Peter Minsky ("Minsky") appeared David E. Robbins, Esq., of Kaufmann, Feiner, Yamin, Gildin & Robbi located in New York City, New York.

Respondent Irv Freiberg ("Freiberg") appeared pro se.

Respondent Paul Peter Alessandrini, Jr., ("Alessandrini") appeared pro se.

For Respondent Westfield Financial Corp., ("Westfield") appeared Salvatore James Mazzeo.

For Respondent Salvatore Mazzeo ("Mazzeo") appeared Leslie K. Case, Esq., of Gersten Savage Kaplowitz & Curtin, LP located in New York City, New York.

CASE INFORMATION

Statement of Claim filed on: May 25, 1994.

Amended Statement of Claim filed on: May 23, 1995.

Claimant's Submission Agreement signed on: May 18, 1994.

Claimant's Amended Submission Agreement signed on: August 18, 1995.

Statement of Answer filed by Respondent Minsky on: May 23, 1995.

Respondent Minsky's Submission Agreement signed on: May 8, 1995.

Respondent Freiberg did not file a Statement of Answer or execute a Submission Agreement.

Statement of Answer filed by Respondent Alessandrini on: October 17, 1994.

Respondent Alessandrini's Submission Agreement signed on: November 21, 1994.

Statement of Answer filed by Respondent Westfield on: October 17, 1994.
No Submission Agreement was signed by Respondent Westfield.

Statement of Answer filed by Respondent Mazzeo on: August 2, 1995.
Respondent Mazzeo's Submission Agreement signed on: July 25, 1995.

HEARING INFORMATION

Hearing Dates/Sessions:	October 10, 1995	-	2 sessions
	October 11, 1995	-	2 sessions

The hearings took place at the National Association of Securities Dealers Inc.'s offices located in Boston, Massachusetts.

CASE SUMMARY

Claimant Saker alleged that the Respondents' actions constituted violations of Section 10(b) of the Securities Exchange Commission Act of 1934 and S.E.C. Rule 10b-5, breaches of their promises and fiduciary duties to Saker, and constituted common law fraud, negligent misrepresentation and negligence. In addition, the Claimant maintained that the Respondents' actions were for the sole purpose of advancing their economic interests at Claimant's expense and were wanton, willful, and intentional. The Claimant further contended that Respondents Alessandrini and Mazzeo were also liable to the Claimant because they negligently and intentionally failed to supervise, and were grossly negligent in hiring Respondents Minsky and Freiberg.

According to Claimant, on January 31, 1994 Respondents Minsky and Freiberg acting on behalf of themselves, Westfield, Alessandrini and Mazzeo, solicited Claimant to purchase common stock in Alpha Hospitality Corp., ("ALHY"). Claimant maintained that during the course of this solicitation, Respondent Freiberg, acting on behalf of himself, Westfield, Alessandrini, and Mazzeo, for the purpose of earning profits for Respondents and contrary to Claimant's interests, made promises and representations which were false and known to be false when they were made. As alleged by the Claimant, these promises and representations consisted of the following: 1) that Westfield had brought Alpha Hospitality Corp., public a few months earlier; 2) that Freiberg was very close to that company; 3) that Westfield's research department and two others on the street would soon be recommending the stock; and 3) that there would be material news regarding the monthly WIN coming out shortly which would send the price of this common stock quickly into the 20s. In reliance upon these promises and representations, Claimant contended, he purchased 2,500 shares of ALHY common stock through Westfield at \$16-3/8 at a total cost of \$40,950.00. Claimant alleged that contrary to the above promises and representations, the price of ALHY common stock never went above \$20.00 per share but, fell. On March 15, 1994, according to the Claimant, he sold his 2,500 shares of ALHY common stock through Triad Securities at \$12-1/2 at a total net price of \$31,171.50. Claimant further maintained that Alessandrini and Mazzeo solicited, encouraged, and aided and abetted in the actions of Minsky and Freiberg. The Claimant alleged that as a result of these actions he sustained damages in an amount not less than \$9,778.50 and is entitled to recover punitive damages in an amount not less than \$100,000.00.

On February 15, 1994, as Claimant contended, he purchased 10,000 shares of common stock in United Vision Group, Inc., ("UCIC") at \$6.00 per share in the aftermarket of an offering of UCIC common

stock. The Claimant also alleged that before he purchased this stock, Minsky, acting on behalf of himself, Westfield, Alessandrini and Mazzeo, promised and represented to Claimant that he would be buying this stock at \$6.00 per share net with no mark-up. According to the Claimant these promises and representations, which he relied upon when he purchased the stock, were false and known to be false at the time they were made. Claimant maintained that contrary to these promises and representations, when he received the confirmation of his purchase of stock it showed a price of \$6.00 plus a mark-up of \$.25 per share. In addition, Claimant alleged that contrary to the promises and representations of Respondents Minsky and Freiberg, made on behalf of themselves and the remaining Respondents, the amount of the markup was never credited to Claimant's brokerage account. Claimant also alleged that on February 22, 1994 at the solicitation of Respondents Minsky and Freiberg, acting on behalf of themselves and the other Respondents, Saker purchased 5,000 shares of UCIC common stock at \$5-3/4 at a total cost of \$28,762.50.

The Claimant also contended that prior to March 3, 1994 he purchased, through Westfield, 7,500 shares of common stock in Pharma Patch PLC ("SKINY"), a new issue, at \$6.00 per share at a total cost of \$45,000.00; 5,000 shares of common stock in SKINY in the aftermarket at \$7.00 per share at a total cost of \$35,012.50; 2,000 Class B warrants in SKINY at \$.10 at a total cost of \$200.00; 2,000 Class C warrants in SKINY at \$.10 at a total cost of \$200.00; and 5,000 Class C warrants in SKINY at \$2-1/4 at a total cost of \$11,262.50. According to Saker, the settlement dates for these purchases were March 7, and March 8, 1994. The Claimant contended that on March 3, 1994, Respondent Freiberg, acting on behalf of himself, Westfield, Alessandrini, and Mazzeo, called Claimant and solicited him to sell his SKINY common stock at \$7-3/4 and to purchase 12,500 shares of UCIC common stock at \$4-1/2. In response to this solicitation, Claimant contended that he informed Freiberg that he was concerned about the liquidity of UCIC common stock and that he needed the money in cash in two weeks to make an investment pursuant to a stock subscription in Long Island Savings Bank. Claimant maintained that Freiberg, acting on behalf of himself, Westfield, Alessandrini and Mazzeo, guaranteed Claimant that UCIC common stock would be trading at \$5-1/2-\$6.00 per share within two weeks. Moreover, according to the Claimant, Freiberg promised and represented that he had spoken with the president of Westfield, that all the loose stock in UCIC had been absorbed, that Westfield had sufficient orders to cause the price of the UCIC common stock to increase, and that Westfield was going to "squeeze" the individuals who were short in UCIC. In addition, Claimant contended that Freiberg guaranteed him that he would be out of this stock within a two week period which would make him profitable on his trades in UCIC common stock as a whole. In reliance upon these promises, representations, and guarantees (which according to Claimant were false and known to be false at the time they were made), the Claimant maintained that on March 3, 1994 he placed orders with Westfield to sell his 12,500 shares in SKINY common stock at \$7-3/4 and to purchase 12,500 shares of UCIC common stock at \$4-1/2.

In addition, Claimant further alleged that in reliance upon these promises, representations, and guarantees, he refrained from selling the 10,000 shares of UCIC common stock he had purchased on February 15, 1994 and the 5,000 shares of UCIC common stock he had purchased on February 22, 1994. Claimant also averred that contrary to the promises, confirmations, and representations made by Freiberg, on behalf of himself, Westfield, Alessandrini, and Mazzeo, 5,000 shares and 2,500 shares of Gayer's SKINY common stock were sold at \$7-3/4 on March 10, 1994 and March 22, 1994, respectively, and 5,000 shares of Saker's SKINY common stock were sold at \$7-7/8 on March 15, 1994. According to Claimant, he was charged a price differential of \$1/8 per share on these trades, and that in reliance upon these promises, confirmations, and representations he did not make other attempts to sell these warrants. Furthermore, Claimant contended that contrary to the promises, confirmations and representations made

by Freiberg on March 4, 1994 (on behalf of himself, Alessandrini, Westfield, and Mazzeo), Claimant's Class B and Class C SKINY warrants were never sold by Westfield. Moreover, the Claimant alleged that in reliance upon these promises, confirmations, and representations, he did not make other attempts to sell these warrants.

Between March 3, 1994 and March 24, 1994, as alleged by the Claimant, the price of UCIC common stock declined. Claimant contended that pursuant to a phone conversation with Freiberg on March 24, 1994, Freiberg (on behalf of himself, Westfield, Alessandrini, and Mazzeo) promised and represented to Claimant that his UCIC common stock would be sold that day. As a result of these promises and representations, Claimant maintained that he did not make any other attempts to sell his UCIC common stock. Claimant further alleged that near the close of business on March 24, 1994 Freiberg (acting on behalf of himself, Westfield, Alessandrini, and Mazzeo) promised and represented to Claimant that all but a few thousand shares of Claimant's UCIC common stock had been sold at \$3-7/8 per share net and the rest would be sold the following day. As of March 25, 1994, the Claimant contended, that the UCIC common stock closed at \$3-7/8. According to the Claimant when he contacted Freiberg on March 25, 1994, Freiberg falsely assured Claimant that "everything had been taken care of," and therefore, he did not make other attempts to sell his UCIC common stock and SKINY warrants. However, on March 31, 1994, as alleged by the Claimant, he was advised by a sales assistant of Westfield that his UCIC common stock and SKINY warrants had not been sold. Claimant further alleged that, thereafter, Respondent Alessandrini acting on behalf of himself, Mazzeo, and Westfield, offered to purchase Claimant's UCIC common stock at \$3-1/4 net but, stated that sale of the warrants would disrupt the market.

As contended by the Claimant, he sold his 27,500 shares of UCIC common stock through Westfield on April 7, 1994 at \$3-1/4 for a total net price of \$89,363.00 at a loss of \$58,176.00. In addition, Claimant maintained that he was finally able to sell the Class B and Class C SKINY warrants through Prudential Bache between April 19, 1994 and April 25, 1994 as follows: a) 2000 Class B warrants on April 25, 1994 at \$1-1/8 for a total net price of \$2,226.00; b) 5,000 Class C warrants between April 19, 1994 and April 25, 1994 at \$2.00 for a total net price of \$9,932.00; and c) 2,000 Class C warrants on April 21 and 22, 1994 at \$2-1/4 for a total net price of \$4,472.00.

Claimant also maintained that he sustained the following damages as a result of the Respondents' actions: 1) losses of \$58,176.00 on the UCIC common stock; 2) losses of \$6,120.00 on the SKINY Class B and Class C warrants, representing the difference in the price at which sales of these warrants were confirmed by respondents and the price at which Claimant was subsequently able to sell the warrants; and 3) losses of \$1,600.00, representing the differential and commissions deducted by Westfield from Claimant's brokerage account with Westfield on the sale of his SKINY common stock, which sale was made by Claimant in reliance upon Respondents' promises and misrepresentations to him on March 3, 1994. In addition, the Claimant contended that the Respondents should be required to pay him punitive damages in an amount not less than \$1,000,000.00.

Respondent Minsky alleged that although he completed a U-4 application, Minsky was never registered as broker with Respondent Westfield. According to Minsky, since his license was not current he was not allowed nor did he solicit business. Furthermore, Minsky alleged, that for this reason he gave his list of clients, which included Claimant, to his partner Freiberg. Minsky also contended that he assured Claimant that Freiberg was reputable and that through Freiberg the Claimant had conducted several trades which were confirmed and agreed upon. When Westfield asked Minsky to leave, as alleged by Minsky, he left the firm and any of his clients who did not transfer with him stayed with Freiberg. In addition,

Minsky maintained that after he left the firm he contacted Saker and informed him that he should transfer his account away from Freiberg because the firm, in Minsky's opinion, was not conducting business the way that Minsky thought was correct. However, as Minsky contended, the Claimant did not listen to Minsky's warnings.

Respondents Westfield and Alessandrini alleged as affirmative defenses that: the Claimant failed to state claims upon which relief could be granted; Respondent Alessandrini cannot be held personally liable for claims alleged against Westfield or its employees; the Claimant is not entitled to punitive damages from any of the Respondents; Respondent Westfield's supervision of Freiberg and Minsky was adequate and responsible; any claim which the Claimant may have against Westfield and Alessandrini is barred by the doctrines of estoppel, waiver, and laches; and that the Claimant failed to mitigate his damages.

By way of affirmative defenses the Respondent Mazzeo alleged the following: that the Claimant has failed to state claims against Mazzeo upon which relief could be granted; that Mazzeo cannot be held personally liable for claims alleged against Westfield or its employees; that under New York law the Claimant is not entitled to recover punitive damages from Mazzeo; that Mazzeo did not have a fiduciary relationship with the Claimant; that any claim which the Claimant may have against Mazzeo is barred by the doctrines of estoppel, waiver, and laches; and that the Claimant has failed to mitigate his damages.

RELIEF REQUESTED

Claimant requested: 1) On the first claim for relief, compensatory damages in an amount not less than \$9,778.50 and punitive damages in an amount not less than \$100,000.00; 2) On the second claim for relief, compensatory damages in an amount not less than \$65,896.00 and punitive damages in an amount not less than \$1,000,000.00; 3) Costs, attorneys' fees and interest; and 4) Such other relief as the arbitration panel may deem just, equitable, and proper.

Respondents requested that the claims be dismissed and Respondent Minsky requested that the Statement of Claim against him be dismissed in its entirety and that the arbitrators assess all costs against Claimant.

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 original remains on file with the NASD.

The Claimant made a motion to Amend the Statement of Claim in order to add an additional party which was granted by the arbitration panel.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. All Count 1 claims are denied.
2. Count 2 claims are denied against Respondents Minsky, Alessandrini and Mazzeo.

3. The Count 2 claims against Respondent Freiberg as to fraud and 10-b5 are denied but, the claims as to negligent misrepresentation, breach of contract, breach of fiduciary duty, and negligence are granted.
4. The Count 2 claims against Respondent Westfield as to fraud and 10-b5 are denied but, the claims as to negligent misrepresentation, breach of contract, breach of fiduciary duty, negligence, and failure to supervise and control person are granted.
5. Respondents Freiberg and Westfield are jointly and severally liable to the Claimant for the sum of **SEVENTEEN THOUSAND ONE HUNDRED EIGHTY SEVEN DOLLARS and FIFTY CENTS** (\$17,187.50).
6. Respondent Minsky's CRD record with respect to reference to this case should be expunged.
7. Claimant is liable to Respondent Minsky for attorneys' fees in the sum of **ONE THOUSAND DOLLARS** (\$1,000.00).
8. Respondent Mazzeo's request that his CRD record be expunged is denied.
9. Claimant's request for attorneys' fees is denied.
10. Claimant's request for punitive damages is denied.
11. Forum fees are to be split as follows: 50% to be paid by the Claimant and 50% to be paid by Respondents Westfield, Alessandrini, Freiberg and Mazzeo jointly and severally.
12. All other claims for relief are denied.

FORUM FEES

Pursuant to Section 43c of the *Code of Arbitration Procedure*, the following Forum Fees are assessed.

Non-refundable Filing Fee:	\$ 250.00
Hearing Sessions (4 @ \$1,000 per session):	<u>\$4,000.00</u>
Total Fees:	\$4,250.00

1. The Claimant has paid \$1,250.00 and owes \$1,000.00 to the NASD.
2. Respondent Minsky has paid \$750.00 for the postponement of the July 12, 1995 hearing.
3. Respondents Freiberg, Westfield, Alessandrini, and Mazzeo have paid nothing.
4. Respondents Minsky, Freiberg, Westfield, Alessandrini, and Mazzeo are jointly and severally liable for 50% of the forum fees which equals a total amount of \$2,000.00.

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

ARBITRATION PANEL

Philip M. Giordano, Esq.	-	Public Chairperson
William P. Hurley	-	Public Panelist
Tobi J. Lesse	-	Industry Panelist

Concurring Arbitrator's Signature

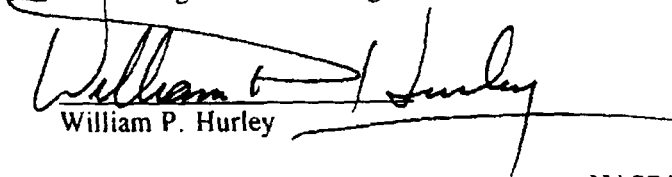

Philip M. Giordano, Esq.

NASD's Date of Decision: December 1, 1995

ARBITRATION PANEL

Philip M. Giordano, Esq.	-	Public Chairperson
William P. Hurley	-	Public Panelist
Tobi J. Lesse	-	Industry Panelist

Concurring Arbitrator's Signature

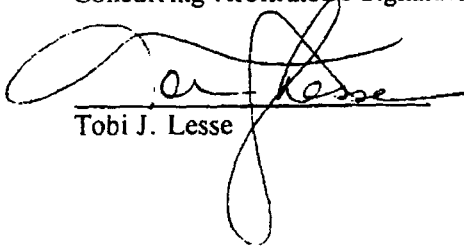

William P. Hurley

NASD's Date of Decision: December 1, 1995

ARBITRATION PANEL

Philip M. Giordano, Esq.	-	Public Chairperson
William P. Hurley	-	Public Panelist
Tobi J. Lesse	-	Industry Panelist

Concurring Arbitrator's Signature


Tobi J. Lesse

NASD's Date of Decision: December 1, 1995