

NASD FINAL ORDER

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Delbert Becker, Elvada Becker, and
the Becker Unitrust, Baptist General
Foundation, Trustee.

Claimants.

v.

No. 94-05078

John L. Kassab, Arthur Vern Heim,
Estate of Arthur Vern Heim, and
Financial Network Investment Corporation.
Respondents.

REPRESENTATION OF PARTIES

Delbert Becker, Elvada Becker, and the Becker Unitrust, Baptist General Foundation, Trustee ("Claimants") were represented by John F. Flynn, Esq., Scottsdale, Arizona.

John L. Kassab ("Kassab"), Financial Network Investment Corporation ("FNIC") (or collectively referred to as "Respondents") Arthur Vern Heim ("Heim"), and the Estate of Arthur Vern Heim, were represented by David S. Markun, Esq. and Steven M. Sherman, Esq., of Zelle & Larson, San Francisco, California.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about December 5, 1994. Claimants' Submission Agreements' were signed on October 14, 1994, and November 9, 1994.

Respondents Kassab's and FNIC's Statement of Answer was filed on or about April 3, 1995. Respondent FNIC's Submission Agreement was signed on May 4, 1995. Respondents' Amended Answer was filed on or about April 7, 1995.

HEARING INFORMATION

A hearing was held pursuant to §14 of the Code of Arbitration Procedure (the "Code") on January 23, 1996 in Scottsdale, Arizona for a total of one (1) session.

CASE SUMMARY

Claimant alleged that Respondents: Committed fraud, deceit, and misrepresentations; made unsuitable purchases and sales decisions and recommendations; violated NYSE Rule 342 and NASD Rules of Fair Practice Art. III, §2, and §27 supervision; breached their fiduciary duty to the Claimants; committed negligence; breached a written trust agreement contract; and committed fraudulent concealment. Claimants further alleged that: The limited partnership investments were purchased by Respondents during the middle 1980's, and that initially, some of the limited partnerships paid some income, thus Claimants were lulled into a false sense of security; and in 1989 and 1990, the Claimants were paid out principle, although it was labeled income, and amounted to fraudulent concealment of the negative results from the limited partnership investments. The allegations arose out of purchases of the following limited partnerships: Consolidated Capital Properties; Landsing Pacific Fund; Angeles Income Properties Ltd.; August Deferred Income Fund; Commonwealth Equity Trust; University Real Estate Fund #10; and Consolidated Capital Special Trust.

Respondents generally and specifically denied each and every substantive allegation contained in the Statement of Claim. Respondents specifically stated that: The investments were made between September 20, 1982 and September 20, 1983; FNIC is not responsible for investments transacted through University Securities Corporation ("USC"); claimants met the suitability requirements of the limited partnerships purchased through FNIC; Claimants met the suitability requirements set forth in the prospectuses for the limited partnerships; Claimants met the NASD suitability requirements; Claimants' allegations of misrepresentations are without merit given that they received and reviewed offering materials prior to making each investment; and Claimants' purported reliance on alleged oral misrepresentations is not justifiable. Respondents also asserted the following affirmative defenses: Claimants ratified the handling of their investments; Claimants must establish that they acted with reasonable diligence; the Statement of Claim is barred by applicable statutes of limitations; the damages that the Claimants seek to hold Respondents liable resulted in whole or in part from acts or omissions of others who are not parties to this arbitration and that respondents are in no way responsible for or liable to claimants for the acts or omissions of individuals and/or business entities that are not party to this arbitration; Claimants, through their conduct, approved, ratified, and authorized respondents' actions and that claimants are accordingly estopped from recovery; claimants' purported damages were caused by their own conduct and negligence or they are guilty of contributory negligence and, therefore, they are precluded from recovery; Claimants, by their conduct, waived any and all rights they might have had against Respondents, and, therefore, they are precluded from recovery; claimants' claims are barred by the equitable doctrine of laches because they delayed bringing these claims; Claimants are precluded from recovery on the ground that they came to this proceeding with unclean hands; claimants knowingly, willingly and voluntarily assumed the risks of their investments; Claimants failed to exercise their duty of due diligence in connection investments at issue as to which they assumed the risk of loss and, therefore, they are barred from recovery; Claimants are barred by their signatures and by the representations and warranties made in the subscription agreements. claimant cannot escape their representations

in the subscription agreements: Claimants' damages calculations are substantially overstated in that Claimant in securities cases are generally limited to a recovery of out-of-pocket losses or actual damages; and the NASD lacks jurisdiction over the claim filed by claimants against Respondents on the ground that the claims arising from all of the investments are ineligible for arbitration and may not be heard by the arbitration panel under §15 of the Code.

RELIEF REQUESTED

Claimants requested an award in the amount of: Principal and lost interest in excess of \$680,000; reasonable attorneys' fees, costs, and punitive damages deemed appropriate by the arbitrators.

Respondents requested that the Statement of Claim asserted against them be denied in its entirety and that they be awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

On or about April 4, 1995, Respondents filed a Motion to Dismiss claims arising from investment transactions which occurred in excess of six (6) years prior to the filing of the Statement of Claim. The motion was submitted pursuant to §15 of the NASD Code of Arbitration Procedure (the "Code"). Further, on or about April 7, 1995, Respondents filed a Motion to Change the venue of this arbitration to San Francisco, California. On or about April 13, 1995, Claimants filed their opposition to the request to Change venue. On or about April 20, 1995, Respondents filed their Reply in support of their Motion to Change Venue. On or about May 3, 1995, Claimants filed their Response to Respondents' Motion to Dismiss asserting: That the Respondents were fiduciaries and that they continually breached their fiduciary duty; the occurrence or event giving rise to the claim was not the purchase of the securities; the Claimants were in no position to discover Respondents' alleged misdeeds; and that applicable law mandated presentation of the delay issue to the arbitrators for hearing. On or about May 17, 1995, Respondents filed their Reply in support of their Motion to dismiss asserting that: The NASD should dismiss claims concerning investments Claimants purchased more than six (6) years ago; since Claimants received quarterly, semi-annual, or annual reports from the issuer of each investment, and were fully advised of each investment's performance, Claimants could not have justifiably relied on any alleged misrepresentation; Respondents' fiduciary duty, if any, terminated when each transaction closed; Respondents involvement was so limited that no fiduciary relationship existed; and the mere fact that Claimants' former broker, Heim, acted as their trust's trustee does not create a fiduciary relationship between Claimants and the Respondents. After review of the pleadings, the motions, and related responses, the Director of Arbitration denied the motion in full regarding all purchases made on or after December 5, 1988; and further determined that "Claims regarding purchases made prior to December 5, 1988 will be permitted to go to the panel of arbitrators but only as to the allegations of wrongdoing made on or after December 5, 1988. Respondents motion pertaining to the situs of this arbitration was denied.

On or about April 19, 1995, the Estate of Arthur Vern Heim filed a Motion pursuant to §12 of the Code asserting the NASD's lack of jurisdiction over the estate. On or about May 16, 1995, Claimants filed their Response to the Estate of Arthur Vern Heim's Motion to Dismiss. On or about May 23, 1995, the Estate of Arthur Vern Heim filed its reply in support of its Motion to dismiss pursuant to §12 of the Code. After review of the motion, and responses, the Director of Arbitration granted the motion.

On or about October 12, 1995, Respondents filed a Motion to Confirm the Director of Arbitration's §15 ruling, and to limit argument and evidence that are based only to those issues (if any) that are eligible for arbitration. Respondents asserted that: All claims are based on alleged events occurring before December 5, 1988; and applying the Director's ruling to these allegations precludes arbitration of them or presentation of evidence or argument concerning them. On or about October 27, 1995, Claimants filed their Response to respondents' Motion to Limit Evidence asserting that: Heim was acting as an agent on behalf of the other respondents; Respondents and Heim, not the Claimants, made the investment decisions; Kassab made recommendations to the Claimants; Kassab was Heim's supervisor at all relevant times and was responsible for Heim's investment decisions; and the Director's ruling was not binding on the parties. On or about October 30, 1995, Respondents filed their Reply Memorandum in support of their motion asserting that: §15 is an eligibility requirement, not a statute of limitations; for the purposes of §15, the "occurrence or event" is the purchase date of the security; and §15 is jurisdictional. On January 23, 1996, a hearing was convened pursuant to §14 of the Code for the purpose of the eligibility of this arbitration. On January 23, 1996, the arbitrators requested that the parties file supplemental briefs on the eligibility of this matter for arbitration. Pursuant to the arbitrators' request, the parties filed their briefs February 1, 1996 and January 31, 1996, respectively. After review of the pleadings, the motions, responses, briefs and memoranda, hearing argument from the parties on January 23, 1996, and deliberation, the arbitrators decided that this matter is ineligible for submission under §15 of the Code, and found the Respondents not to be trustees of the Becker Unitrust.

AWARD

After considering the pleadings and attached exhibits, the motions and responses with attached exhibits (if any), and the argument presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimants' claims are ineligible for submission under §15 of the Code. Further, Respondents were found not to be trustees of the Becker Unitrust. Therefore, Claimants claims are, and each of them, dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session. There was (1) session x \$1,000 = \$1,000 in forum fees. Pursuant to §43(b) of the Code, 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 Code, the 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 \$1,000 previously deposited with the NASD by the Claimants.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$500 previously paid by Financial Network Investment Corp..

The NASD shall retain postponement fees in the amount of \$350 previously deposited with the NASD by the Respondents. **Fees are payable to the National Association of Securities Dealers, Inc.**

Dated:

Thomas F. Tobin
Thomas F. Tobin
Public Arbitrator, Presiding Chair

s/s

April 3, 1996

Keith Folkman
Keith Folkman
Public Arbitrator

s/s

March 21, 1996

James Sullivan
James Sullivan
Industry Arbitrator

s/s

March 20, 1996