

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Ed Willcox
and Regina M. Willcox,

Claimants and Counter-Respondents,

and

No. 95-01572

First of Michigan Corporation, Inc.
and Terry Stanfill,

Respondents and Counter-Claimants.

REPRESENTATION OF PARTIES

Claimants and Counter-Respondents Ed Willcox and Regina M. Willcox ("Claimants") were represented by C. Nicholas Revelos, Esq. of Grosse Pointe Farms, Michigan.

Respondents and Counter-Claimants First of Michigan Corporation, Inc. ("First of Michigan") and Terry Stanfill ("Stanfill") (collectively referred to as "Respondents") were represented by Michael P. Coakley, Esq. of Miller Canfield Paddock & Stone located in Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about March 29, 1995.

The Statement of Answer, Motion to Dismiss, and Counterclaim was filed on or about February 20, 1996.

Respondents' Supplemental Brief in Support of Respondents' Motion to Dismiss was filed on or about August 12, 1996.

Claimants' Brief in Opposition to Respondents' Motion to Dismiss and Response to Counterclaim was filed on or about August 13, 1996.

Respondents' Brief in Rely to Claimants' Brief in Opposition to Respondents' Motion to Dismiss and

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Response to Counterclaim was filed on or about August 14, 1996.

Respondents' Motion for Leave to Amend Counterclaim was filed on or about January 21, 1997. Claimants' Response thereto was filed on or about January 24, 1997. Respondents' Reply Brief was filed on or about February 5, 1997.

The Amended Counterclaim was filed on or about January 21, 1997.

Claimants' Answer to Amended Counterclaim was filed on or about January 24, 1997.

Claimants' Motion for Partial Summary Disposition on the Issue of Suitability was filed on or about February 14, 1997. Respondents' Response thereto was filed on or about March 4, 1997.

Respondents' Supplemental Brief in Support of Request for Injunctive Relief was filed on or about March 4, 1997.

Claimants' Joint Submission Agreement was signed on March 20, 1995.

Respondent First of Michigan Corporation, Inc.'s Submission Agreement was signed on March 14, 1996 by Conrad W. Koski, Executive Vice President & Treasurer of First of Michigan Corporation, Inc.

Respondent Terry Stanfill's Submission Agreement was signed on March 18, 1996.

HEARING INFORMATION

The telephonic hearing on Respondents' Motion to Dismiss before the full panel was held on August 15, 1996 for one (1) session.

The telephonic pre-hearing conference before Chairperson Weiner was held on November 8, 1996 for one (1) session.

The hearing was held on: May 15, 1997 for three (3) sessions, May 16, 1997 for two (2) sessions, and May 20, 1997 for three (3) sessions.

The hearing was held in Southfield, Michigan.

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CASE SUMMARY

Claimants brought this action to recover losses allegedly resulting from misrepresentations by Respondent Stanfill, a registered representative with Respondent First of Michigan.

Claimants alleged that Respondent Stanfill invested \$20,000 of Claimants' funds in an investment called Phoenix Leasing Cash Distribution Fund IV ("Phoenix Leasing"). Claimants contended that subsequent to making this investment they learned that the Phoenix Leasing investment was a limited partnership. Claimants asserted that they had expressly stated to Respondent Stanfill that they wanted no part in limited partnership investments and that Respondent Stanfill had expressly assured them that no part of their funds would be made in limited partnership investments.

Claimants made the following legal claims: (1) violation of § 12(2) of the Securities Act of 1933; (2) violation of § 410(a)(2) of the Michigan Uniform Securities Act; (3) violation of § 3(1)(s), (b)(b), and (c)(c) of the Michigan Consumer Protection Act; (4) violation of § 10(b) and Rule 10(b)(5) of the Securities Exchange Act of 1934; (5) common law fraud; (6) negligence; (7) breach of fiduciary duty; (8) violation of NYSE Rule 342; (9) violation of NYSE Rule 401; (10) violation of NYSE Rule 405; (11) violation of NYSE Rule 408; and (12) violation of Art. III, §§ 2 and 27 of the NASD Rules of Fair Practice.

Respondents denied all liability to Claimants in the Statement of Answer. Respondents contended that Claimants knew or should have known at the time they decided to make the investment in question that Phoenix Leasing was a limited partnership because Respondent Stanfill gave them the Phoenix Leasing prospectus, which fully described its features and risks, and discussed the investment in detail. Respondents asserted that Phoenix Leasing has paid Claimants over \$12,000 in distributions over the past several years, which they have accepted without objection, and that Phoenix Leasing's general partner currently values the units held by Claimants at approximately \$12,000. Respondents argued that because Claimants are complaining about an investment decision they made nearly five years before they filed this action, most of their claims are time-barred and all are completely barred by Claimants' long ago ratification of the purchase.

Respondents asserted the following affirmative defenses: (1) that Claimants' Statement of Claim and each count therein fails to state a claim upon which relief can be granted; (2) that Claimants' Statement of Claim and each count therein is barred by reason of the applicable statute of limitations or other period of limitation; (3) that Claimants' Statement of Claim and all claims therein are barred by reason of Claimants' negligence, comparative negligence and/or contributory negligence; (4) that Claimants' Statement of Claim and each count therein are barred by virtue of negligence, comparative negligence and contributory negligence of other third parties' acts and actions who are not related to Respondents or whose acts or actions are not attributable to Respondents; (5) that Claimants' Statement of Claim and each count therein are barred by reason of Claimants' ratification of the actions complained of in the Statement of Claim; (6) that Claimants' Statement of Claim and

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each count therein are barred by reason of the doctrine of waiver, estoppel, laches and release; (7) that Claimants' Statement of Claim and each count therein are barred for the reason that Claimants did not rely on any alleged acts, misrepresentations or omissions; (8) that Claimants' Statement of Claim and each count therein are barred for the reason that Claimants exercised active control over the account with First of Michigan Corp., Inc. and all investments related thereto; (9) that Claimants' Statement of Claim and each count therein are barred for the reason that the alleged actions of Respondents were not the proximate cause or cause in fact of any alleged injury; (10) that Claimants' Statement of Claim and each count therein are barred for the reason that Respondents exercised due care and acted in good faith with respect to Claimants and Claimants' accounts; and (11) that Claimants' Statement of Claim and each count therein are barred by reason of Claimants' failure to give notice of the acts complained of to Respondents.

In the Counterclaim, Respondents alleged that Claimants negligently and/or with actual malice published a false and defamatory statement to current and potential customers of Respondents by placing a sign in the window of Claimants' truck that read: "Want to get 'Shafted' / Try: T.S. / FIRST OF MICHIGAN CORP." Respondents contended that Claimants knew the statement made was false or was made in reckless disregard of its truth or falsity. Respondents asserted that as a result of this defamation, Respondent First of Michigan has suffered substantial economic injury, loss of goodwill, harm to its business reputation, loss of esteem and standing in the community, and likely loss of business opportunities. Respondents also asserted that as a result of this defamation, Respondent Stanfill has suffered substantial economic injury, loss of goodwill, harm to his business reputation, loss of esteem and standing in the community, likely loss of business opportunities, emotional distress, humiliation, embarrassment, and anxiety.

In the Answer to Counterclaim, Claimants asserted the following affirmative defenses to Respondents' Counterclaim: (1) that Respondents' Amended Counterclaim alleges matters that are not within the subject matter jurisdiction of the NASD Department of Arbitration and Mediation or the Federal Arbitration Act; (2) that Respondents' Amended Counterclaim has failed to state a claim for defamation under Michigan law; (3) that Respondents' Amended Counterclaim has failed to state a claim for emotional distress under Michigan law; and (4) that Respondents' Amended Counterclaim alleges conduct on the part of Claimants which is privileged and guaranteed by right under the U.S. Constitution.

RELIEF REQUESTED

Claimants requested an award for: (1) actual damages (or rescission) in the amount of \$20,227.00; (2) exemplary damages for depression suffered as a result of stress in the loss of investments; (3) pre-award and post-award interest at the statutory rate; (4) costs of arbitration, attorneys' fees and expert witness and accounting fees; and (5) treble damages under RICO. Claimants further requested that all relief requested by Respondents in their Counterclaim be denied in full.

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Respondents requested that the Statement of Claim be dismissed with prejudice and that they be awarded their costs and attorneys' fees. Respondents also requested an award for: (1) compensatory damages; (2) exemplary damages; (3) an order requiring Claimants to remove the sign from the truck; (4) a preliminary and permanent order enjoining of Claimants from making false and defamatory statements about Respondents; (5) an order requiring Claimants to publish a retraction which will reach the same persons as the defamatory statements; and (6) interest.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents' Motion for Leave to File the Amended Counterclaim was granted.

Respondents' Motion to Dismiss was granted in part and denied in part.

Respondents' Motion for a Directed Verdict was granted in part and denied in part.

The arbitrators did not issue a ruling prior to the hearing on Claimants' Motion for Partial Summary Disposition on the Issue of Suitability. The final disposition of this Motion is made unnecessary by this final Award.

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 Regulation, Inc. Office of Dispute Resolution.

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) With respect to Claimants', Ed Willcox and Regina M. Willcox, Statement of Claim the arbitrators award a no cause of action in favor of Respondents, First of Michigan Corporation, Inc. and Terry Stanfill;
- (2) With Respect to the Counterclaim, the arbitration panel awards Respondents, First of Michigan Corporation, Inc. and Terry Stanfill, the sum of One Dollar and No Cents (\$1.00) in Respondents' favor and against Claimants; and

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- (3) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically enumerated are hereby denied and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference. There was one (1) pre-hearing conference x \$300 = \$300 in forum fees. There were nine (9) hearing sessions x \$600 = \$5,400 (the nine hearing sessions includes the telephonic hearing before all three arbitrators on Respondents' Motion to Dismiss). Total forum fees are \$300 + \$5,400 = \$5,700. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (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.

Filing fees and Hearing Session Deposits

Pursuant to § 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants Ed Willcox and Regina M. Willcox.

Pursuant to § 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as postponement fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Respondents First of Michigan Corporation, Inc. and Terry Stanfill.

Member Surcharge

Pursuant to § 10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain Respondent First of Michigan's member surcharge in the amount of \$200.

Postponement Fees

Pursuant to § 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain as postponement fees the amount of \$500 previously deposited by Respondents First of Michigan Corporation, Inc. and Terry Stanfill in connection with Respondents' First Motion for Adjournment. Pursuant to § 10332(c) of the Code, Respondents are jointly and severally liable for and shall pay as postponement fees the amount of \$400 (postponement fee - hearing session deposit) previously assessed in connection with Respondents' Second Motion for Adjournment.

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Forum Fees

Pursuant to § 10332(c) of the Code, Claimants Ed Willcox and Regina M. Willcox are jointly and severally liable for all forum fees incurred in this matter which is the amount of \$5,200 (total forum fees - hearing session deposit).

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Stewart C.W. Weiner, Esq.
Stewart C.W. Weiner, Esq.
Chairperson
Public Arbitrator

June 2, 1997
Dated:

/s/ Michael B. Laikin, Esq.
Michael B. Laikin, Esq.
Panelist
Public Arbitrator

June 2, 1997
Dated:

/s/ Timothy D. Wasson
Timothy D. Wasson
Panelist
Industry Arbitrator

June 2, 1997
Dated:

For NASD Regulation use only:
Date Award served on parties:

June 3, 1997