

NASD REGULATION, INC. AWARD

OFFICE OF DISPUTE RESOLUTION

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In the Matter of the Arbitration Between

Name of Claimants

Paul and Diane Roman

96-01854

Name of Respondents

First Institutional Securities, LLC  
Eric Swain

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**REPRESENTATION**

For Claimants Paul and Diane Roman ("Claimants") appeared Thomas W. Williams, Esq., a sole practitioner with offices in Mahwah, New Jersey.

For Respondents First Institutional Securities, LLC ("First Institutional") and Eric Swain ("Swain"), collectively referred to as "Respondents", appeared Robert Axelrod, of the firm First Institutional Securities, LLC located in Clifton, New Jersey.

**CASE INFORMATION**

Statement of Claim filed on: April 25, 1996.

Claimants' Submission Agreement signed on: April 17, 1996.

Respondents filed a Joint Statement of Answer on: August 07, 1996.

Respondent First Institutional's Submission Agreement signed on: August 08, 1996.

Respondent Swain's Submission Agreement signed on: August 08, 1996.

**HEARING INFORMATION**

Hearing Dates/Sessions:	April 30, 1997	Two Sessions
	October 13, 1997	One Session

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York, New York.

**CASE SUMMARY**

Claimants alleged that they were unsophisticated investors and that their investment objectives were conservative. Claimants further alleged that they informed Respondent Swain that they wished to invest in non-speculative securities. Claimants also alleged that Respondent Swain assured them that the investments would be non-speculative and guaranteed by the government. Claimants asserted that based

on this information, they invested with Respondent Swain. Claimants further asserted that when they wished to withdraw the funds Respondent Swain advised against it, stating that there would be a large loss if they did. Claimants also asserted that at this time, they discovered that Respondent Swain had invested in a volatile institutional derivative which was highly speculative and not recommended for individual investors. Claimants alleged that they transferred the investments to another brokerage firm and sold the securities at a loss. Claimants further alleged that Respondent Swain invested contrary to their stated objectives, and defrauded them by doing so. Claimants also alleged that Respondent First Institutional is liable, given the fact that Respondent Swain was their employee or agent.

Respondents maintained that Claimants had invested with Respondent Swain for a number of years, and therefore, Respondent Swain was familiar with their financial situation and investment objectives. Respondents further maintained that Claimants expressed a desire for securities which incurred some market risk in exchange for a high return. Respondents also maintained that Claimants discussed with Respondent Swain investing in collateralized mortgage obligations ("CMOs"). Respondents stated that at this time Respondent Swain informed Claimants of the risks involved in this type of security and that Respondent First Institutional also sent Claimants an explicit letter further detailing the risks involved. Respondents maintained that Claimants asked Respondent Swain to purchase these securities and signed an acknowledgement, contained in the letter, that they understood and accepted the risks involved. Respondents further maintained that although the CMOs in which Claimants invested would continue to make any payments due according to their contracts, Claimants elected to sell these securities at a loss.

Respondents offered the following affirmative defenses: the Claim is barred for failure to state a cause of action; the claim is barred by the doctrines of ratification, waiver, and estoppel; the Claim is barred by doctrine of mitigation of damages; the Claim is barred by the doctrine of assumption of risk; the Claim is barred because the losses complained of were caused by market fluctuation; the Claim is barred by Claimants' own negligence; and the Claim is barred because the acts complained of did into cause any losses; losses were caused by Claimants' own investment decisions.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$30,357.64, punitive damages and treble damages.

Respondents requested that the Statement of Claim be dismissed in its entirety.

#### **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 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. The claims of Claimants Paul and Diane Roman against Respondents First Institutional Securities Corp. and Eric Swain are hereby dismissed in their entirety.
2. Forum Fees are to be assessed equally between Claimants and Respondents.
3. All further requests for relief are hereby denied.

**FORUM FEES**

Pursuant to Rule 10332 of the NASD Regulation, Inc. Code of Arbitration Procedure, the arbitrators have determined that the NASD will retain the \$150.00 non-refundable filing fee deposited by Claimant and have assessed the following Forum Fees:

3 Hearing sessions x \$500.00                      =              \$1,500.00

Total Forum Fees    =              \$1,500.00

1. Claimants be and hereby are liable and shall pay to NASD Regulation, Inc. the sum of \$750.00 representing 50% of the total forum fees assessed. Claimants deposited \$500.00 with the NASD, and therefore, Claimants are liable and shall pay the balance of \$250.00.
2. Respondents First Institutional and Eric Swain be and hereby are liable and shall pay to NASD Regulation, Inc. the sum of \$750.00 representing 50% of the total forum fees assessed.
3. Respondent First Institutional be and hereby is liable and shall pay to NASD Regulation, Inc. the sum of \$300.00 representing the Member Surcharge assessed. Respondent First Institutional deposited \$300.00 with the NASD, and therefore, does not owe the Member Surcharge.

Fees are payable to NASD Regulation, Inc..

**ARBITRATORS' SIGNATURES**

I, Alison H. Berry, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Alison H. Berry, Esq.  
Public Chairperson

I, Arthur Kelban, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Arthur Kelban  
Public Panelist

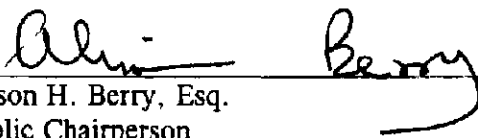
I, Donald J. Rasweiler, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Donald J. Rasweiler  
Industry Panelist

Date of Decision: January 28, 1998

**ARBITRATORS' SIGNATURES**

I, Alison H. Berry, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Alison H. Berry, Esq.  
Public Chairperson

I, Arthur Kelban, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Arthur Kelban  
Public Panelist

I, Donald J. Rasweiler, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
Donald J. Rasweiler  
Industry Panelist

Date of Decision: JANUARY 28, 1998

**ARBITRATORS' SIGNATURES**

I, Alison H. Berry, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

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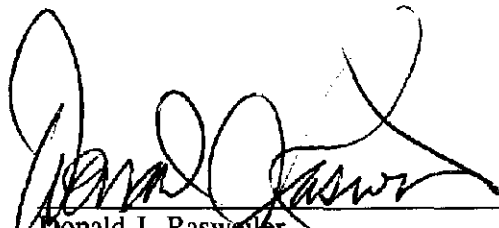
Alison H. Berry, Esq.  
Public Chairperson

I, Arthur Kelban, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

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Arthur Kelban  
Public Panelist

I, Donald J. Rasweiler, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



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Donald J. Rasweiler  
Industry Panelist

Date of Decision: JANUARY 28, 1998