

N.A.S.D. REGULATION AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Gary Clemens
Bonnie Clemens

Arbitration No.
96-03330

Name of Respondents

Titan/Value Equities Group, Inc.
Greg P. Bourbeau

REPRESENTATION OF PARTIES

For Claimants: Jerome Sapiro, Jr., Esq., The Sapiro Law Firm, San Francisco, California.

For Respondents: G. Thomas Fleming III, Esq., Jones, Bell, Simpson & Abbott, Los Angeles, California.

CASE INFORMATION

Gary and Bonnie Clemens' Uniform Submission Agreement was signed on July 30, 1996.
The Uniform Submission Agreement for the Clemens Trust and the G.D. Clemens Electric Profit Sharing Plan was signed on November 18, 1996.
The Statement of Claim was filed on or about July 31, 1996.
The Uniform Submission Agreement for Titan/Value Equities Group, Inc. was signed on July 30, 1997.
Greg Bourbeau's Uniform Submission Agreement was signed on July 30, 1997.
The Joint Statement of Answer was filed on or about February 14, 1997.

HEARING INFORMATION

Pre-hearing conferences were held on:	July 22, 1997	1 session;
	November 25, 1997	1 session;
	December 11, 1997	1 session.

The hearing was held in San Diego, California on: March 23, 1998 2 sessions;

March 24, 1998	2 sessions;
March 25, 1998	2 sessions;
March 26, 1998	2 sessions;
March 27, 1998	2 sessions;
June 8, 1998	2 sessions;
June 9, 1998	2 sessions;
June 10, 1998	2 sessions;
June 11, 1998	2 sessions;
June 12, 1998	2 sessions;
June 15, 1998	2 sessions;
June 16, 1998	2 sessions;
June 17, 1998	2 sessions;
June 18, 1998	2 sessions;
June 19, 1998	1 session;

CASE SUMMARY

The Claimants allege that they retained the Respondents for their financial planning and investment advisor services. The Claimants further allege that the Respondents solicited their purchase of speculative and illegal LP investments and other investments. Additionally, the Claimants allege the Respondents' actions constitute three causes of action; fraud, negligence, and breach of fiduciary duty including, fraudulent misrepresentation and affirmative concealment of material facts.

Respondents denied all allegations of wrongdoing and argued that the Claimants were experienced qualified investors with actual knowledge of applicable investment risks through their other investment experience. Respondents further argued the Claimants sought aggressive tax write offs in their individual investments and tax favored income for The Profit Sharing Plan. Additionally Respondents argued that each cause of action raised by the Claimants are barred by applicable California Statutes of Limitations.

FINDINGS OF FACT

The undersigned panel find that the evidence presented at the hearing established the following facts:

- * At the time Claimants opened their accounts with Respondents, one of Claimants' investment objectives was "preservation of capital". Mr. Clemens testimony revealed however, that "preservation of capital" referred to Claimants' intent to invest for profit, stating that no one invests in order to lose money. However, in making each of their investments in limited partnerships or speculative stocks through Respondents during the next eight years, Claimants knowingly and intentionally subordinated such objective to one or more of their competing objectives of high income or tax benefits or aggressive growth despite the increased risks which they knew were inherent in achieving such objectives. Claimants were aware when making each of these investments that such investments were

not safe or low risk and that Claimants were sacrificing some safety and accepting some risk in order to achieve high income, tax benefits, and/or aggressive growth;

- * In light of Claimants' investment objectives, finances, and investment experience, each investment recommended by Respondents to Claimants was a suitable investment for Claimants at the time such investment was recommended. In 1988 through 1995, Respondent Titan conducted a due diligence investigation with respect to each of the limited partnership investments in question before placing it on Titan's approved list. The scope of each such due diligence investigation by Respondent Titan was appropriate and reasonable and complied with applicable regulatory requirements. At the times that Respondents recommended each investment, Respondents disclosed to Claimants all materially adverse information in Respondents' possession. Respondents are not liable to Claimants for failure to discover and disclose to Claimants the existence of material facts, if any, which were undisclosed or misrepresented in any of the offering circulars;
- * Prior to each of the Claimants' purchase of a limited partnership investment, Respondents provided an offering circular to Claimants with respect to such limited partnership investment;
- * None of the actions or disclosures or failures to disclose of Titan or Bourbeau in *recommending or selling investments to Claimant* were fraudulent or negligent as claimed by Claimants or breached the fiduciary duty owed by Respondents to Claimants under applicable law.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested an award of compensatory damages of \$589,000, or rescission, plus interest at the legal rate from the dates of the respective purchases through the date of payment of the award, plus costs and fees incurred in filing this arbitration. At the end of the hearing, Claimants presented a revised Summary of Damages requesting an award of \$807,336.08 comprised of compensatory damages of \$567,637.56, plus simple interest at 10% equal to \$390,016.52, less distributions of \$100,736.00 and less sales of \$49,582.00.

Respondents requested that Claimants be awarded no damages by way of the Statement of Claim and requested that Respondents recover their attorneys' fees, costs, plus any and all other expenses incurred in connection with the defense of the case, and such further relief as the arbitrators may deem just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Motion to Bar Representation by Non-Attorney

On March 23, Respondents moved to exclude Irwin Stein, a Claimants' representative who is not licenced to practice law in California, from the Hearing and to bar him from otherwise participating in the preparation and presentation of Claimants' case. Counsel presented arguments as to the applicability of the recent Birbrower decision. Mr. Sapiro advised the Panel that Mr. Stein had substantial background in the preparation of Claimants' case and that trying the case without his participation would be difficult. The Panel denied the Respondents' motion to exclude Mr. Stein from the Hearing and ruled that Mr. Stein would attend sessions and assist Mr. Sapiro but could not directly question witnesses or present arguments to the Panel.

Respondents' Motions to Dismiss

At several stages of the proceeding, Respondents moved to dismiss various claims asserted by Claimants on the ground that such claims were ineligible for arbitration in the NASD forum or were barred by applicable statutes of limitations. The Panel reserved ruling on such motions unless and until such a ruling became necessary at the conclusion of the case. The decision on the merits has made Respondents' motions moot and made it unnecessary for the Panel to rule on them.

Claimants' Counsel's Statement Regarding Fairness

At the conclusion of the Hearing, Mr. Sapiro asserted that Claimants did not have a full and fair opportunity to be heard in three respects. First, because the Panel allegedly exceeded its' authority in barring Mr. Stein from actively representing Claimants in questioning witnesses. Second, because the Panel excluded evidence that the false disclosure which Titan allegedly made to Claimants was part of a pattern of Titan in offering securities to thousands of customers. And, third, because the Panel excluded proffered testimony by a series of other customers of Respondents to support Claimants' testimony.

The parties agreed to receive conformed copies of the award while the original remains on file with NASD Regulation, Inc., Office of Dispute Resolution.

AWARD

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

1. Each and every claim asserted in the Statement of Claim is denied;
2. Each side to bear their own costs, including attorneys' fees.

FORUM FEES

There were 29 sessions x \$1,000 plus 3 pre-hearing conferences (2 pre-hearing conferences @ \$1000 and 1 pre-hearing conference @ \$300 = \$2,300) = \$31,300 in total forum fees. Pursuant to §10332(b) of the NASD Regulation, Inc., Office of Dispute Resolution 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. Pursuant to §10332(c) of the Code, the parties shall divide the forum fees 50%-50%, with the Claimants bearing \$15,650 and the Respondents, jointly and severally, bearing \$15,650.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** the hearing session deposit made by the Claimants in the amount of \$1000.

Pursuant to Rule 10333 of the Code, Respondent Titan/Value Equities Group has paid to NASD Regulation, Inc. the \$500 member surcharge previously invoiced. The request by Titan/Value Equities Group for a waiver of the postponement fees associated with the November 20, 1997 Postponement Request is denied. The \$1,000 submitted by Titan/Value Equities Group for the postponement will be retained by the NASD.

Fees are payable to the NASD, Regulation, Inc.

Franklin G. Allen, Esq.

Franklin Geerdes

Richard M. Leigh

Public / Industry

Public Arbitrator
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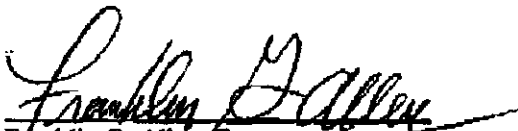
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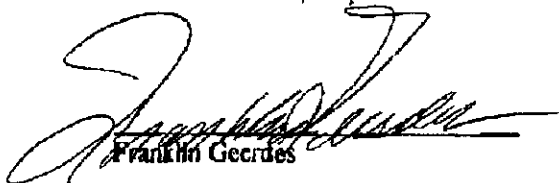
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