

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between:

**RAYMOND P. CLARK, Claimant,**

**v.**

**DONALD TERNS, Respondent.**

Hearing Site: Southfield, Michigan

Case Number: 99-4222

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**REPRESENTATION OF PARTIES**

Claimant, Raymond P. Clark ("Clark"), hereinafter referred to as "Claimant": Thomas J. Kenny, Esq., Raymond & Prokop, P.C., Southfield, Michigan

Respondent, Donald Terns ("Terns"), hereinafter referred to as "Respondent": Dennis J. Levasseur, Esq., Bodman, Longley & Dahling, LLP, Detroit, Michigan.

**CASE INFORMATION**

Statement of Claim filed on or about: September 13, 1999

Amended Statement of Claim filed on or about: January 18, 2000

Uniform Submission Agreement submitted by Claimant on or about: September 9, 1999

Statement of Answer filed by Respondent on or about: December 8, 1999

Respondent's Answer to Amended Statement of Claim filed on or about: February 2, 2000

Uniform Submission Agreement submitted by Respondent on or about: November 9, 1999

**CASE SUMMARY**

Claimant asserted the following causes of action: fraud, misrepresentation, unsuitability and breach of fiduciary duty relative. This action arises out of purchases by Mr. Clark of a number of financial investments (the "Securities") marketed and sold through the efforts of Respondent Terns including the following:

- a. Auto Dealer Network LLC Notes – \$100,000;
- b. MCA 1996-113 – \$50,000;
- c. MCA 1996-114 – \$50,000;
- d. MCA 1997-117 – \$50,000.

Claimant alleged that in connection with his purchase of these Securities, Terns, acting as both a financial advisor and registered representative: (a) disseminated materially false and misleading information and failed to disclose other material information to Mr. Clark; (b) offered and sold the Securities under circumstances where such investments were not suitable for Mr. Clark; and, (c) breached fiduciary duties owed to Mr. Clark, all in violation of state securities laws and common law.

Claimant alleged that he relied upon Respondent's professional recommendations and representations and purchased the Securities. Claimant asserted that the Securities consisted of high risk, illiquid, under secured interests that were, individually and in the aggregate, not suitable for the Clarks' financial needs and investment objectives. In addition, Claimant stated that these Securities were inconsistent with the financial plan developed for and presented to Claimant by Respondent.

Unless specifically admitted in its Answer, Respondent Terns denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted affirmative defenses including the following: Claimant's failure to state a claim upon which relief can be granted; at all times relevant to this action, Claimant had a nondiscretionary account, and, therefore was not owed any fiduciary duty; Claimant's claims are barred, in whole or in part, because they are not ripe for adjudication; Claimants alleged damages are to be reduced by any benefit received; Claimant's claims are barred, in whole or in part, under the doctrine of assumption of the risk and/or comparative or contributory negligence; Claimant's claims are barred, in whole or in part, by the applicable statute of limitations; and Claimant's claims are barred, in whole or in part, by MCLA 451.810(a)(2).

#### **RELIEF REQUESTED**

At hearing, Claimant requested compensatory damages of \$297,224.41, attorneys fees [amount to be determined after arbitration], costs and expenses [amount to be determined after arbitration], and disciplinary referral. Claimant's Statement of Claim requested damages in excess of \$500,000.00. Claimant's Amended Statement of Claim requested damages in excess of \$50,000.00.

Respondent requested dismissal, plus costs, attorney fees, that forum fees be assessed against Claimant, and other unspecified relief.

#### **AWARD**

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

- 1.) Respondent Donald Terns is solely liable and shall pay to Claimant Raymond P. Clark the sum of \$43,934.24 in compensatory damages;
- 2.) Respondent Donald Terns is solely liable for and shall pay to Claimant Raymond P. Clark interest at the rate of 6% per annum on the sum of \$43,934.24 from and inclusive of March 11, 1998, to and inclusive of the date this award is paid in full;

- 3.) The panel orders the expungement of all references only to any allegation of fraud in the above captioned arbitration from Respondent Donald Terns' registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Terns (CRD #725597) must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
- 4.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 5.) That any relief not specifically enumerated, including punitive damages is hereby denied with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$375.00

#### **Adjournment Fees**

Adjournments requested during these proceedings:

September 15, 2000, adjournment by Donald Terns = \$ 750.00 (waived by Panel)

#### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00

Pre-hearing conference: October 30, 2000 1 session

One (1) Pre-hearing session with Panel x \$750.00 = \$ 750.00

Pre-hearing conference: August 24, 2000 1 session

Eight (8) Hearing sessions x \$750.00 = \$6,000.00

Hearing Dates: August 24, 2000 2 sessions  
August 25, 2000 2 sessions  
September 14, 2000 2 sessions  
November 6, 2000 2 sessions

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Total Forum Fees = \$7,200.00

The Panel has assessed \$3,600.00 of the forum fees to Raymond P. Clark.

The Panel has assessed \$3,600.00 of the forum fees to Donald Terns.

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### Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Donald Terns requested Awards = \$70.00

### Fee Summary

Claimant, Raymond P. Clark, be and hereby is solely liable for:

Initial Filing Fee	= \$ 375.00
<u>Forum Fees</u>	<u>= \$ 3,600.00</u>
Total Fees	= \$ 3,975.00
<u>Less payments</u>	<u>= \$ 1,575.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 2,400.00

Respondent, Donald Terns, be and hereby is solely liable for:

Administrative Costs	= \$ 70.00
<u>Forum Fees</u>	<u>= \$ 3,600.00</u>
Total Fees	= \$ 3,670.00
<u>Less payments</u>	<u>= \$ 70.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 3,600.00

All balances are due to NASD Dispute Resolution, Inc.

### Concurring Arbitrators' Signatures

\_\_\_\_\_  
Tracy L. Allen, Esq.  
Public Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Richard G. Porter, Esq.  
Public Arbitrator

12/18/00  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Patrick R. Sughrue  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Date of Service (For NASD office use only)

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Industry Arbitrator

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Signature Date

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NASD Regulation, Inc. Office of Dispute Resolution  
Arbitration # 88-4222  
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Tracy L. Allen, Esq.  
Public Arbitrator, Presiding Chair

12/16/02  
Signature Date

Richard G. Porter, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

Patrick R. Sughrue  
Industry Arbitrator

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Signature Date

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