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M.S.R.B.

In the Matter of the Arbitration between :

AWARD

Claimants, :

v. :

MS 91-71

DOUGHERTY, DAWKINS, STRAND & BIGELOW, INC., :
F/K/A DOUGHERTY, DAWKINS, STRAND & YOST, INC.:
Respondent. :

The Undersigned, pursuant to section 31 of MSRB rule G-35, hereby state as follows:

SUMMARY OF ISSUES

Claimants charge Respondent with actual and/or constructive fraud; misrepresentations and/or omissions; and failure to exercise due diligence in connection with the underwriting and sale of the City of Fargo, North Dakota, Industrial Development First Mortgage Revenue Bonds (Black Building Project) Series 1986 (the "Bonds"). Claimants purchased \$10,000 face amount of the Bonds paying 9%, at par, on or about 10/07/86, and another \$10,000 face amount several months later; Claimant purchased \$5,000 face amount of the Bonds paying 9%, at par, on or about 10/16/86.

Respondent denies that it is liable in any way to the Claimants and denies that it violated any rule, law, regulation or statute. Respondent also argues, among other things, that Claimants' claims are not specified with the particularity required by the rules of the MSRB and that Claimants' claims of fraud, whether asserted under state or federal law, are time barred by the applicable statutes of limitation.

RELIEF REQUESTED

Claimants seek to recover their original principal invested, plus interest and the costs of this arbitration, including the costs charged by Claimants' representative.

Respondent requests that Claimants' claims be dismissed with prejudice. Respondent also requests that the arbitrators direct Claimants' representative to return any fees that he charged the Claimants; in the alternative, Respondent requests that Respondent be awarded its attorney fees.

DECISIONS ON RESPONDENT'S MOTIONS

A) Motions made and heard prior to the hearing: 1.) Motion to compel discovery; 2.) Motion for a more definite statement; 3.) Motion to dismiss for failure to state a claim upon which relief can be granted and/or plead with particularity; 4.) Respondent also moved the Panel for attorney fees.

The above Motions were heard at the pre-hearing conference on November 19, 1992. Motions 3 and 4 were held open. The remaining Motions were ruled on at the pre-hearing conference. The files and testimony adduced at the pre-hearing conference revealed that Claimants failed to timely and properly answer Respondent's discovery requests (as required by the Arbitration Rules of the MSRB), and failed to object (as allowed by the Rules). Despite attempts by Respondent to resolve the problem informally, Claimants' representative refused to comply and failed to properly object.

Because Claimants' representative was not an attorney, the Chair took pains to explain the purpose and rules of discovery. Although Claimants had not made formal objection, the Chair modified Respondent's requests. Claimants were ordered to properly respond to these modified discovery requests by November 25, 1992. Claimants' representative represented that Claimants would comply. The Chair cautioned Claimants' representative that Claimants would be allowed to present only that evidence which appeared in their responses. This warning was repeated, more than once, and Claimants' representative stated, more than once, that he understood. The Chair also ordered Claimants to supply Respondent with a definite, and more particular claim.

B) Motions heard at the hearing which were renewed, or first made before or at the hearing: 1.) Motions to Bar Claimants' Witnesses and Exhibits; 2.) Motion to dismiss for failure to comply with the statute of limitations; 3.) Motion to dismiss for failure to state a claim upon which relief can be granted and/or plead with particularity; 4.) Motion for attorney fees.

On December 2, 1992, in Fargo, North Dakota, the Panel heard the controversy between the parties set forth in submission agreements signed by Claimants on June 4, 1991 (filed with the MSRB on or about October 21, 1991) and/or November 27, 1992, and by Respondent on January 8, 1992.

The Panel denies Respondent's Motion to Bar Claimants' Witnesses and Exhibits. Although Claimants' representative did not comply with the Order to respond to Respondent's discovery, and although that Order barred exhibits not contained in Claimants' responses to discovery, the Panel decided to admit Claimants' exhibits. The Panel did not want to penalize the Claimants for the conduct of their representative.

The Panel denies Respondent's Motion to dismiss on the basis of the statute of limitations. The Panel recognizes that failure to comply with applicable statutes of limitation may divest a

tribunal of jurisdiction to even hear a dispute. However, given the fact that this is a technical yet absolute defense, the moving party is held to a high standard. The party raising this defense has the burden of convincing the tribunal of the applicable law and dates in issue. Respondent has not met this burden.

It is clear that *Lampf* (a June 20, 1991 U.S. Supreme Court case) adopted federal limitations for Section 10(b) and Rule 10b-5 cases, rejecting the use of state statutes of limitations and equitable tolling. However, Congress added Section 27A to the 1934 Act. Section 27A quashed the retroactive application of *Lampf* for cases pending before *Lampf* was decided. But, it is not clear whether the Panel should apply the *Lampf* or the Section 27A standard. This case was filed with the National Association of Securities Dealers, and was then transferred to the MSRB. The original date of filing was not established at the hearing. Respondent asserts that the date it receives notice of a claim is the critical date in considering this defense. However, Respondent presented no support for this assertion.

The Panel denies Respondent's Motion to dismiss for failure to state a claim upon which relief can be granted and/or plead with particularity. While Claimants may not have met formal standards for pleading fraud with particularity, or made clear and definite claims, they put Respondent on notice of the nature of the claims and/or the facts upon which they were based.

At the hearing, Respondent modified its Motion for attorney fees, asking the Panel to order Claimants' representative to return fees he charged the Claimants; if the Panel decides not to do that, only then did Respondent request attorney fees. Although we find that Claimants' representative ignored the Arbitration Rules, knowingly violated Orders, and caused Respondent, the MSRB, and perhaps Claimants themselves, to expend needless time and expense; and although we find his conduct would in the ordinary course result in an award of attorney fees, costs, and perhaps other sanctions, the Panel denies Respondent's Motion. First, it appears that the Panel does not have the power to order Claimants' representative to return any fees he charged the Claimants. Second, on equitable grounds, the Panel denies Respondent's request for attorney fees. Claimants acted in good faith, following the advice (or lack thereof) of their representative. To assess fees would be to punish Claimants for the actions of their representative.

DECISION ON THE MERITS

The Panel, having considered the pleadings, the testimony and the evidence presented at the hearing, has determined, in full and final resolution of the issues submitted for determination, as follows:

Claimants have the burden of proving their claims. Even viewing the evidence in a light most favorable to Claimants, they have not met this burden.

Claimants did not present even a *prima facie* case of actual or constructive fraud against Respondent. They also presented no evidence to support their claims of misrepresentations or omissions. They testified that they relied solely on the Official Statement which clearly states the non-recourse nature of their investment.

The charge of a lack of due diligence also fails. First, while there may have been confusing statements in the Official Statement, the Panel finds that the Official Statement was not misleading. Any confusing statements which may have appeared were, when considering the Statement as a whole, minor, had no effect on the failure of the project underlying the Bonds, and were not a cause of any losses Claimants may have suffered. Second, Respondent is entitled, even required, to rely on the opinions of independent experts. Even if Claimants established (which they did not) that these experts acted improperly, absent other facts, Respondent would still not be liable. Third, Respondent had no duty to oversee operation of the project; Respondent's duty to Claimants ended with the sale of the Bonds.

While there may have been problems in the project underlying the Bonds, Claimants failed to establish a cause of action against Respondent, and Claimants must look to other parties for redress. We sympathize with the Claimants, but on the facts presented and reasonable inferences which may be drawn therefrom, Claimants presented no legal theory under which Respondent may be held liable.

Accordingly, all of the claims of the Claimants against Respondent are dismissed, with prejudice. Costs shall be borne by the parties who incurred them. Filing fees shall be returned to the parties who paid them.

Public Arbitrator

Public Arbitrator

Industry Arbitrator

Dated: *January 4, 1993*

STATE OF *Wisconsin*
COUNTY OF *Milwaukee*

SS.:

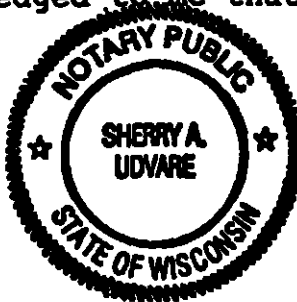
On this *26* day of *Dec.*, 19*92*, before me personally
appeared _____ to me known and known to me to be the indi-
vidual described in and who executed the foregoing instrument and
he duly acknowledged to me that he executed the same.

John G. Vergara

STATE OF
COUNTY OF

SS.:

On this *4* day of *January*, 19*93*, before me personally
appeared _____ to me known and known to me to be the
individual described in and who executed the foregoing instrument
and he duly acknowledged to me that he executed the same.



Sherry A. Udvarcse

STATE OF
COUNTY OF

SS.:

On this _____ day of _____, 19____, before me personally
appeared _____ to me known and known to me to be the
individual described in and who executed the foregoing instrument
and she duly acknowledged to me that she executed the same.

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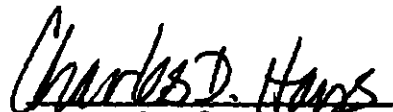
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Andrew Dick


Charles D. Hays


Ramona V. Larson

Dated: *January 4, 1993*