

Award
NASD Dispute Resolution

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In the Matter of the Arbitration Between:

Jan M. Miller, Claimant v. Prudential Securities, Inc. n/k/a Prudential Equity Group, LLC,
Wachovia Securities, LLC and Joseph Tomkiewicz, Respondents

Case Number: 05-00435

Hearing Site: San Francisco, California

Nature of the Dispute: Customer vs. Members and Associated Person

REPRESENTATION OF PARTIES

For Claimant:

Mitchell S. Ostwald, Esq.
Law Offices of Mitchell S. Ostwald
Sacramento, California

For Respondents:

Casey McNamara, Esq.
Folger Levin & Kahn LLP
San Francisco, California

CASE INFORMATION

Statement of Claim filed: January 26, 2005

Claimant's Pre-Hearing Brief filed: none

Claimant's Uniform Submission Agreement signed: December 23, 2004

Joint Statement of Answer filed by Respondents Prudential Equity Group, LLC, formerly known as Prudential Securities, Inc. ("Prudential"), Wachovia Securities, LLC ("Wachovia") and Joseph Tomkiewicz: May 9, 2005

Respondents' Pre-Hearing Brief filed: December 2, 2005

Respondent Prudential's Uniform Submission Agreement signed: July 13, 2005

Respondent Joseph Tomkiewicz's Uniform Submission Agreement signed: May 5, 2005

CASE SUMMARY

Claimant alleged that this case involves unsuitable investments recommended by the Respondents for the Claimant's joint account with her now deceased husband and in the husband's IRA account, for which Claimant is the beneficiary. Claimant specifically alleged the following claims with respect to investments in various mutual funds, including but not limited to, investments in Communications Technology, Aggressive Growth, Large Cap Growth and International Small Companies: A) Breach of Fiduciary Duty; B) Fraud; C) Constructive Fraud; D) Negligent Misrepresentation; E) Negligence; F) Failure to Supervise; and G) Violation of Federal and State Securities Laws; NASD Rules of Fair Practice and NYSE Rules.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents also asserted affirmative defenses.

RELIEF REQUESTED

Claimant requested:

1. Compensatory damages in an amount according to proof, but not less than \$400,000.00;
2. Disgorgement and restitution of all earnings, profits, compensation and benefits received by the Respondents in an amount according to proof;
3. Lost opportunity costs;
4. Attorney's fees and costs;
5. Pre- and post judgment interest at the legal rate;
6. Punitive damages in an amount according to proof; and
7. Such other and further relief as the Panel deems just and proper.

Respondents requested:

1. That judgment be entered in favor of Respondents and that Claimant take nothing by her Statement of Claim;
2. Removal of all reference to this matter from Mr. Tomkiewicz's registration records maintained by the NASD Central Registration Depository;
3. That Respondents be awarded their costs of suit incurred in the defense of this action, including legal fees to the extent allowed by law; and
4. That Respondents be awarded such other relief as the Panel deems proper.

OTHER ISSUES CONSIDERED AND DECIDED

On March 13, 2005, Claimant and Claimant's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimant shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On or about March 16, 2005, Claimant's counsel advised that Wachovia should not have been named in this case and dismissed Wachovia as a party in this matter.

At the outset of the hearing, the Panel reviewed and considered the positions of the parties relative to Respondents' Motion in Limine to preclude the presentation of witnesses not identified during discovery. The panel denied the Motion.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

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

- 1) The Panel ruled in favor of Claimant with respect to Claimant's claim for breach of fiduciary duty. Accordingly, Respondents Prudential and Joseph Tomkiewicz are jointly and severally liable to and shall pay Claimant the sum of \$140,000.00.
- 2) All other claims by Claimant, and Claimant's requests for disgorgement, restitution, punitive damages, interest, and attorney's fees (except as may be agreed by and between Claimant and Claimant's counsel) are dismissed.
- 3) Respondents Prudential and Joseph Tomkiewicz are jointly and severally liable to and shall pay Claimant the sum of \$10,700.00 in expert fee costs.
- 4) Respondents Prudential and Joseph Tomkiewicz are jointly and severally liable to and shall pay Claimant the sum of \$300.00 as reimbursement for Claimant's filing fee.
- 5) Respondent Joseph Tomkiewicz's request for removal of all reference to this matter from his registration records maintained by the NASD Central Registration Depository is denied.
- 6) Each party shall bear its own attorney's fees.
- 7) All other relief not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$300.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Prudential is a party and the following fees are assessed:

Member Surcharge	= \$1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,750.00</u>
Total Member Fees	= \$5,200.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(1) Decision on discovery-related motion on the papers with a single arbitrator @ \$200.00	= \$200.00
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Respondents submitted one discovery-related motion

(1) Pre-hearing conference session with a single arbitrator @ \$450.00/session	= \$450.00
Pre-hearing conference: November 10, 2005	1 session

(1) Pre-hearing conference session with the Panel @ \$1,125.00/session	= \$1,125.00
Pre-hearing conference: July 13, 2005	1 session

(7) Hearing sessions @ \$1,125.00/session	= \$7,875.00
Hearings: December 13, 2005	2 sessions
December 14, 2005	2 sessions
December 15, 2005	2 sessions
December 16, 2005	1 session

Total Forum Fees	= \$9,650.00
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The Panel assessed the \$9,650.00 in forum fees jointly and severally to Respondents Prudential and Joseph Tomkiewicz.

Fee Summary

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
<u>Less Payments</u>	= \$(1,425.00)
Refund Due Claimant	= \$(1,125.00)

2. Respondent Prudential is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
<u>Less Payments</u>	= \$(5,200.00)
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents Prudential and Joseph Tomkiewicz are jointly and severally charged with the following fees and costs:

Forum Fees	= \$ 9,650.00
<u>Less Payments</u>	= \$(0.00)
Balance Due NASD Dispute Resolution	= \$ 9,650.00

All balances are payable to NASD Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Gary S. DeWeese	-	Public Arbitrator, Presiding Chair
William Michael Samsel	-	Public Arbitrator
Stephen A. Field	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Gary S. DeWeese
Chair, Public Arbitrator

12/22/2005
Signature Date

William Michael Samsel
Public Arbitrator

Signature Date

Stephen A. Field
Non-Public Arbitrator

Signature Date

12/22/05
Date of Service

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Public Arbitrator

12/21/05
Signature Date

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