

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

Frederick A. Lewis, Jr., M.D., P.C.,
Frederick A. Lewis, Jr., M.D. and
Jeanne C. Lewis, individually and as
Trustees, Frederick A. Lewis, Jr., M.D., P.C.
Pension Trust and Profit Sharing Trust

and

91-02271

Name of Respondents

Oppenheimer & Co., Inc., Tucker Anthony
Incorporated and James J. Stead, Jr.

REPRESENTATION OF PARTIES

Claimants were represented by Kenneth C. Groves, Esq. and K.C. Groves, Esq. of Denver, Colorado.

Respondent Oppenheimer & Co., Inc. was represented by Eugene L. Small, Esq. of Oppenheimer & Co., Inc., New York, New York.

Respondents Tucker Anthony Incorporated and James J. Stead, Jr. were represented by Paul A. Lieberman, Esq. of Tucker Anthony Incorporated, New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about July 25, 1991.
Amended Statement of Claim filed on or about April 15, 1992.

Claimant's Submission Agreement signed on July 22, 1991 by Frederick A. Lewis, Jr., M.D. and Jeanne C. Lewis, individually and as Trustees, Frederick A. Lewis, Jr., M.D., P.C. Pension Trust and Profit Sharing Trust.

Statement of Answer filed by Respondent, Oppenheimer & Co., Inc. on or about October 30, 1991.

Respondent Oppenheimer & Co., Inc.'s Submission Agreement signed on October 30, 1991 by Eugene L. Small.

Statement of Answer filed by Respondents Tucker Anthony Incorporated and James J. Stead, Jr. on or about November 1, 1991.

Respondent Tucker Anthony Incorporated's Submission Agreement signed on October 30, 1991 by Paul A. Lieberman.

Respondent James J. Stead Jr.'s Submission Agreement was undated.

Statement of Answer to the Amended Statement of Claim filed by Respondents Oppenheimer & Co., Inc., Tucker Anthony Incorporated, and James J. Stead, Jr. on or about May 26, 1992.

HEARING INFORMATION

A pre-hearing conference was held on May 19, 1992 presided by Samuel Wing, Esq. lasting one (1) session.

The hearing was held on Wednesday, May 27, 1992 for two (2) sessions, Thursday, May 28, 1992 for two (2) sessions, and Friday, May 29, 1992 for two (2) sessions in Denver, Colorado for a total of seven (7) sessions.

CASE SUMMARY

Claimant alleged that during the period from February 3, 1987 through May 18, 1988, Respondent James J. Stead, Jr. was employed as a broker by Respondent Oppenheimer & Co., Inc. and that during the period from May 18, 1988 through March 31, 1992, Respondent James J. Stead, Jr. was employed as a broker by Respondent Tucker Anthony Incorporated. Claimant alleged that during the relevant time periods Respondent James J. Stead, Jr. rendered investment advice to Claimant Frederick A. Lewis which constituted breach of fiduciary duties, both statutory and at common law. Claimant specifically alleged that the investment advice rendered by Respondents was not rendered with the care, skill, prudence, and diligence that a prudent man would use in violation of ERISA, 29 U.S.C. 1104(a)(1)(B); Respondents failed to diversify the investments in violation of ERISA, 29 U.S.C. 1104(a)(1)(C); that the investment advice was not suitable to the stated investment objectives in violation of ERISA, 29 U.S.C. 1104(a)(1)(D).

Respondent Oppenheimer & Co., Inc. denied the allegations set forth in the Statement of Claim. Oppenheimer & Co., Inc. specifically denied that it or Respondent James J. Stead, Jr. acted in a fiduciary capacity and that investment recommendations were made which were consistent with the investment objectives expressed by Claimant Frederick A. Lewis, Jr. Respondent Oppenheimer & Co., Inc. also asserted the following affirmative defenses: the claimants fail to state a claim upon which relief can be granted; claimant authorized, consented to or acquiesced to each transaction in the accounts and is therefor equitably estopped from bringing this action; waiver; ratification; assumption of the risk; the doctrine of unclean hands and in pari delicto; failure to mitigate; failure to exercise reasonable care; and that the claims asserted herein are barred by the applicable statutes of limitations.

Respondents Tucker Anthony Incorporated and James J. Stead, Jr. denied the allegations set forth in the Statement of Claim. Tucker Anthony Incorporated also denied that it acted as a plan fiduciary and denied that it exercised any discretionary authority. Respondents Tucker Anthony Incorporated and James J. Stead, Jr. also asserted the following affirmative defenses: the claimants fail to state a claim upon which relief can be granted; claimant authorized, consented to or acquiesced to each transaction in the accounts and is therefor equitably estopped from bringing this action; waiver; ratification; assumption of the risk; failure to mitigate; failure to exercise reasonable care; and that the claims asserted herein are barred by the applicable statutes of limitations.

Respondents in their Consolidated Amended Statement of Answer denied the allegations contained in the Amended Statement of Claim.

RELIEF REQUESTED

Claimants requested the following:

1. an award to Profit Sharing Trust, pursuant ERISA, 29 U.S.C. 1109(a) against Respondents Oppenheimer & Co., Inc. and James J. Stead, Jr. in the amount of \$104,023.00, interest, and attorney's fees;
2. an award to Pension Trust, pursuant ERISA, 29 U.S.C. 1109(a) against Respondents Oppenheimer & Co., Inc. and James J. Stead, Jr. in the amount of \$111,461.00, interest, and attorney's fees;
3. an award to Profit Sharing Trust, pursuant ERISA, 29 U.S.C. 1109(a) against Respondents Tucker Anthony Incorporated and James J. Stead, Jr. in the amount of \$54,582.77, interest, and attorney's fees;
4. an award to Pension Trust, pursuant ERISA, 29 U.S.C. 1109(a) against Respondents Tucker Anthony Incorporated and James J. Stead, Jr. in the amount of \$87,646.85, interest, and attorney's fees; and
5. an award in favor of Claimants against all Respondents of attorney's fees, costs, interest, and expert witness fees.

Respondents requested that the Amended Statement of Claim be dismissed in its entirety and that costs be assessed against claimants.

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 original(s) 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 asserted herein shall be and hereby are dismissed in their entirety.
2. Each party shall bear its own costs, expenses and attorney's fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant. Claimants shall pay to the NASD the sum of \$1,650.00, Respondent Oppenheimer & Co., Inc. shall pay to the NASD the sum of \$1,200.00, and Respondent Tucker Anthony Incorporated shall pay to the NASD the sum of \$1,200.00 as forum fees.

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each prehearing conference, if any.

Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

6/9/92

s/s

Samuel E. Wing, Esq.
Presiding Chair
Public Arbitrator

6/8/92

James B. Eichberg
Public Arbitrator

6/8/92

Richard M. Reider
Industry Arbitrator

NASD decision served: June 17, 1992