

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Ernesto R. Espiritu
Howard Fuechlin

No. 92-01990

Name of Respondents

Tucker Anthony, Incorporated
Osborne Jones

REPRESENTATION OF PARTIES

For Claimants: John Troelstrup, Esq., of Griffin & Staat, Ltd., Chicago, Illinois.

For Respondent Tucker Anthony, Inc.: Patrick J. Howley, Esq., of Tucker Anthony, Incorporated, New York, New York.

For Respondent Osborne Jones: James J. Moylan, Esq. of James J. Moylan and Associates, Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on or about: June 12, 1992.

Claimants' Submission Agreement signed on: May 21, 1992.

Statement of Answer filed by Respondent, Tucker Anthony, Incorporated on or about: September 30, 1992.

Respondent Tucker Anthony, Incorporated's Submission Agreement signed on: September 29, 1992.

Statement of Answer filed by Respondent, Osborne Jones on or about: October 5, 1993.

Respondent Osborne Jones' Submission Agreement signed on: July 9, 1992.

Claimants' First Amended Complaint filed: June 3, 1993.

HEARING INFORMATION

Pre-Hearing date: June 1, 1993. One (1) session.

Hearing dates: June 3, 1993. Two (2) sessions.
June 4, 1993. Two (2) sessions.
June 22, 1993. Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants, Ernesto Espiritu and Howard Fuechslin ("Claimants") alleged: Selection, purchase and sale of numerous securities which were not suitable for, and resulted in a departure from the expressed investment objectives of the Claimants; assumption and exercise of control over accounts; exercise of investment discretion without prior written authorization; material representations and inducements relied upon by Claimants in connection with the opening and maintenance of the accounts, which later proved to be false; breach of fiduciary duties and responsibilities owed to Claimants; excessive and undisclosed mark-ups in connection with the purchase and sale of numerous unsuitable securities transactions; failure to disclose/inform Claimants of the risks involved in this highly speculative trading strategy, nor of the direct and adverse effect of the volatile and erratic fluctuations in the interest-rate market; and failure to supervise the activities of the account executive by Respondents Tucker Anthony, Incorporated ("TA") and Osborne Jones ("Jones"). The allegations arose out of transactions in Claimants' accounts in zero-coupon United States government securities ("Strips").

In its Answer, TA denied each and every allegation of wrongdoing alleged by the Claimants. In addition, TA asserted the following affirmative defenses:

1. The statement of Claim fails to state a claim upon which relief can be granted.
2. Claimants are barred from recovery because they authorized, approved of and/or ratified the purchase of STRIPS after being fully appraised of and with full knowledge of all risks attendant to the investment.

3. Claimants are barred from recovery because they failed to timely complain or to bring this proceeding.
4. Claimants are barred from recovery by the doctrines of laches, estoppel, and waiver.
5. Any losses allegedly sustained by Claimants were due to their decision to buy, hold or sell the securities complained of.
6. Any losses allegedly sustained by Claimants were due to their failure to mitigate damages.
7. Any losses allegedly sustained by Claimants were caused by the sole actions and/or negligence of Claimants.
8. Neither TA nor any person for whose actions it is legally responsible made any misrepresentations to Claimants or omitted to state any material facts.
9. TA did not intend to deceive or defraud Claimants and did not act with "scienter" or in a reckless or negligent manner. Rather, they acted in good faith in reliance upon Claimants' representations.
10. Claimants assumed the risks of investing in the STRIPS after being fully apprised of and with full knowledge of those risks.
11. Any injury or loss to Claimants was the result of superseding or intervening causes beyond the control of TA.
12. There is no private right of action for violation of the rules of self-regulatory organizations including those of the NASD and the NYSE.
13. Claimants have no cause of action entitling them to punitive damages.

For his Answer, Jones denied each and every allegation contained in the Statement of Claim, except where specifically admitted in his Answer. In addition, Jones asserted the following affirmative defenses:

1. The Arbitration Complaint fails to state a claim for which relief can be granted.

2. The relief sought in the Arbitration Complaint is barred by the doctrines of ratification, waiver, and estoppel.
3. The relief sought in the Arbitration Complaint is barred by the doctrine of laches.
4. The relief sought in the Arbitration Complaint is barred by the applicable statute of limitations contained in the federal and state securities and other laws.
5. Claimants fail to plead fraud with sufficient particularity necessitating the dismissal of the Arbitration Complaint, or, in the alternative, the dismissal of all fraud allegations and consequent request for punitive damages.
6. There is no private right of action for violation of the rules of securities industry self-regulatory organizations such as the NASD and NYSE.
7. Claimant Howard Fuechslin maintained power of attorney over the Defined Benefit Plan Account and made the final decisions on the joint account and the Defined Benefit Plan Account. Claimant Ernesto Espiritu's IRA rollover account followed the transactions in the foregoing accounts.

RELIEF REQUESTED

Claimants requested an award of at least \$207,668.62 in compensatory damages, plus interest, punitive damages, treble damages, statutory interest, costs, attorneys' fees and expenses as provided by the Illinois Securities Law, and such other relief as to the arbitrators shall seem appropriate.

TA requested that the Statement of Claim be dismissed in its entirety with prejudice and that TA be awarded its costs.

Jones requested that the arbitrators dismiss and/or deny this claim and award Jones his costs, including his reasonable attorneys' fees incurred in connection with this arbitration, and for such other and further relief as the arbitrators will allow.

OTHER ISSUES CONSIDERED & DECIDED

On June 3, 1993, Claimants submitted to the undersigned panel their First Amended Complaint. After hearing argument from the parties, and deliberation, the panel allowed the Amendment to become part of the pleadings pursuant to Section 39(b) of the NASD Code of Arbitration Procedure (the "Code").

The parties have agreed that the Award in this matter may be executed by 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. Claimants, Ernesto R. Espiritu's and Howard Fuechslin's claims against Respondents Tucker Anthony, Incorporated and Osborne Jones are hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs and expenses of this arbitration, including attorneys' fees, except as set forth more fully below.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 pre-hearing conference session X \$300.00 = \$300.00

6 hearing sessions X \$750.00 = \$4,500.00

Pursuant to Section 43(c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$200.00, and shall retain the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimants.

Additional forum fees in the amount of \$850.00 are assessed against Claimants.

Additional forum fees in the amount of \$1,600.00 are assessed against Respondent Tucker Anthony, Incorporated.

Additional forum fees in the amount of \$1,600.00 are assessed against Respondent Osborne Jones.

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

CONCURRING ARBITRATORS

Dated:

July 2, 1993

/s/ Warren P. Landsman
Warren P. Landsman
Presiding Chair
Public Arbitrator

July 7, 1993

/s/ John D. Crawford
John D. Crawford
Public Arbitrator

July 1, 1993

/s/ James E. McDonough
James E. McDonough
Industry Arbitrator

Date of Service by the NASD:

7-19-93