

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Margaret M. O'Neill-Jones Personal
Representative of the Estate of Austin J. O'Brien

and

93-00754

Name of Respondents

Merrill Lynch, Pierce Fenner & Smith, Inc.
Thomas Klucartis, Ross Fox and Kyle Rice

REPRESENTATION OF PARTIES

Margaret M. O'Neill-Jones Personal Representative of the Estate of Austin J. O'Brien ("Claimant") appeared *pro se*.

Merrill Lynch, Pierce Fenner & Smith, Inc. Thomas Klucartis, Ross Fox and Kyle Rice ("Respondents") were represented by Michael E. Olney, Esq. of Merrill Lynch, Pierce Fenner & Smith, Inc., New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about March 2, 1993. Submission Agreement of Claimant was signed on February 25, 1993.

Statement of Answer was filed by Respondents on or about May 3, 1993. Submission Agreement of Respondent Merrill Lynch, Pierce Fenner & Smith, Inc. was signed on May 3, 1993 by John R. Cummings. Submission Agreement of Thomas J. Klucartis was signed on March 30, 1993. Submission Agreement of Ross Fox was signed on April 13, 1993. Submission Agreement of Kyle Rice was signed on March 30, 1993.

HEARING INFORMATION

The hearing was held on Tuesday, November 9, 1993 for two (2) sessions and Wednesday, November 10, 1993 for two (2) sessions in Denver, Colorado for a total of four (4) sessions.

CASE SUMMARY

Claimant alleged that Respondents made unauthorized sales in the account of Austin J. O'Brien, breached their fiduciary duty to him, and willfully and intentionally defrauded and deceived the Claimant.

Respondents denied the allegations of fraud, breach of fiduciary duty, unauthorized trading or any other purported basis of liability set forth in the Statement of Claim. Respondents stated that the late Austin J. O'Brien was a sophisticated investor in the securities markets for many years, that he had successfully implemented the use of margin to increase the value of his portfolio. It was also stated by the Respondents that substantially all of the trades in Mr. O'Brien's account were done on an unsolicited basis. Respondents stated that the liquidation of the margin position was undertaken because of their concern over the positions in the account and Mr. O'Brien's age. It was stated that the Respondents made several attempts to reach Mr. O'Brien to either transfer the account to another brokerage firm or the Respondents would liquidate the margin positions. After receiving no response from Mr. O'Brien, the Respondents began the liquidation of the margin positions. Respondents further state that Mr. O'Brien did not complain to them about the liquidation while he was alive.

RELIEF REQUESTED

Claimant requested an award of compensatory damages in the amount of \$23,415.19, costs, attorney's fees and punitive damages in an amount at least five times the compensatory damages.

Respondents requested that the claims be denied in all respects, that Respondents be awarded their reasonable attorney's fees, costs and expenses incurred in the defense of the instant claim together with such other and further relief as is deemed just and proper.

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 N.A.S.D.

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 of unauthorized sales of securities shall be and hereby are dismissed and denied in their entirety.

2. The claims for punitive damages shall be and hereby are dismissed and denied in their entirety.
3. Each party shall bear its own costs, expenses and attorney's fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Pursuant to §43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall **retain** the non-refundable filing fee in the amount of \$200.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the N.A.S.D. by the Claimant.

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:

s/ Edmund Epstein, Esq.
Edmund Epstein, Esq.
Public Arbitrator, Presiding Chair

November 22, 1993

s/ Richard L. Haney, OD
Richard L. Haney, OD
Public Arbitrator

November 30, 1993

s/ Harold C. Jones
Harold C. Jones
Industry Arbitrator

December 13, 1993