

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

William J. Webb,
Madeline B. Calkins-Webb, and
Gary W. Sierk

93-03860

Name of Respondents

Johnston, Lemon & Co., Inc.,
Legg Mason Wood Walker, Inc.,
Moors & Cabot, Inc., and
Thomas J. Fox

REPRESENTATION

Claimants William J. Webb ("Webb"), Madeline B. Calkins-Webb ("Calkins-Webb"), and Gary W. Sierk ("Sierk") were represented at the hearing by Janet K. DeCosta, Esq. of Washington, D.C.

Respondent Johnston, Lemon & Co., Inc. ("Johnston Lemon") did not appear at the hearing. (See "Other Issues").

Respondent Legg Mason Wood Walker, Inc. ("Legg Mason") did not appear at the hearing. (See "Other Issues").

Respondent Moors & Cabot, Inc. ("Moors & Cabot") was represented at the hearing by Sander A. Rikleen, Esq. of Hutchins, Wheeler & Dittmar, of Boston, Massachusetts.

Respondent Thomas J. Fox ("Fox") did not appear at the hearing. (See "Other Issues").

CASE INFORMATION

The Statement of Claim was filed with the NASD by Claimants Webb, Calkins-Webb, and Sierk on September 27, 1993. The Uniform Submission Agreement was signed by Webb on July 29, 1993, by Calkins-Webb on July 28, 1993, and by Sierk on July

29, 1993.

A Statement of Answer and Cross-Claim against Respondent Fox was filed by Respondent Johnston Lemon on November 24, 1993. The Uniform Submission Agreement was signed by Donald E. Clem, Vice President and Director of Compliance, on behalf of Johnston Lemon, on October 11, 1993.

A Statement of Answer was filed by Respondent Legg Mason on November 19, 1993. The Uniform Submission Agreement was signed by John R. Gilner, Assistant Vice President, on behalf of Legg Mason, on November 8, 1993.

A Statement of Answer was filed by Respondent Moors & Cabot on January 19, 1994. The Uniform Submission Agreement was signed by Philip C. McMorrow, Vice President, on behalf of Moors & Cabot, on January 18, 1994.

A Statement of Answer was filed by Respondent Fox on December 13, 1993. Respondent Fox did not execute a Uniform Submission Agreement. (See "Other Issues").

HEARING INFORMATION

A Preliminary Hearing was held on September 30, 1994 with the Chairperson for one (1) hearing session.

The hearing was held on: November 9, 1994 and November 10, 1994 at the NASD Executive Office; on November 17, 1994, November 18, 1994, and November 21, 1994 at the American Arbitration Association; November 28, 1994 at the NASD Executive Office; and on November 29, 1994 and December 1, 1994 at the ANA Hotel in Washington, D.C., for a total of seventeen (17) hearing sessions.

CASE SUMMARY

Claimants Webb, Calkins-Webb, and Sierk alleged in their Statement of Claim that between 1987 and 1993 Respondent Fox made unsuitable recommendations, omissions, misrepresentations, unauthorized trades, and engaged in improper sales practices, while employed as a broker at Johnston Lemon, Legg Mason, and Moors & Cabot. The allegations covered various investments, including several general and limited partnerships, including: Arrowhead Partnership, Crystal Hill Associates Limited Partnership, Message Systems Limited Partnership, (made while Fox was employed by Johnston Lemon); Charlotte Development Income Partnership, Med Q Corporation, Washington Car Rental Systems L.P. ("WCRS"), Airport Auto Services Corporation, and Silver Plume Industries, Inc. Claimant Sierk additionally alleged

that Respondent Fox effected an unauthorized withdrawal from Sierk's Keogh account to effect an unauthorized purchase of WCRS.

Claimants alleged violations of Section 15 of the Securities Act of 1933; Sections 10(b) and 20 of the Securities and Exchange Act of 1934, and Rule 10b(5) promulgated thereunder; the common law of the District of Columbia, Maryland, and New York; common law fraud; breach of fiduciary duty; negligent misrepresentation; violations of Article III Sections 1, 2, 12, 14, 15, 18, 19, and 27 of the NASD Rules of Fair Practice; forgery, and a pattern of concealment and subterfuge.

Claimants further alleged that Respondents Johnston Lemon, Legg Mason, and Moors & Cabot failed to properly supervise Respondent Fox.

Respondent Johnston Lemon in its Answer and Cross-Claim against Respondent Fox denied each and every substantive allegation made against it, and stated that it is without sufficient knowledge to admit or deny the substantive allegations made against Respondent Fox. Additionally, Johnston Lemon denied that Claimant Sierk indicated that his investment objectives included safety of principal. Johnston Lemon asserted that Arrowhead Limited Partnership and Message Systems Limited Partnership were not securities or investment opportunities offered by the firm, and that it had no knowledge of Claimants' investment in them.

Respondent Johnston Lemon set forth the following affirmative defenses in its Answer and Cross-Claim: failure to state a claim upon which relief may be granted; the Claimants' claims are barred by the doctrines estoppel, laches, waiver, and by the applicable statute of limitations; Claimants failed to mitigate their damages; Claimants were guilty of contributory negligence; assumption of risk; and Johnston Lemon cannot be liable for punitive damages because such damages are beyond the relief available through arbitration and are unconstitutional.

Respondent Johnston Lemon in its Cross-Claim for Indemnity or Contribution Against Respondent Fox stated that if Johnston Lemon is held liable for all or part of any loss suffered by Claimants, then Respondent Fox is liable to Johnston Lemon indemnify it against such loss, or alternatively, Fox is liable to Johnston Lemon for contribution.

Respondent Legg Mason in its Answer denied each and every substantive allegation made against it, and stated that it is without sufficient knowledge to admit or deny the substantive allegations made against Respondent Fox. Additionally, Legg Mason denied that Claimant Sierk had a margin account with the firm. Respondent Legg Mason set forth the following affirmative defenses in its Answer: failure to state a claim upon which relief may be granted; the Claimants' claims are barred by the

doctrine of laches and by the applicable statute of limitations; Respondent Legg Mason is not liable for the actions of Respondent Fox based on respondent superior. Claimant was guilty of contributory negligence; assumption of risk, Claimants consented to the matters of which they complain; Claimants did not justifiably rely on any misrepresentations and/or omissions; the alleged misrepresentations were not material; the Claimants did not sustain any compensatory damages attributable to Legg Mason; Legg Mason did not act with actual knowledge or reckless regard; and Legg Mason did not breach any supervisory responsibilities.

Respondent Moors & Cabot in its Answer denied each and every substantive allegation made against it, and stated that it is without sufficient knowledge to admit or deny the substantive allegations made against Respondent Fox. Moors & Cabot denied that Respondent Fox was acting as its agent or employee, or within the scope of his employment with respect to any alleged fraudulent activities. Moors & Cabot further denied that it failed to supervise properly Respondent Fox while Fox was employed by them. Respondent Moors & Cabot set forth the following affirmative defenses in its Answer: failure to state a claim upon which relief may be granted; none of the alleged transactions in Claimants' accounts were unauthorized; Claimants did not suffer any damage as a result of any alleged activity in their Moors & Cabot accounts; Claimants did not justifiably or reasonably rely on Fox or Moors & Cabot with respect to any alleged activity in their Moors & Cabot accounts; Respondent Fox was not acting as an agent or employee of Moors & Cabot, but was acting outside the scope of his authority when the alleged wrongful transactions occurred; Claimants' alleged losses, if any, were caused by a combination of their own actions and those of Respondents Johnston Lemon, Legg Mason, and Fox; Moors & Cabot acted responsibly and prudently and carried out all of its supervisory and other duties in a proper manner; Claimants' recovery is barred or must be reduced by the doctrines of contributory negligence, comparative negligence, assumption of risk, estoppel, laches, and waiver; Claimants are not entitled to punitive damages or attorneys fees under applicable law; and if Moors & Cabot is found to have any liability to Claimants, and such liability is based upon or arises out of the actions of the other Respondents, Moors & Cabot is entitled to an award against the other Respondents.

Respondent Fox in his Answer stated that he invokes his privilege under the Fifth Amendment to the United States Constitution, in addition to corresponding provisions of the applicable state constitutions, and therefore neither admits nor denies the Claimants' allegations. However, Respondent Fox failed to provide the Panel with the grounds for invoking the Fifth Amendment.

RELIEF REQUESTED

Claimant Webb requested damages of \$208,400. Claimant Calkins-Webb requested

damages of \$126,500. Claimant Sierk requested damages of \$89,000. Claimants Webb, Calkins-Webb, and Sierk requested punitive damages, accrued interest, rescission of trades in Med Q stock, costs and attorney's fees.

Respondent Johnston Lemon requested that in the event that the Claimants receive any award in this arbitration from Johnston Lemon, that Johnston Lemon be awarded an offset for contributions and indemnity against Respondent Fox.

Respondent Legg Mason did not specifically state a relief, but denied each and every substantive allegation contained in the Statement of Claim.

Respondent Moors & Cabot requested that the Statement of Claim be dismissed and that it be awarded its costs. At hearing, Moors & Cabot additionally requested that the Panel enter an award stating that Moors & Cabot, Inc. shall not seek to recover from Claimant Webb in any subsequent court or arbitration proceeding any of the amounts which he received from the Kibitz & Liptz Escrow Account.

Respondent Fox did not specifically state a relief.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of the file and the representations made by/on behalf of the Claimant, the panel has determined that Respondent Thomas J. Fox has been properly served with the Statement of Claim pursuant to Section 25 of the NASD Code of Arbitration Procedure (the "Code"). The panel also determined that Respondent Fox had received due notice of the hearing as required under Section 26 of the Code and that arbitration of the matter would proceed pursuant to Section 29 of the Code.

Respondent Thomas J. Fox did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the Claim, is bound by the determination of the arbitration panel on all issues submitted.

Respondent Johnston Lemon filed a Motion to Dismiss citing applicable statute of limitations. The Claimants filed a response. After due consideration, the Panel denied the motion.

Claimants Webb, Calkins-Webb, and Sierk entered into a settlement agreement with Respondent Legg Mason on November 9, 1994, whereby all claims are dismissed with prejudice as to Respondent Legg Mason.

Claimants Webb, Calkins-Webb, and Sierk entered into a settlement agreement with Respondent Johnston Lemon whereby all claims are dismissed as to Respondent Johnston Lemon.

At the beginning of the hearing the Panel heard Claimants' motion for sanctions against Respondent Moors & Cabot regarding certain discovery issues. The Panel deferred its decision until the end of the hearing.

Claimants Calkins-Webb and Sierk dismissed any pending claims against Moors & Cabot at the hearing, leaving only Claimant Webb's claim to be heard. No testimony or requests were made at hearing regarding Claimants Calkins-Webb's and Sierk's claims against Respondent Fox.

The parties have agreed that the Award in this matter may be executed by counterpart copies. The parties have also agreed to receive conformed copies of the Award while the original remains 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. Respondents, Moors & Cabot, Inc. and Thomas J. Fox, shall be and hereby are jointly and severally liable for, and shall pay to Claimant, William J. Webb, damages in the sum of Fourteen Thousand One Hundred and Sixteen Dollars and No Cents. (\$14,116.00).
2. Moors & Cabot, Inc. shall not seek to recover from William J. Webb in any subsequent court or arbitration proceeding any of the amounts which he received from the Kibitz & Liptz Escrow Account.
3. Claimant's request for punitive damages is hereby denied.
4. Respondent Moors & Cabot, Inc. shall be liable for, and shall pay to Claimant William J. Webb, One Thousand Dollars and No Cents (\$1,000.00) as reimbursement for attorney's fees relating to discovery issues.
5. The original court reporter transcript is to be filed with the NASD with the cost born equally by the parties.
6. Each of the parties shall bear their own costs, attorneys' fees, and

expenses incurred, other than those specifically provided for herein.

7. Any relief not specifically provided for herein is denied.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed:

17 hearing sessions x \$750 = \$12,750.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$200, and the hearing session deposit in the amount of \$750 previously paid to the NASD by Claimants.

The panel has ordered that the Claimant, William J. Webb pay additional forum fees to the NASD in the amount of \$5,625, and that Respondent Moors & Cabot, pay forum fees in the amount of \$6,375 to the NASD.

The panel has also ordered that Respondent Moors & Cabot, pay forum fees in the amount of \$300 as discovery sanctions to the NASD for the Pre-Hearing Conference.

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

By The Arbitration Panel:

Dated:

Anne W. Larkin, Esq., Presiding
Public Arbitrator

Leonard E. Benade
Public Arbitrator

2/2/95

Gordon F. Linke
Gordon F. Linke
Industry Arbitrator

Date Award Served By the NASD: 2/6/95

expenses incurred, other than those specifically provided for herein.

7. Any relief not specifically provided for herein is denied.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed:

17 hearing sessions x \$750 = \$12,750.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$200, and the hearing session deposit in the amount of \$750 previously paid to the NASD by Claimants.

The panel has ordered that the Claimant, William J. Webb pay additional forum fees to the NASD in the amount of \$5,625, and that Respondent Moors & Cabot, pay forum fees in the amount of \$6,375 to the NASD.

The panel has also ordered that Respondent Moors & Cabot, pay forum fees in the amount of \$300 as discovery sanctions to the NASD for the Pre-Hearing Conference.

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

By The Arbitration Panel:

Dated:

2/3/95

Anne W. Larkin, Esq., Presiding
Public Arbitrator

Leonard E. Benade
Leonard E. Benade
Public Arbitrator

Gordon F. Linke
Industry Arbitrator

Date Award Served By the NASD: 2/6/95

expenses incurred, other than those specifically provided for herein.

7. Any relief not specifically provided for herein is denied.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed:

17 hearing sessions x \$750 = \$12,750.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$200, and the hearing session deposit in the amount of \$750 previously paid to the NASD by Claimants.

The panel has ordered that the Claimant, William J. Webb pay additional forum fees to the NASD in the amount of \$5,625, and that Respondent Moors & Cabot, pay forum fees in the amount of \$6,375 to the NASD.


The panel has also ordered that Respondent Moors & Cabot, pay forum fees in the amount of \$300 as discovery sanctions to the NASD for the Pre-Hearing Conference.

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

By The Arbitration Panel:

Dated:

2/2/95


Anne W. Larkin, Esq., Presiding
Public Arbitrator

Leonard E. Benade
Public Arbitrator

Gordon F. Linke
Industry Arbitrator

Date Award Served By the NASD: 2/6/95