

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Names of Claimants

Albert & Lilybett Zitomer, TTEES, et al.

95-00179

Names of Respondents

Prudential Securities Incorporated  
Kenneth F. Klespies

REPRESENTATION

For Claimants, Albert & Lilybett Zitomer, TTEES, et al. ("the Zitomers"): Norman Meyers Esq. of Meyers & Bierkan, P.A., Sun City Center, Florida.

For Respondent, Prudential Securities Incorporated ("PSI"): David A. Weintraub, Esq. of Prudential Securities Incorporated, Boca Raton, Florida.

For Respondent, Kenneth F. Klespies ("Klespies"): George L. Guerra, Esq. of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Clearwater, Florida.

CASE INFORMATION

Statement of Claim filed: 1/18/95.

Claimants' Submission Agreement signed on: 1/16/95.

Respondent PSI's Submission Agreement was signed on: 2/15/96.

Respondent, Klespies' Submission Agreements was signed on: 2/16/96.

HEARING INFORMATION

On 1/12/95, a Pre-Hearing Conference lasting one (1) session was conducted via telephone conference with the Chairman of the Panel.

Hearing Dates/Sessions: 1-17-96/two (2) sessions.  
1-18-96/two (2) sessions.  
1-19-96/two (2) sessions

Hearing Location: Tampa, Florida.

CASE SUMMARY

Claimants alleged that Respondent, PSI, through its Vice President and Financial Adviser, Klespies, took advantage of Claimant's memory handicap and violated Claimants' complete trust

by ignoring their investment objectives, making material misrepresentations, omissions and misleading statements upon which Claimants relied, to their detriment, and also made unsuitable and unauthorized trades. Claimants further alleged that Respondent, Klespies, violated Article III, Section 43 of the NASD Rules of Fair Practice and that Respondent, PSI, was grossly negligent in supervising Klespies.

Respondents denied all allegations of wrongdoing contained in the Statement of Claim and maintained that at all times Claimants were provided with truthful and accurate information regarding investment recommendations made by Klespies; that Claimants made informed and intelligent decisions; that as a result of those decisions, Claimants' accounts enjoyed profits of approximately \$47,000.00; that the profits represented the equivalent of an approximate 10% return on an annualized basis and that this amount is in excess of the 7% rate of return Claimants claimed they would have received had their portfolio been invested in more conservative securities; that accordingly, Claimants suffered no legally recognized damages as a result of any of the transactions at issue. Respondents further argued that Claimants' claims were barred by the affirmative defenses of ratification, estoppel, failure to mitigate, and failure to act with due diligence and that further, Claimants were aware of and understood the risks attendant to maintaining a margin account. Respondents also alleged that at no time did the Claimants make a single purchase using borrowed funds and denied that Respondent, Klespies, attempted to convince Claimants to take a mortgage on their home and that that was a decision made by the Claimants. Further, Respondents alleged that Claimants failed to produce any evidence that they suffered any damages as a result of any mortgage and that, by their own choice, continued to maintain that mortgage.

### **RELIEF REQUESTED**

Claimants requested compensatory damages consisting of commission disgorgement and annuity surrender, trebled, totaling \$92,171.00 together with income the accounts should have realistically earned. In addition, Claimants requested prejudgment interest, attorney's fees, punitive damages in the discretion of the arbitrators and such other relief as the Arbitrators deem appropriate.

Respondents requested that all claims against them be dismissed.

### **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 originals remain on file with the NASD.

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, PSI, is found liable and shall pay to the Claimants the amount of \$2,700.00.

2. Respondent, Klespies, is found liable and shall pay to the Claimants the amount of \$900.00.
3. Claimants' requests for prejudgment interest, attorney's fees, punitive damages and treble damages are hereby denied.
4. All other claims are denied.

**OTHER COSTS**

The parties shall each bear all costs and expenses incurred by them in connection with this proceeding including attorney's fees.

**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$3,300.00 (one (1) pre-hearing conference X \$300.00 plus six (6) hearing sessions X \$500.00).

1. Claimants are hereby assessed Forum Fees in the amount of \$1,650.00 for which the NASD shall retain the \$500.00 previously deposited in partial satisfaction thereof leaving a balance due to the NASD of \$1,150.00.
2. Respondent, PSI, is hereby assessed Forum Fees in the amount of \$1,650.00 payable to the National Association of Securities Dealers.
3. Respondent, PSI, shall pay the surcharge due and payable to the NASD in the amount of \$300.00.
4. The NASD shall retain the non-refundable filing fee of \$150.00 paid by the Claimants.

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

**ARBITRATION PANEL**

**Concurring Arbitrators' Signatures**

/s/

\_\_\_\_\_  
James F. Turner, III

Public/Chairperson

/s/

\_\_\_\_\_  
Stanley Lampert

Public/Panelist

/s/

\_\_\_\_\_  
Daniel Calabria

Industry/Panelist

Date of Decision: February 21, 1996