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AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC

In the Matter of the Arbitration Between

Earl L. Lester,

Claimant,

v.

CASE No. 95-04503

Prudential Securities, Inc. and Anne Davidson,

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Securities Dealers Inc.

Respondents.

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REPRESENTATION OF PARTIES

Claimant, Earl L. Lester was represented by Kevin S. Fiur, Esquire and Christopher Norton, Esquire of Bristow, Hackerman, Wilson & Peterson located in Houston, Texas.

Respondents, Prudential Securities, Inc. and Anne Davidson were represented by Gabriel Loubier, Esquire and Mark Seffinger, Esquire of Prudential Securities, Inc. located in New York, New York.

INFORMATION

Claimant, Earl L. Lester's Statement of Claim was filed on or about September 21, 1995. Claimant, Earl L. Lester's First Amended Statement of Claim was filed on or about April 25, 1996.

Claimant, Earl L. Lester's Submission Agreement was signed on September 11, 1995

Respondents, Prudential Securities, Inc. and Anne Davidson's Joint Statement of Answer was filed on or about November 15, 1995. Respondents, Prudential Securities, Inc. and Anne Davidson's Joint Response to the Amended Statement of Claim was filed on or about May 10, 1996.

HEARING INFORMATION

A pre-hearing conference was held on May 14, 1996 before one arbitrator for one (1) session.

The hearing was held on: June 24, 1996 for two (2) sessions;
June 25, 1996 for two (2) sessions; and
June 26, 1996 for two (2) sessions.

The hearing was held in Houston, Texas.

CASE SUMMARY

In the Statement of Claim and Amendment, Earl L. Lester ("Lester") alleged that Anne Davidson ("Davidson"), through her employer, Prudential Securities, Inc. ("Prudential"), gave him insufficient and inaccurate or misleading information in order to induce him into making investments contrary to his investment objectives. Lester asserted that he had always limited his investments to safe and conservative investments, that his main objective had always been preservation of principal, and that he had never had any interest in investing in anything that might be considered volatile or high risk. Claimant further asserted that he had not had an account with a brokerage firm until solicited by Davidson.

Claimant alleged: that in November 1993, Davidson contacted him about investing in the Putnum Investment Grade Municipal Trust III Share Beneficial Trust ("Putnum Fund"); that just a few days earlier, he had invested in the Nuveen Tax Exempt Unit Trust Prospectus 705 ("Nuveen Fund") with another broker at another brokerage firm; that Davidson, who had previously sold Claimant investments in the Nuveen Fund, assured him that the Putnum Fund and the Nuveen Fund were identical and very low risk investments; that he relied on this advice and the advertising material;,, which gave the misleading impression that the Putnum Fund only invested in securities that were conservative and low risk; that Respondents never provided a prospectus or any other written materials that fully described the nature of the risks for the Putnum Fund; that had he not been told that the Putnum Fund would purchase derivatives; that after noticing a \$12,000.00 loss in the Putnum Fund in a single month, he sold the Putnum Fund, which was approximately the same time he sold the Nuveen Fund that he had purchased from his other broker at the other brokerage firm; that after noticing that the Putnum Fund had suffered a 200 percent greater loss than the Nuveen Fund he made an inquiry and was informed for the first time that the Putnum Fund traded very risky and complex securities known as derivatives and that this was not the only mutual fund which invested in derivatives that Davidson had purchased with his retirement funds; and that his requests for information and answers from Prudential were not satisfied.

Lester made the following legal claims: (1) violations of the Texas Securities Act; (2) negligence/breach of the NASDR Rules of Fair Practice and Rules of the NYSE; (3) breach of fiduciary duty and breach of duty; (4) common law fraud and misrepresentation; (5) violations of the Texas Deceptive Trade Practices Act; and (6) negligent hiring and supervision.

In their Answer, Prudential Securities, Inc. and Anne Davidson denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Claimant failed to check an investment objective of "safety of principal" on his Investment Profile and instead designated "income" as his only investment objective. Respondents further stated: that the sale of the Putnum Fund to Claimant was unsolicited; that the Putnum Fund was suitable for Claimant in light of his stated investment objective and net worth; that they did not hear any complaints about his investment in the Putnum Fund until after Claimant sold it; that Claimant was sent a prospectus detailing the risks, objective;,, and attributes of the Putnum Fund; that the brokerage firm from which Claimant purchased the Nuveen Fund were underwriters of the Putnum Fund, which facilitated another means for Claimant

to address any questions he may have had about his investments; that the Putnum Fund held a minimal percentage of derivative securities and that the losses that it experienced were not solely related to alleged problems with derivatives; that Claimant chose to sell the Putnum Fund shares when the shares were at their lowest point in order to incur a capital loss and offset other capital gains; that Claimant understood the risks of derivatives; and Respondents denied that they ever informed Claimant that the Putnum Fund was the same as the Nuveen Fund. Respondents also denied the claims of negligent hiring and failure to supervise.

Respondents made the following affirmative defenses: (1) the Statement of Claim failed to state a claim upon which relief could be granted; (2) Claimant, at all relevant times, had or should have had full knowledge of all material facts concerning the investments he made; (3) Claimants directed and authorized the execution of all transactions in his account and was estopped from bringing this action; (4) Claimant may not recover anything against Respondents because he ratified all of the activity in his account; (5) to the extent any losses or diminution in the value of Claimant's investments had occurred, Respondents were not liable for such losses and diminution because they were within the risks Claimant chose to assume; (6) to the extent Claimant's investments diminished in value, such diminution was the result, in whole or in part, of unforeseen price fluctuations in volatile securities markets in which Claimant knowingly and willingly participated; (7) Claimant failed to mitigate his losses; (8) Claimant's claims were barred, in whole or in part, by applicable statutes of limitation; (9) the purported wrongdoing on the part of Respondents was not the proximate cause of the losses for which Claimant sought recovery; (10) Claimant had not incurred damages arising from the actions of Respondents; (11) Claimant's comparative fault, lack of diligence, and failure to conduct his own affairs reasonably, prudently and responsibly barred any recovery of damages; (12) Claimant's claims fail because he had not sustained any loss or damage; (13) Claimant's claims fail because he did not justifiably rely upon any alleged misstatements or omissions by Respondents; (14) Claimant's account was not invested in contravention of his investment objectives; (15) Respondents did not make any misrepresentations or omissions with respect to the investments made in Claimant's account; (16) Claimant knew of the alleged untruths or omissions and was therefore barred from bringing this action; (17) Respondents did not know, and in the reasonable exercise of reasonable care could not have known, of the alleged untruths and omissions; (18) the Texas Deceptive Trade Practices Act was inapplicable to securities transactions; (19) Claimant had failed to plead or establish that a fiduciary relationship existed with Respondents; (20) Respondents did not stand in a fiduciary relationship to the claimant; (21) Claimant had failed to establish the existence of a contract between him and Respondents, and a breach thereof; (22) there was no private cause of action for violations of the NASDR Rules of Fair Practice and/or the rules of the New York Stock Exchange; and (23) an award of punitive damages in this case would be a violation of the due process clause of the U.S. Constitution.

RELIEF REQUESTED

Claimant, Earl L. Lester requested: an award in excess of \$100,000 for actual damages, punitive damages in an undetermined amount; costs, expenses, and disbursements, including reasonable attorneys' fees; and pre-award and post-award interest.

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Respondents, Prudential Securities, Inc. and Anne Davidson requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondent, Prudential Securities, Inc. did not file with NASDR Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 10301 of the NASDR Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

Respondent, Anne Davidson did not file with NASDR Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 10301 of the NASDR Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

At hearing, Respondents, Prudential Securities, Inc. and Anne Davidson moved for dismissal in accordance with Section 10305 of the Code after the close of Claimant, Earl L. Lester's presentation of his case. After hearing oral arguments on the motion and careful consideration, the undersigned arbitrators denied this motion.

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 NASDR Regulation, Inc. Office of Dispute Resolution.

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) That Respondent, Prudential Securities, Inc. is liable for and shall pay Claimant, Earl L. Lester the sum of \$7,561 in compensatory damages;
- (2) That Respondent, Anne Davidson is liable for and shall pay Claimant, Earl L. Lester the amount of \$22,683 in compensatory damages;
- (3) That Respondent, Prudential Securities, Inc. is liable for and shall pay Claimant, Earl L. Lester the sum of \$5,755.25 in attorneys' fees pursuant to Tex. Rev. Stat. Ann. art. 581-33D(6) & (7) which was the legal authority provided by the Claimant;

- (4) That Respondent, Anne Davidson is liable for and shall pay Claimant, Earl L. Lester the sum of \$17,265.75 in attorneys' fees pursuant to Tex. Rev. Stat, Ann. art. 581-33D(6) & (7) which was the legal authority provided by the Claimant;
- (5) That Respondent, Prudential Securities, Inc. is liable for and shall pay Claimant Earl L. Lester the amount of \$632.50 for costs;
- (6) That Respondent Anne, Davidson is liable for and shall pay Claimant, Earl L. Lester the amount of \$1,897.50 for costs; and
- (7) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing session x \$300 = \$300 in forum fees, and there were six (6) hearing sessions x \$750 = \$4,500 in forum fees. Total forum fees are \$300 + \$4,500 = \$4,800. Pursuant to Section 10332(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASDR") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASDR by Claimant, Earl L. Lester. Pursuant to Section 10333 of the Code, Respondent, Prudential Securities, Inc. is hereby liable for and shall pay to the NASDR the sum of \$350.00 for the member surcharge.

Respondents, Prudential Securities, Inc. and Anne Davidson are hereby, jointly and severally, liable for and shall pay to the claimant, Earl L. Lester the sum of \$750 for reimbursement of forum fees. Respondents, Prudential Securities, Inc. and Anne Davidson are hereby, jointly and severally, liable for and shall pay to NASDR the amount of \$3,750 in additional forum fees.

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Fees are payable to National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.

Signed:

Dated:

Russell E. Rains, Esquire
Russell E. Rains, Esquire
Public Arbitrator, Presiding Chair

September 11, 1996

Kathryn Ann McCoach
Kathryn Ann McCoach
Public Arbitrator

September 10, 1996

Mary Ann Tunick
Mary Ann Tunick
Industry Arbitrator

September 10, 1996

Date served by the NASDR: September 18, 1996