

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

William Fox,

Claimant,

and

No. 95-04506

Gruntal & Co., Inc.,
Oppenheimer & Co., Inc.
and Richard Lynch,

Respondents.

REPRESENTATION OF PARTIES

Claimant William Fox was represented by Thomas A. Hargett, Esquire of Maddox, Koeller & Hargett, located in Indianapolis, Indiana.

Respondent Gruntal & Co., Inc. was represented by Harry D. Frisch, Esquire of Gruntal & Co., Inc. located in New York, New York.

Respondent Richard Lynch was represented by Peter Shaeffer, Esquire of Chicago, Illinois.

CASE INFORMATION

Claimant William Fox's Statement of Claim was filed on or about September 22, 1995. Claimant William Fox's Submission Agreement was signed on September 19, 1995.

Respondent Gruntal & Co., Inc.'s Statement of Answer was filed on or about December 21, 1995. Respondent Gruntal & Co., Inc.'s Submission Agreement was signed on December 21, 1995 by Robert Sablowsky, Executive Vice President of Gruntal & Co., Inc.

Respondent Richard Lynch's Statement of Answer was filed on or about December 20, 1995. Respondent Richard Lynch's Submission Agreement was signed on December 19, 1995.

HEARING INFORMATION

No pre-hearing conferences were held.

The hearing was held on: February 11, 1997 for one (1) session;
 February 12, 1997 for three (3) sessions;
 February 13, 1997 for two (2) sessions;
 April 23, 1997 for two (2) sessions;
 April 24, 1997 for two (2) sessions; and
 April 25, 1997 for two (2) sessions.

The hearing was held in Indianapolis, Indiana.

CASE SUMMARY

Claimant William Fox ("Claimant") brought this action to recover losses allegedly resulting from the acts, omissions, and violations of respondent Gruntal & Co., Inc. ("Gruntal") and respondent Richard Lynch ("Mr. Lynch") while he was a registered representative of Oppenheimer & Co., Inc. and Gruntal.

According to Claimant, Mr. Lynch contacted him in early 1991 at which time Claimant opened an account with Mr. Lynch at Oppenheimer & Co., Inc. ("Oppenheimer"). Claimant asserted that from March 3, 1991 to May 29, 1992, Mr. Lynch maintained an account for him at Oppenheimer, during which time the account lost \$47,275 and had an annual turnover rate of 5.92. Claimant stated that while his account was at Oppenheimer, the investments made based on Mr. Lynch's recommendations and representations included the following: 3,000 shares of Grand Metropolitan for a total cost basis of \$88,242; 20,000 shares of Telefonos De Mexico for a total cost basis of \$41,104; 3,000 shares of Kansas City Gas & Electric for a total cost basis of \$139,744, which was liquidated in less than 30 days in order to purchase RJR Nabisco; 5,000 shares of Quantum Corp. for a total cost basis of \$5,630, and another 5,000 shares for a total cost basis of \$10,005; and 6,000 shares of Centocor, Inc. for a total costs basis of \$255,010. Claimant further asserted that Mr. Lynch induced him into making purchases on margin and through option trading.

Claimant reported that in May 1992 he transferred his account to Gruntal along with Mr. Lynch, where Claimant's account was maintained through Mr. Lynch from May 25, 1992 to September 30, 1994. Claimant asserted that his account at Gruntal sustained losses of \$186,186 and was turned over 2.29 times annually. Claimant further asserted that Mr. Lynch continued taking positions for quick, short-term profits, such as: Compression Labs, Inc.; Triton Energy; 8,000 shares of American International Petroleum Corp. with a cost basis of \$17,371; and 9,000 shares of Checkers Drive-In Restaurants, Inc. at a cost basis of \$109,886.

Claimant alleged that Mr. Lynch and Gruntal are liable for the losses sustained in his account due to breach of fiduciary duties, their failure to provide him investment recommendations that were suitable to his investment needs, failure to diversify his portfolio; and failure to recommend investments that are within the parameters of his investment objectives. Claimant asserted that by failing to diversify

his portfolio, making recommendations that were leveraged on speculative events, and by undertaking such large positions, Mr. Lynch and Gruntal exposed Claimant's portfolio to inappropriate and extraordinary risks.

Claimant's legal claims included the following: (1) violation of Securities and Exchange Act § 10-b and Rule 10b-5; (2) violation of state anti-fraud provisions at IC 23-2-1-12 and commission of various unethical practices located in 710 IAC 1-17-1; (3) common law fraud and constructive fraud; (4) breach of fiduciary duty and breach of contract; (5) negligence, gross negligence, and negligent supervision; (6) failure to reasonably supervise; and (7) failure to use due diligence.

Respondent Gruntal denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on its part. Gruntal stated that Claimant made or approved of all decisions pertaining to the Gruntal account at issue in this case and never expressed any dissatisfaction, displeasure or complained of any of the transactions executed. Gruntal contended that all purchases and sales in Claimant's account were suitable in light of his investment objectives, investment experience and financial situation. According to Gruntal, Claimant was invited and failed to comment upon the financial information and investment objectives noted on his New Account Form, which indicated investment objectives of growth, capital gains, safety, income and speculation, and which also indicated his net worth of approximately \$1,000,000 and annual income of approximately \$100,000. Gruntal asserted that Claimant monitored the activity in his accounts and was undeniably aware of the nature and status of his investments at all times through the receipt of transactional confirmation slips and monthly client statements, in addition to his regular and frequent telephone contact with respondent Mr. Lynch, and others. Gruntal further stated that Claimant signed a Gruntal Client Agreement that contained all provisions related to margin transactions. Furthermore, according to Gruntal, Claimant executed and signed an Options Account Information form, which indicates that Claimant had 30 years of prior investment experience, that his option investment objective was growth, that his estimated liquid net worth was \$1,500,000, that his estimated annual income was \$120,000, and that his estimated net worth was \$2,500,000.

Gruntal asserted the following affirmative defenses: (1) Claimant ratified and acquiesced in each and every trade of which he now complains; (2) Claimant is not entitled to any measure of damages other than out-of-pocket losses and specifically is not entitled to special, exemplary or punitive damages or an award of attorney fees as a matter of law, and any award of punitive damages would violate the due process clause of the New York State Constitution; (3) any losses sustained by Claimant are attributable to market conditions and to his own investment decisions, not to any action or inaction on the part of Gruntal; (4) Claimant's losses, if any, were proximately caused by his express and implied agreement to voluntarily assume the risk of the known peril of any losses sustained by his account; (5) to the extent any loss or diminution in the value of Claimant's accounts has occurred, such loss or diminution was the result either of unforeseen market fluctuations within the risk that Claimant assumed, or wrongful conduct of others which may not be imputed to Gruntal; (6) Claimant's claims are barred by the principles of waiver, estoppel, and ratification; (7) Gruntal

maintained a comprehensive system of supervision, properly implemented based upon the information available to Gruntal as reflected on new account documents and trading records; (8) Claimant has failed to mitigate damages; (9) Claimant has failed to state a claim for punitive damages; (10) Claimant cannot recover damages for violations of NASD rules, if any, as no private right of action exists for such violations; (11) Claimant's account was invested in accordance with his investment objectives; (12) New York law governs this dispute, and each of Claimant's non-New York claims must fail; and (13) if Claimant has transferred any of the investments complained of from Gruntal, and/or has chosen to retain investments in his portfolio that were purchased at Gruntal after that point, he has made a "second investment decision," and Claimant is thus estopped from seeking any recovery from Gruntal for any further diminution in value of those transferred investments.

Respondent Mr. Lynch denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on his part. According to Mr. Lynch, Claimant was aware that Mr. Lynch wanted to be Claimant's aggressive broker and did not intend or want to be Claimant's regular broker. Mr. Lynch stated that Claimant confirmed regularly that the trading in his account was consistent with his investment objectives. Mr. Lynch also stated that Claimant reported that he had income in excess of \$100,000 per year and a net worth of more than \$1,000,000, and later that he had annual income of \$120,000, liquid net worth of approximately \$1,500,000, and net worth of \$2,500,000. Furthermore, according to Mr. Lynch, Claimant did not lack investment experience, was fully informed, and gave prior authority to effect all the transactions in the account.

Mr. Lynch's affirmative defenses included the following: (1) the federal securities law violations are time-barred for any transaction occurring prior to September 18, 1992 because Claimant knew or should have known prior to this time of the existence of his alleged claim against Mr. Lynch; (2) Claimant's claims are barred by the doctrine of estoppel; and (3) representations of future conduct or the occurrence of future events are not actionable as a fraud.

RELIEF REQUESTED

Claimant William Fox requested an award for: actual damages in the Oppenheimer & Co., Inc. account in the amount of approximately \$47,275; actual damages in the Gruntal & Co., Inc. account in the amount of approximately \$186,186; lost interest of 8% per year, as provided by IC 23-2-1-19(a); attorneys' fees and costs of arbitration (including expert witness fees, expenses and accounting fees) as provided by IC 23-2-1-19(a); pre-award and post-award interest at the statutory rate; and punitive damages.

Respondent Gruntal & Co., Inc. requested that the Statement of Claim be dismissed in its entirety and that any and all costs associated with these arbitration proceedings be assessed against Claimant William Fox.

OTHER ISSUES CONSIDERED AND DECIDED

Originally, claimant William Fox also named Oppenheimer & Co., Inc. as a respondent. Pursuant to Claimant's letter dated February 4, 1997 indicating that said parties have settled their disputes, Oppenheimer & Co., Inc. was discharged with prejudice.

At the beginning of the April 23, 1997 hearing, Claimant moved to dismiss individual Respondent Richard Lynch. Panel granted the motion and Richard Lynch was dismissed.

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 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 the Respondent Gruntal & Co. is liable for and shall pay Claimant William Fox compensatory damages and interest in the amount of \$87,120.00;
2. That the Respondent Gruntal & Co. is liable for and shall pay Claimant William Fox attorneys fees pursuant to The Indiana Securities Act in the amount of \$37,062.00;
3. That the Respondent Gruntal & Co. is liable for and shall pay Claimant William Fox expenses in the amount of \$2,119.00
4. That the Respondent Gruntal & Co. is liable for and shall pay Claimant William Fox expert witness fees in the amount of \$10,889.00;
5. 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 were no pre-hearing conferences and there were twelve (12) hearing sessions x \$750 = \$9,000 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (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 § 10322(c) of the Code, the NASD Regulation, Inc. 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 the NASD Regulation, Inc. Office of Dispute Resolution by Claimant William Fox.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Gruntal & Co., Inc.

Pursuant to § 10333 of the Code, Respondent Oppenheimer & Co., Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$350.

Gruntal & Co. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the remaining forum fees in the amount of \$7,500 (\$9,000 total hearing fees less \$750 hearing session deposit previously paid by Claimant less \$750 previously deposited by Gruntal & Co).

Gruntal & Co. is liable for and shall reimburse Claimant William Fox for his hearing session deposit in the amount of \$750.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.
Concurring Arbitrators' Signatures

/s/ Keith Shake

June 4, 1997

B. Keith Shake, Esquire
Chairperson
Public Arbitrator

Dated:

/s/ Theodore C. Willoughby

June 5, 1997

Theodore C. Willoughby
Panelist
Public Arbitrator

Dated:

/s/ George W. Humm

June 4, 1997

George W. Humm
Panelist
Industry Arbitrator

Dated: