

NASD REGULATION, INC. AWARD

Office of Dispute Resolution

In the Matter of the Arbitration Between

Claimants

**Thomas R. Jones as Personal Representative
for the Estate of Elizabeth Jones**

Case Number 96-03101

Respondents

**Merrill Lynch, Pierce, Fenner & Smith, Inc.
John Tucker**

REPRESENTATION OF PARTIES

For Claimant Thomas R. Jones as Personal Representative for the Estate of Elizabeth Jones ("Jones"): Robert G. Haile, Esq. and Susan B. Yoffe, Esq. of the law firm of Fleming Haile & Shaw, P.A., North Palm Beach, FL.

For Respondents Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("ML") and John Tucker ("Tucker"): Scott J. Link, Esq. and Julie E. Fox, Esq. of the law firm of Ackerman, Link, Sartory, West Palm Beach, FL.

CASE INFORMATION

Statement of Claim filed on July 19, 1996. Claimant's Submission Agreement signed on August 19, 1996.

Respondents' Statement of Answer filed on October 15, 1996. Respondent ML's Submission Agreement signed by Thomas W. Smith, on behalf of ML, on August 31, 1996. Respondent Tucker's Submission Agreement signed on October 22, 1996.

HEARING INFORMATION

A telephonic prehearing conference lasting one (1) session was conducted on April 30, 1997, with the Chairperson presiding.

Hearings lasting four (4) sessions were conducted on May 28 and 29, 1997 in Fort Lauderdale, Florida.

CASE SUMMARY

Claimant alleged that Tucker, who was a broker at the Vero Beach office of ML, had been his personal broker since the late 1980s and the Estate's broker since late 1993. Claimant contended that on or about January 10, 1994, he orally instructed Tucker to sell 540,079 shares of Merck stock at the price of 37; that Tucker did not sell the stock pursuant to Claimant's instruction even though the stock reached the 37 price on several dates; that Claimant was unaware that the stock reached 37 after he gave the instruction to Tucker; and, that, therefore, on or about February 15, 1994, Jones sold the Merck stock at an average price of \$33.63 per share. Claimant further alleged that he did not learn until December 1994, during his deposition, that the stock price had in fact reached 37 in January 1994, after he had instructed Tucker to sell at that price. Claimant alleged that the Respondents' actions constituted breach of contract, breach of fiduciary duty, and negligence.

Respondents denied all allegations of wrongdoing and specifically asserted that Claimant never entered a limit order. Respondents asserted the affirmative defenses of bar by assumption of risk, contributory and comparative negligence, waiver, estoppel, ratification, failure to state a cause of action, failure to exercise due diligence, and failure to mitigate damages.

RELIEF REQUESTED

Claimant requested damages in the amount of \$1,871,158.28, plus interest for three (3) years at 10% per annum in the amount of \$561,347.46 for a total of \$2,432,505.74, plus reasonable attorneys' fees and costs.

Respondents requested a dismissal of the claims against them, costs and a determination of entitlement to attorneys' fees.

OTHER ISSUES CONSIDERED AND 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 a conformed copy of the Award while the originals remain on file with NASD Regulation, Inc.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Tucker is found not liable and, therefore, all claims against him are hereby dismissed.
2. Respondent ML is found liable for breach of contract and shall pay to the Claimant damages in the amount of \$1,871,158.28; plus prejudgment interest at the legal rate of 10% per annum for three years in the amount of \$561,347.46; for a total due to the Claimant in the amount of \$2,432,505.74. ML is not found liable for negligence or for breach of fiduciary duty.
3. Respondent ML shall reimburse Claimant the hearing session deposit paid by Claimant in the amount of \$1,000.00.
4. With respect to the parties' requests for attorneys' fees, in the absence of a stipulation by the parties that the Panel has jurisdiction to consider the issue, the Panel makes no finding with respect to such fees.
5. The parties' requests for costs are denied.

FORUM FEES

Pursuant to Rule 10332(b) of the Code of Arbitration Procedure ("Code"), a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the Panel has assessed forum fees in the amount of \$4,300.00 (one prehearing conference x \$300.00 plus four sessions x \$1,000.00 per session).

1. Respondent ML is hereby assessed \$4,300.00. Of that amount ML shall pay \$1,000.00 directly to the Claimant as set forth in the Award section, above, and \$3,300.00 to NASD Regulation, Inc.
2. NASD Regulation, Inc. shall retain the claim filing fee of \$250.00 paid by the Claimant.
3. NASD Regulation, Inc. shall retain the \$500.00 member surcharge paid by ML.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

/s/
Alan M. Grunspan, Esq.
Public Arbitrator, Presiding Chairperson

/s/
Charles T. Steffans
Industry Arbitrator

/s/
Adam M. Moscovitz, Esq.
Public Arbitrator

Date of Decision: July 23, 1997