

NASD AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Margaret W. and Richard A. Smucker,
TTEE/FBO Smucker TRUST

96-04103

Name of Respondents

Jacques Serena
James A. McInerney

REPRESENTATION

Claimants Richard A. and Margaret W. Smucker, Trustees FBO Richard A. Smucker and Margaret W. Smucker Trust ("Claimants") were represented by David A. Zimmer, Esq., Greenwich, CT.

Respondents Jacques Serena ("Serena") and James A. McInerney ("McInerney") did not appear.

CASE INFORMATION

The Statement of Claim was filed September 16, 1996.

Claimants' Uniform Submission Agreement, with supporting Trust documents, was signed October 1, 1996.

McInerney's Statement of Answer was filed February 15, 1996.

McInerney did not submit an executed agreement to arbitrate.

Serena did not file an answer or an agreement to arbitrate.

HEARING INFORMATION

Prehearing Conference Date/Sessions: September 5, 1997/one session

Hearing Date/Sessions: July 8, 1998/one session

Hearing Location: Dunhill Hotel
Charlotte, NC

CASE SUMMARY

Claimants alleged, among other things, that Respondents Serena and McInerney (collectively "Respondents") induced them to authorize the purchase of securities through fraudulent nondisclosure and negligent misrepresentations. Claimants asserted that they opened an account in November 1995 with Kensington Wells, Inc., initially under the management of Serena and subsequently under the management of McInerney. Claimants alleged that immediately Serena aggressively solicited the purchase of 2,000

shares of Toys R Us, Inc. ("Toys") claiming that Toys was sure to increase in price due to the holiday rush, but Claimants, while acquiescing to the aggressive sales pressure, only authorized the purchase of 300 shares of Toys at twenty-three and one-half dollars per share. Claimants alleged that Toys did not significantly increase in price as predicted by Serena.

In December 1996, Claimants alleged that Serena repeatedly contacted Claimants and aggressively solicited the purchase of Micron Technologies, Inc. ("Micron") as the price of Micron had recently fallen and "was an absolute steal" and Serena said that he personally knew the officers of Micron. Claimants contended that Serena repeatedly assured them that within ninety days he would have made them "big money" on their investment so they authorized the purchase of 2,000 shares of Micron at more than fifty dollars per share, which represented more than twenty percent of Claimants' net worth. Claimants asserted that as Micron value continued to drop, they discovered that Micron had mothballed its expansion project and that Serena had terminated his employment with Kensington Wells.

Claimants alleged that in March 1996 Kensington Wells contacted them to request they not transfer their account to another firm and appointed McInerney as Claimants' account executive. Claimants alleged that McInerney immediately began soliciting the purchase of securities which Kensington Wells brought public and made a market in such as Videolan Technologies, Inc. and Xybernaut Corp. In addition, Claimants alleged that McInerney told them of the purchase of Xybernaut Corp. after he purchased the shares and not prior and failed to explain the risk of purchasing on margin. Claimants contended that they also learned, after the fact, that their entire position in Micron had been sold to cover the second Xybernaut purchase contrary to their instructions to liquidate their entire Videolan position.

Claimants alleged that Respondents repeatedly made misrepresentations of material facts; fraudulently failed to disclose material facts; failed to follow Claimants' instructions; failed to disclose the risk of the securities they promoted; and executed transactions without authorization. Claimants alleged that these actions constituted a breach of Respondents' fiduciary duty to Claimants.

Respondent McInerney, in the Statement of Answer filed with the NASD, denied the allegations of fraud, misrepresentation, negligence and breach of fiduciary duty. McInerney maintained that Claimants carefully monitored their account, spoke frequently with account executives and that each and every transaction was authorized by Claimants. McInerney maintained Claimants were experienced investors who willingly and knowingly entered into their securities transactions. McInerney also maintained that Claimants had the sophistication to make their investment decisions, the resources to pay for them and that the claims are merely the unwillingness of Claimants to accept the consequences of their decisions and insist on speculating in the market with the benefit of 20/20 hindsight.

Respondent McInerney also adamantly denied Claimants' allegations that he aggressively solicited the sales of Xybernaut. In reality Respondent McInerney contended Claimants specifically authorized and directed the execution of the transactions in their account and knowingly accepted the risks of purchasing speculative securities. McInerney maintained that Claimants clearly understood the risks associated with the investments they made in the stock market and that at no time did he make any promises or guarantees of profit to Claimants.

Respondent McInerney, in his Statement of Answer, raised the affirmative defenses of assumption of risk; ratification and estoppel; contributory negligence; and statute of limitations.

Respondent Serena did not respond to the Statement of Claim.

RELIEF REQUESTED

Claimants requested damages not to exceed \$100,000.00; as well as punitive damages not to exceed \$100,000.00; a fair and reasonable return on their investments as well as a fair and reasonable attorney's fees; pre-award interest and the costs and expenses of this arbitration.

Respondent McInerney, in his Statement of Answer, requested that the panel dismiss the Statement of Claim and assess all costs to Claimants.

Respondent Serena did not request relief.

OTHER ISSUES CONSIDERED & DECIDED

The parties in attendance at the hearing 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.

Upon review of the file and the representations on behalf of the Claimant, the undersigned arbitrators have determined that Respondent Serena has been properly served with the Statement of Claim pursuant to Rule 10302 and Rule 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators also determined that Respondent Serena received due notice of the hearing as required under Rule 10315 of the Code and that arbitration of the matter would proceed pursuant to Rule 10318 of the Code. In addition, Respondent Serena did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the Code and having been properly served with the claim and notice of hearing is bound by the determination of the arbitration panel on all issues submitted.

Respondent McInerney did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the Code and having answered the claim and having received notice of hearing, is bound by the determination of the arbitration panel on all issues submitted.

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 Respondents Serena and McInerney are jointly and severally liable to and shall pay to Claimants \$100,000.00; and
2. That Respondents Serena and McInerney are jointly and severally liable to and shall reimburse directly to Claimants \$500.00 for the hearing Session deposit submitted to the NASD Regulation by Claimants; and
3. That Claimants' request for punitive damages is denied; and
4. That each party shall bear its own costs and expenses, including attorney's fees; and
5. That any and all relief not specifically addressed herein is denied.

OTHER COSTS

Pursuant to Rule 10333, Kensington Wells was assessed a member surcharge of \$300.00 which was paid.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

1 prehearing conference session (full panel) x \$500.00 =	\$ 500.00
1 hearing session x \$500.00 =	<u>\$ 500.00</u>
Total Forum Fees	\$1,000.00

Forum Fees are assessed, jointly and severally, to Respondents Serena and McInerney. Respondents Serena and McInerney shall receive credit for the \$500.00 hearing session deposit submitted by Claimants for which Respondents were ordered to reimburse Claimants, leaving a net forum fees assessment due from Respondents Serena and McInerney of \$500.00.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

DATE

CONCURRING ARBITRATORS' SIGNATURES

7/16/98

Jeff R. Truluck

Jeff R. Truluck, Chairman
Public Arbitrator

John R. Canada
Public Arbitrator

Louis M. Davis
Industry Arbitrator

Date Award was Served by NASD Regulation:

July 27, 1998

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DATE

CONCURRING ARBITRATORS' SIGNATURES

July 15, 1998

Jeff R. Truluck, Chairman
Public Arbitrator

John R. Canada
John R. Canada
Public Arbitrator

Louis M. Davis
Industry Arbitrator

Date Award was Served by NASD Regulation:

July 27, 1998

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Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

DATE

CONCURRING ARBITRATORS' SIGNATURES

Jeff R. Truluck, Chairman
Public Arbitrator

John R. Canada
Public Arbitrator

July 17, 1998

Louis M. Davis

Louis M. Davis
Industry Arbitrator

Date Award was Served by NASD Regulation:

July 27, 1998