

## **AWARD**

### **NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION**

In the matter of the Arbitration Between

#### **Name of Claimant(s)**

Geoffrey Sher and  
Charlene Sher, Individually and as Trustees of the Sher Living  
Trust Dated 10/30/80,

v.

Arbitration No.  
96-04492

#### **Name of Respondent(s)**

Donaldson, Lufkin & Jenrette Securities Corp.  
Seth Radow

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### **REPRESENTATION**

For Claimants: David W. Studley, Esq., San Francisco, California

For Respondents: Susan L. Hoffman, Esq., and Kristi L. Gudoski, Esq., McCutchen, Doyle,  
Brown & Enersen, LLP, Los Angeles, California

### **CASE INFORMATION**

Statement of Claim filed: October 4, 1996

Claimants' Submission Agreement signed:

Geoffrey Sher, Individually: October 1, 1996

Charlene Sher, Individually: October 9, 1996

Geoffrey and Charlene Sher, as Trustees: November 6, 1996

Joint Statement of Answer filed: January 15, 1997

Respondents' Submission Agreements signed: None submitted

### HEARING INFORMATION

Pre-hearing telephone conferences were held as follows:

September 5, 1997	-	1 session
November 12, 1997	-	1 session
December 22, 1997	-	1 session

The evidentiary hearing was held in San Francisco, California, as follows:

January 21, 1998	-	2 sessions
January 22, 1998	-	2 sessions
January 23, 1998	-	2 sessions
February 12, 1998	-	2 sessions
February 13, 1998	-	1 session

### CASE SUMMARY

Claimants, Geoffrey Sher and Charlene Sher, individually and as Trustees of the Sher Living Trust, dated 10/30/80 opened a trust account with DLJ on August 20, 1991 through Seth Radow, DLJ's registered representative. In late October, 1992, on Seth Radow's recommendation, the funds were transferred to DLJ's Portfolio Advisory Service Account. Seth Radow continued as the registered representative until the account was transferred to outside management in 1996. This action arises out of the trading done in the account from August 20, 1991, to October, 1992, when the funds in the account were transferred to the PAS account.

Claimants alleged that Mr. Radow used discretion in trading the account and that this discretionary authority was abused by excessive trading. Claimants further alleged that Seth Radow made material misrepresentations of fact and omitted to state material facts in connection with transactions in the account. Claimants assert causes of action for breach of fiduciary duty, common law fraud and liability on the part of the broker, DLJ, based on respondeat superior and "control person" liability.

Respondents contended that the trading in the account was not discretionary and was subject to approval by Sally Males, Dr. Sher's business manager. Additionally, Respondents contended that the trading in the account was the result of a valid investment strategy. Respondents admitted there was no written trading authority granted by Dr. Sher to Sally Males. Respondents deny that either of them breached a fiduciary duty and that the account was managed and controlled by the broker and its employees and further deny that there is any respondeat superior or "control person" liability on the part of DLJ.

### **RELIEF REQUESTED**

Claimants submitted damage calculations for out-of-pocket losses in the amount of \$18,012.69; lost opportunity damages in the amount of \$22,969.01, interest in the amount of \$14,933.06; commissions in the amount of \$73,365.36; margin interest in the amount of \$8,343.89; attorney fees in the amount of \$30,337.61; expert fees in the amount of \$4,121.25.

Respondents requested that the claims against them be denied in their entirety.

### **OTHER ISSUES CONSIDERED AND DECIDED**

At the conclusion of the testimony, Respondents renewed their Motion to Dismiss, previously denied without prejudice, on the grounds that the claims were barred by the applicable statutes of limitation. After considering the testimony and the evidence submitted on the issue, the arbitrator ordered that the motion be and is hereby denied.

The parties have agreed to receive conformed copies of the Award while the originals remain on file with NASDR, Inc.

### **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. Respondents are jointly and severally liable for and shall pay to claimants the sum of \$106,129.00, representing compensation for out of pocket losses and interest at 7% on said amount; margin interest charged to the account; and commissions charged for transactions in the account including broker compensation.
2. The claim for common law fraud is hereby denied and dismissed.
3. The claims for attorney fees and expert fees are hereby denied and dismissed.
4. The claim for punitive damages is hereby denied and dismissed.

### **FORUM FEES**

Pursuant to Section 10332 of the Code of Arbitration Procedure, the NASDR shall retain Claimants' \$150.00 non-refundable filing fee, but shall refund the \$500.00 hearing session deposit.

Respondents are jointly and severally assessed forum fees, payable to NASDR, Inc.

3 pre-hearing telephone conferences @ \$300/session	\$ 900.00
9 hearing sessions @ \$500/session	<u>\$ 4,500.00</u>
Total:	<u>\$ 5,400.00</u>

Concurring Arbitrators Signatures:

Date signed:

Helen B. Culiner  
Helen B. Culiner  
Presiding Chairperson  
Public Arbitrator

2/27/98

Theodore F. Schmidt  
Theodore F. Schmidt  
Public Arbitrator

Richard B. Bullock  
Richard B. Bullock  
Securities Industry Arbitrator

Date served: 3/5/1998

Pursuant to Section 10332 of the Code of Arbitration Procedure, the NASDR shall retain Claimants' \$150.00 non-refundable filing fee, but shall refund the \$500.00 hearing session deposit.

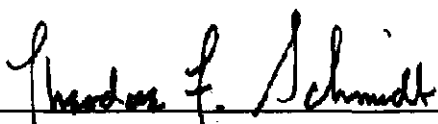
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