

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Bruce Hundelt, and
Claire Hundelt

and

96-04772

Name of Respondents

Timothy O'Leary, and
Oppenheimer & Co., Inc.

REPRESENTATION OF PARTIES

Bruce Hundelt, and Claire Hundelt ("**Claimants**") were represented by Mark H. Levison, Esq., Polsinelli, White, Vardeman & Shalton, St. Louis, Missouri.

Timothy O'Leary ("**O'Leary**") was represented by Charles Siegel, Esq., of Siegel & Wolff, P.C., Clayton, Missouri.

Oppenheimer & Co., Inc. ("**Oppenheimer**") was represented by Michelle A. Murphy, Esq., Oppenheimer & Co., Inc., New York, New York.

CASE INFORMATION

Claimants filed the Statement of Claim on or about October 28, 1996, and signed their Submission Agreement of Claimant on October 24, 1997.

Timothy O'Leary ("**O'Leary**") and Oppenheimer & Co., Inc. ("**Oppenheimer**") (jointly referred to as "**Respondents**") filed their joint Statement of Answer on or about January 7, 1997. Oppenheimer signed its Submission Agreement on January 7, 1997.

HEARING INFORMATION

Telephonic pre-hearing conferences were held on June 26, 1997 for one (1) session, and October 9, 1997 for one (1) session for a total of two (2) sessions.

The Arbitration Panel held a hearing on October 14, and 15, 1997 for two (2) sessions each day, and November 18, and 19, 1997 for two (2) sessions each day in St. Louis, Missouri for a total of eight (8) sessions.

CASE SUMMARY

Claimants alleged that Respondents: Breached their fiduciary duty through O'Leary's misrepresentations and omissions, churning of accounts, investment in unsuitable securities, and in making unauthorized trades; committed fraud through the false and misleading statements made by O'Leary regarding information, advice and investments and through O'Leary's inducement of Claimants' reliance and trust; made negligent misrepresentations on which the Claimants relied; committed negligence through O'Leary's failure to use that standard of care expected and required of professional investment advisors and securities brokers within the profession in that O'Leary negligently advised and induced the Claimants to engage in the securities transactions complained of when they were unsuitable for the Claimants; committed conversion through O'Leary's excessively trading Claimants' account, and engaging in transactions of excessive size, for the purposes of generating excessive commissions for himself and Oppenheimer; violated of §409.411(a), R.S.Mo.; violated §10(b), §20(a), and Rule 10b-5 of the Securities Exchange Act; and committed affirmative fraud through O'Leary's inability to completely invest the Claimants' savings in the manner requested by them and dictated by their circumstances; and committed fraud by omission. Claimant also alleged that Oppenheimer negligently hired O'Leary in that it did not enquire about the previous experience of O'Leary based upon previous employment information supplied to them and the information available to them upon reasonable inquiry. Claimant specifically alleged that Oppenheimer had knowledge of numerous allegations by customers of O'Leary that he omitted material facts, made fraudulent misrepresentations, churned client accounts, and invested clients in unsuitable securities. Claimants claims arose out of transactions in securities fully presented during the course of the hearing in this matter.

Respondents denied the allegations set forth in the Statement of Claim. Respondents asserted the following affirmative defenses: Claimants fail to state a claim upon which relief can be granted; Claimants authorized, consented to or acquiesced in the execution of each transaction in their accounts and are therefore equitable estopped from bringing this action; Claimants, by their own actions, have waived any and all claims alleged in the Statement of Claim by continuing to pursue the investment strategy after acquiring actual knowledge of the nature of that strategy and the risks attendant thereto; Claimants, by failing to timely object to the transactions complained about, have ratified each and every transaction and are barred from recovery herein; Claimants are barred from any recovery for failure to exercise that degree of diligence required in the handling and monitoring of their securities transactions; Claimants were fully aware of the risks inherent in pursuing the trading strategy utilized and voluntarily assumed such risk; as a result of Claimants' failure to notify Oppenheimer of the alleged acts and omissions of which Claimants now complain in a timely basis, Claimants are barred from recovering under the doctrines of ratification, estoppel, waiver and laches;

Claimants are barred from recovery under the doctrine of unclean hands and in pari delicto: Claimants failed to act with due diligence to mitigate their damages after they knew or should have known of the alleged acts or omissions of which they now complain; by failing to exercise the degree of care over the affairs and investments which an ordinary, prudent investor would exercise, any losses sustained by Claimants were proximately caused by their own conduct and negligence in relation to the transactions complained of, and therefore they are precluded from recovery under the doctrine of comparative negligence: Respondents acted in compliance with all applicable rules and regulations and acted in good faith and did not induce the alleged act or acts, if any, constituting alleged violations of law: the damages allegedly suffered by Claimants have no causal relationship with any act committed by or legally attributable to Respondents: Claimants did not reasonably rely to their detriment on any action or inaction of Respondents or any action or inaction legally attributable to Respondents: Respondents discharged their responsibilities in a professional and ethical manner, in good faith, and all actions were well within the parameters of accepted brokerage procedure and all exchange and governmental regulations: Claimants' statutory securities fraud claims are barred because their broker did not act with the requisite scienter: Claimants' claims are barred by the applicable statutes of limitations: and Claimants' demand for punitive damages is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and applicable provisions of the New York State Constitution.

RELIEF REQUESTED

Claimant requested an award in the amount of the following: Not less than \$125,000 actual damages; punitive damages; pre- and post-judgment interest; costs of this suit; and for such other and further relief as the panel deemed just and proper.

Respondents denied the claims asserted against them and asked that all of the costs of this proceeding be assessed fully against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

Respondent O'Leary did not file with 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 NASD 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.

Prior to the start of the November hearing sessions, Respondents filed a Motion to Dismiss. After reviewing the motion, and deliberation, the undersigned arbitrators denied the 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 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:

Respondents Timothy O'Leary, and Oppenheimer & Co., Inc. are jointly and severally liable for, and shall pay to the Claimants the sum of \$12,001 as satisfaction of their compensatory damages claim, and \$4,000 as an award of attorneys' fees. The authority for the award of attorneys' fees can be found in Claimants' brief.

All other requests for relief/claims for damages are, and each of them, 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 two (2) pre-hearing sessions @ \$300 per session and eight (8) hearing sessions @ \$750 per session = \$6,600 in forum fees. Pursuant to Rule 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 Rule 10332 of the Code, 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 NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to Rule 10333 of the Code, Oppenheimer is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$350 assessed in this case.

Additional forum fees in the amount of \$1,450 (\$2,200 - \$750) are assessed by the arbitrators against the Claimants.

Additional forum fees in the amount of \$2,200 are assessed by the arbitrators against O'Leary.

Additional forum fees in the amount of \$2,200 are assessed by the arbitrators against Oppenheimer.

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

Dated:

Paul Lansing
Paul Lansing
Public Arbitrator, Presiding Chair

/s/

December 19, 1997

Albert J. Haller
Albert J. Haller
Public Arbitrator

/s/

December 18, 1997

Ronald L. Looney
Ronald L. Looney
Industry Arbitrator

/s/

December 23, 1997