

10-10-97

97/115200

**AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Charles A. Thurman,  
Claimant,

vs.

No. 96-05398

Pioneer Trading Discount Brokerage,  
A Division of John Dawson & Associates,  
Member NASD and SIPC,  
Bear Stearns Securities, Inc., and  
John Dawson & Associates, Inc.,  
Respondents.

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**REPRESENTATION OF PARTIES**

Charles A. Thurman ("Claimant") appeared pro se.

Pioneer Trading Discount Brokerage, A Division of John Dawson & Associates, Member NASD and SIPC, and John Dawson & Associates, Inc. collectively referred to as ("Pioneer") were represented by Thomas P. Ward, Esq. of McBride Baker & Coles, Chicago, Illinois.

Bear Stearns Securities, Inc. ("BSSI") was represented by Thomas P. Ward, Esq. of McBride Baker & Coles, Chicago, Illinois.

**CASE INFORMATION**

Claimant filed the Statement of Claim on or about December 6, 1996. Claimant signed the Submission Agreement on November 27, 1997. Claimant's Amendment to the Statement of Claim was filed on or about January 3, 1997.

Respondent Pioneer filed the Statement of Answer on or about April 3, 1997. Pioneer signed the Submission Agreement on March 31, 1997. NASD Regulation, Inc. Office of Dispute Resolution does not have a separate Answer and Submission Agreement from John Dawson & Associates, Inc. on file.

Respondent BSSI filed the Statement of Answer on or about April 3, 1997. BSSI signed the Submission Agreement on April 2, 1997.

9/11/96

### HEARING INFORMATION

The Arbitration Panel held a hearing on October 21, 1997 in St. Louis, Missouri for a total of one (1) session.

### CASE SUMMARY

Claimant contended that: Pioneer illegally short sold him 2,000 shares of Jones Medical Industries (JMED) on margin even though his account did not have the required 50% assets to cover the short sale; Pioneer violated the federal securities laws of the Securities Exchange Act of 1934; through the short sale of JMED on margin, Pioneer exposed Claimant's account to unacceptable risks and violated NASD Rules for short sales and margin accounts; Pioneer refused to pay interest income on his margin account during the short sale; and, over the phone, Claimant was informed by Pioneer that a short sale was appropriate for his financial situation, recommended short selling to Claimant, and that he would receive interest during the short sale.

Pioneer denied the allegations set forth in the Statement of Claim. Pioneer specifically asserted that: Claimant had been an active in-and-out margin trader for months before he decided to make a short sale of JMED on September 3, 1996; on September 3, 1997 Claimant contacted Richard Marolda ("Marolda") indicating he wanted to sell short; Marolda did no more than observe that if a trader believed a certain stock was over-priced, short selling was a way to profit in it; Claimant ordered Pioneer to sell his only open position of 3,000 shares of Express Scripts, Inc. Class A ("Express") and short 2,000 shares of JMED; on or about September 11, 1996, as JMED continued to increase in value, Claimant was advised that he would be required to add cash or marketable securities to his account, and declined to do so; on September 20, 1996 Claimant received a formal margin call after failing to add equity to his account, declined to meet the call and elected to liquidate the position on that day at 46; even in situations where credit in excess of the amount permitted by Regulation T has been extended, the courts have uniformly held there is no private right of action by the customer who borrows the property; and Claimant had the ability to settle his borrowing of JMED shares within three business days of the short transaction.

Except as otherwise specifically set forth in its Answer, BSSI denied the allegations set forth in the Statement of Claim. In addition, BSSI asserted the following affirmative defenses: Claimant has failed to state a claim upon which relief may be granted; Claimant has failed to state a claim against BSSI; BSSI acted in good faith and did not directly or indirectly induce the act or acts alleged to have constituted the Claimant's causes of action or any alleged violations; BSSI had no knowledge of or reasonable grounds to believe in the existence of the facts of which the alleged liability of the alleged control persons is alleged to exist; if any damage or loss was sustained by the Claimant, this damage or loss was caused or contributed to by Claimant's own actions, fault or lack of due diligence; Claimant acted in reckless disregard of facts which he had, or should have been aware, and failed to exercise the required due care and diligence; Claimant, at all relevant times had, full knowledge of all material facts concerning his securities account maintained with Pioneer,

including the positions maintained and the transactions made therein; Claimant should be estopped from bringing this proceeding or from obtaining any recovery herein; Claimant authorized and directed the execution of all transactions in his securities account maintained with Pioneer; Claimant authorized and/or ratified all transactions in his securities accounts maintained with Pioneer with full knowledge of all material facts with respect thereto; Claimant's claims are barred by applicable principles of waiver and ratification; Claimant with full knowledge of all material facts concerning his securities account maintained with Pioneer waived the alleged claims set forth in the Claim and the alleged damages resulting therefrom by failing to take timely and appropriate action prior to incurring such damage; BSSI in discharging its duties, if any, to Claimant acted in good faith and exercised at least that degree of care, and skill which ordinary prudent clearing brokers would exercise in similar circumstances and like positions; Claimant is barred from recovery on his claim because he knowingly assumed the risk of his investments; there is no duty of a clearing broker to supervise its introducing broker (e.g. Pioneer) or the employees of its introducing broker; and BSSI did not violate any laws, regulations or industry practices and standards relevant to the claims herein.

#### **RELIEF REQUESTED**

Claimant requested the following remedies: \$30,000 in total damages from Pioneer relating to the short sale of JMED consisting of the following: \$12,320 to compensate for the loss sustained by short selling JMED; \$180 to compensate for the loss of interest income; and \$17,500 in punitive damages

Pioneer requested that the panel find that No Award is permitted here, and to assess the Claimant all costs of this arbitration plus reasonable attorneys fees incurred by Pioneer in defending against this claim.

BSSI requested that the panel: Dismiss the Statement of Claim against it in its entirety; award BSSI the costs and expenses of this arbitration; and grant BSSI such other and further relief as is just and proper.

#### **OTHER ISSUES CONSIDERED & DECIDED**

Claimant filed Motions to Bar Answers and Defenses under Rules 10314(b) and 10321(b) and (c) of the Code of Arbitration Procedure (the "Code"). In its Answer, BSSI raised a Motion to Dismiss the Statement of Claim against itself. The arbitrators denied Claimant's Motions to Bar. The arbitrators did allow Claimant to Amend the claim. The arbitrators also took BSSI's Motion to Dismiss under advisement to be taken up with the case.

At the close of Claimant's case, BSSI and Pioneer made a Motion to Dismiss. After hearing argument from the parties, and deliberation, the arbitrators denied the motion as to Pioneer. However, the motion was granted as to BSSI.

Respondent John Dawson & Associates, Inc. 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 appeared and testified at the hearing and is bound by the determination of the arbitration panel on all issues submitted.

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:

Claimant's claims made against Pioneer Trading Discount Brokerage, A Division of John Dawson & Associates, Member NASD and SIPC, Bear Stearns Securities, Inc., and John Dawson & Associates, Inc. are, and each of them, denied with prejudice.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) hearing session x \$400 = \$400 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(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$100 and shall retain as forum fees the hearing session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$200 paid by Pioneer.

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Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, BSSI is liable for, and shall pay to NASD Regulation, Inc. Office of Dispute Resolution the sum of \$200 for the member surcharge.

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

Dated:

Anthony J. Soukenik  
Anthony J. Soukenik  
Public Arbitrator, Presiding Chair

/s/

October 29, 1997

Albert J. Haller  
Albert J. Haller  
Public Arbitrator

/s/

October 22, 1997

H. Todd Iveson  
H. Todd Iveson  
Industry Arbitrator

/s/

October 22, 1997