

AWARD
NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Thomas R. Jones, Individually and as Trustee
of the Thomas Jones Pension Plan, and
Deborah W. Jones,
Claimants,

and

No. 96-05741

Sterling Foster & Company, Inc.,
Michael Richard MacCaull, and
Adam Lieberman
Respondents.

REPRESENTATION OF PARTIES

Claimants, Thomas R. Jones, Individually and as Trustee of the Thomas Jones DDS Pension Plan and Deborah W. Jones (hereinafter, "the Joneses,") were represented by Andrew David, Esquire of Sugar, Friedberg & Felsenthal located in Chicago, Illinois.

Respondents, Sterling Foster & Company, Inc., ("Sterling Foster,") and Adam Lieberman were represented by Gregory M. Curley, Esquire of the Law Offices of Joseph D'Elia located in Huntington, New York. Respondent, Michael Richard MacCaull, ("MacCaull,") was represented by Marshall H. Fishman, Esquire of Rosenman & Colin, L.L.P. located in New York, New York.

CASE INFORMATION

Claimants', the Joneses', Statement of Claim was filed on or about January 24, 1997, the Claimants', the Joneses' Amended Statement of Claim, adding Adam Lieberman as a Respondent was filed on or about September 11, 1997. Claimants', Thomas R. and Deborah W. Joneses' Submission Agreements were signed on December 19, 1996. Claimant, Thomas Jones DDS, P.C. Pension Plan, Thomas Jones, Trustee's Submission Agreement was signed on January 14, 1997.

NASD has no record of a Statement of Answer or a Submission Agreement filed by Respondents, Sterling Foster, Lieberman, or MacCaull.

HEARING INFORMATION

The hearing was held on February 16, 1998, at 9:00 a.m., for two (2) sessions in Nashville, Tennessee.

CASE SUMMARY

Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C., ("Claimants,") alleged that the losses in their Sterling Foster accounts were the result of the mishandling of their accounts by Michael Richard MacCaull, the agent of Sterling Foster & Company, Inc., and Adam Lieberman, (together, Sterling Foster and Lieberman are "Respondents.") Claimants asserted that they began dealing with Respondents through broker MacCaull in mid-June of 1996, when Thomas R. Jones opened a personal account at Sterling Foster and purchased stocks in Allied Materials. Claimants said that on July 10, 1996, when MacCaull recommended an investment in Aztar Corporation, ("Aztar,") Claimants purchased 8,000 shares at 11½ per share. Claimants asserted that when Thomas R. Jones learned of the increase of Aztar, to 13 per share, he instructed MacCaull to sell his shares in Aztar if they reached 13½, the price which they did rise to later that day, but that MacCaull did not sell the shares and the price shortly thereafter began to decline. Claimants said they lost \$50,000.00 in the end from the personal accounts of Thomas R. and Deborah W. Jones in Aztar.

Claimants also asserted that on June 24, 1996, when MacCaull recommended the purchased of stock in Embryo Development Corporation, ("Embryo,") Claimants purchased 23,450 shares at the price of 5⅞ per share, and that shortly thereafter, these shares began to decline in value. Claimants said that their instructions to sell Embryo after it reached a value of 4 per share were ignored, and that they lost a total of \$64,000.00 on the Embryo stock, from the personal accounts of Thomas R. and Deborah W. Jones.

Finally, Claimants asserted that in August of 1996, MacCaull recommended the purchase of stock in ML Direct in a block of 10-20,000 shares to maximize profits, and further, in order to cover the unavailability of funds in the personal accounts of Thomas R. and Deborah W. Joneses' personal accounts, recommended the investment of Thomas Jones' pension plan in order to meet the amount of money needed for such a proposition. Claimants said that MacCaull assured them that such an investment would be a no lose proposition, despite the fact that this promise from MacCaull came after Claimants relayed their concern that the funds from the pension plan be kept in safe investments with no risk of loss. Claimants stated based on the recommendations, on September 4, 1996, Thomas R. Jones purchased 12,000 shares of ML Direct at a price of 14 per share, with 3,000 of these shares in the joint account of he and his wife, Deborah W. Jones, and 9,000 into the pension plan account. Claimants lastly stated that on or about September 9, 1996, MacCaull recommended the purchase of additional shares of ML Direct, of which he said he had 10,000 shares at 14 per share, despite the trading value of the shares at between 15¾ and 16 per share, thereby effectively handing Claimants' a \$17,000-\$20,000 profit. Claimants stated that when Thomas Jones questioned the appropriateness of investing forty percent (40%) of the pension plan's assets in one stock, MacCaull assured him that the funds would be safe and that there would be a safety net of a stop loss order at 14½ to 15. However, Claimants stated that on September 26, 1996, when Thomas R. Jones attempted to confirm the sale of his shares at 14¾, which is the

price to which the shares declined on September 25, 1996 and on the numerous times thereafter when he instructed MacCaull to sell his shares of ML Direct, MacCaull declined to do so and even suggested that Claimants acquire more shares, in order to cut their losses.

Claimants asserted that Respondents actions constituted: breach of contract, and breach of fiduciary duty, violations of the Tennessee Securities Act of 1980, and ERISA violations.

RELIEF REQUESTED

Claimants, Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C., requested an award for \$350,000.00 in compensatory damages, prejudgment interest at the statutory rate, reasonable attorneys' fees and costs, and any other relief as the panel deems appropriate.

Respondents, Sterling Foster & Company, Inc., and Adam Lieberman, requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorney fees.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to Claimants', Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C.'s letter dated October 30, 1997 Michael Richard MacCaull is dismissed from this action.

The undersigned arbitrators in this matter did consider notice and orders of the United States District Court in the Eastern District of New York in making their determination in this matter. First, the panel considered the Order Enjoining Arbitration and Ordering Notice of the United States District Court of October 29, 1997 and the Notice of Pendency of Proposed Class Action Proceedings and Right to Request Early Exclusion to Pursue Arbitration of December 8, 1997. The undersigned arbitrators then considered the Claimants', Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C.'s Request for Early Exclusion signed on December 22 and 23, 1997 respectively. Furthermore, the undersigned arbitrators considered Respondent's failure to attend the hearing pursuant Fifth Amendment assertions based on the March 20, 1997 Order staying the S.E.C.'s action pending resolution of parallel criminal proceedings instituted by the Office of the United States Attorney for the Southern District of New York. Lastly, the undersigned arbitrators considered Respondents, Sterling Foster and Company, Inc., and Adam Lieberman's failure to attend based upon the frozen assets of Lieberman and his failure, therefore, to attend the hearing

Upon review of the file and the representations made by/on behalf of Claimants, Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C., the undersigned Arbitrators have determined that Respondents,

Sterling Foster & Company, Inc., and Adam Lieberman, have been properly served with the Statement of Claim pursuant to Rules 10302 and 10314 of the NASD Code of Arbitration Procedure ("the Code.") The undersigned Arbitrators have also determined that Respondents, Sterling Foster & Company, Inc., and Adam Lieberman, did receive due notice of the hearing as required under Rule 10318 of the Code.

Respondents, Sterling Foster & Company, Inc., and Adam Lieberman, did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration, but are required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure and are bound by the determination of the arbitration panel on all issues submitted.

Claimants, Thomas R. Jones and Deborah W. Jones and Thomas R. Jones as Trustee of the Pension Plan of Thomas Jones DDS, P.C., have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. Conformed copies of the Award will be received by the parties, while the originals remain on file with the 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:

1. That Respondents, Sterling Foster & Company, Inc., and Adam Lieberman are jointly and severally liable for and shall pay to Claimants, Thomas R. Jones and Deborah W. Jones the amount of \$131,519.00; and
2. That Respondents, Sterling Foster & Company, Inc., and Adam Lieberman are jointly and severally liable for and shall pay to Claimant, Thomas R. Jones as Trustee of the Pension plan of Thomas Jones DDS, P.C. the amount of \$178,835.00; and
3. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There was one (1) pre-hearing conferences and there were two (2) hearing sessions x \$750.00 = \$1,800.00 in forum fees. Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure (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, the NASD Regulation, Inc., Office of Dispute Resolution shall **retain** the non-refundable filing fee of \$200.00 and shall **retain** as forum fees the hearing session deposit of \$750.00 previously deposited with the NASD Regulation, Inc., Office of Dispute Resolution by Claimants, Thomas R. Jones and Deborah W. Jones, individually and Thomas R. Jones as Trustee for the Thomas Jones DDS, P.C. Pension Plan. Claimants, Thomas R. Jones and Deborah W. Jones, individually and Thomas R. Jones as Trustee for the Thomas Jones DDS, P.C. Pension Plan are jointly and severally liable for one-half (1/2) of the forum fees in this matter therefore are still liable for and shall **pay to** NASD Regulation, Inc., Office of Dispute Resolution the amount of \$50.00 (\$800.00 - \$750.00 paid = \$50.00.) Respondents, Sterling Foster & Company, Inc., and Adam Lieberman, are jointly and severally liable for one-half (1/2) of the forum fees in this matter and shall **pay to** NASD Regulation, Inc., Office of Dispute Resolution, the sum of \$800.00.

Pursuant to Rule 10315 of the Code, the NASD Regulation, Inc., Office of Dispute Resolution shall **retain** the postponement fee of \$750.00, previously deposited by Respondent, Sterling Foster & Company, Inc.

Pursuant to Rule 10333 of the Code, Respondents, Sterling Foster & Company, Inc., and Adam Lieberman, shall **pay to** the NASD Regulation, Inc., Office of Dispute Resolution the non-refundable member surcharge of \$350.00.

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

Concurring Arbitrators' Signatures:

/s/ Lee H. Goodman

March 10, 1998

Lee H. Goodman
Chairperson
Public Arbitrator

Date

/s/ Kenneth M. Jackson

March 9, 1998

Kenneth M. Jackson, Esquire
Panelist
Public Arbitrator

Date

/s/ Phil Lubetkin

March 11, 1998

Phil Lubetkin
Panelist
Industry Arbitrator

Date