

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Wagner Family Trust, Caymus Vineyards, Inc. Profit Sharing Plan and Trust and Caymus Vineyards, Inc. Pension Plan and Trust

Claimants

vs.

Smith Barney, Harris Upham & Co., Inc. and Richard Grace

Respondents

AWARD

CASE NO. 88-03369

In the Matter of the Arbitration Between

James M. Talcott, M.D., Inc. Retirement Trust and James M. Talcott, M.D. Pension Plan

Claimants

vs.

Smith Barney, Harris Upham & Co., Inc. and Richard Grace

Respondents

CASE NO. 89-01379

SUMMARY OF ISSUES

Claimants the Wagner Family Trust, the Caymus Vineyards, Inc. Profit Sharing Plan and Trust and the Caymus Vineyards, Inc. Pension Plan and Trust ("Wagner") allege that Respondent Richard Grace ("Grace") while employed by Respondent Smith Barney, Harris Upham & Co., Inc. ("Smith Barney") violated the N.A.S.D. Rules of Fair Practice, as well as applicable legal standards, by churning Wagner's accounts, putting unsuitable securities into Wagner's accounts, misrepresenting and omitting to disclose material facts to Wagner, breaching fiduciary duties to Wagner, and acting negligently.

Respondents allege that Wagner and Grace had an established business relationship unrelated to the investment activity during the periods claimed and that said business relationship deteriorated. Respondents allege that Wagner made no complaints as to the nature of the handling of the accounts until after said relationship ended and that over the course of the client/broker relationship, Wagner actually made a profit on his investments through Grace.

Claimants James M. Talcott, M.D., Inc. Retirement Trust and James M. Talcott, M.D. Pension Plan ("Talcott") allege that Respondent Grace while employed by Respondent Smith Barney recommended and induced Claimants to invest large sums of retirement trust and pension plan fund in highly speculative stocks on margin and that said investments were inappropriate in light of Claimants' stated financial objectives. Claimants also allege that they were not fully informed of the risks involved in these transactions and that they totally relied on Respondents for guidance in investment matters. Claimants also allege that Respondents churned the accounts to the extent of creating \$398,000.00 in commissions in one year.

Respondents allege that the Claimant James M. Talcott, M.D. was a sophisticated securities trader who knowingly and willingly engaged in active speculative trading over a prolonged period of time and it wasn't until after the market decline of October of 1987 that Claimant complained about the volume, frequency or concentration of stocks in his portfolios. Respondents also allege that the element of control was not shown in Claimants' allegation of churning.

#### DAMAGES AND RELIEF REQUESTED

Claimants Wagner seek to recover \$239,763.00 in commissions and interest and \$265,618.00 for decline in value plus general market increases plus interest and punitive damages.

Respondents seek dismissal of the claim in its entirety.

Claimants Talcott seek to recover compensatory damages of \$1,072,604.00 as a result of the unsuitable investments and churning. Claimants also seek punitive damages for malicious breach of fiduciary duty.

Respondents seek dismissal of the claim in its entirety.

#### DAMAGES AND RELIEF AWARDED

On April 30, May 22, 23 and 24, and June 5, 6, 7 and 11, 1990, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants James M. Talcott, M.D., Inc. Retirement Trust, James M. Talcott, M.D. and James M. Talcott, M.D. Pension Plan on October 7, 1988, by Claimants Wagner Family Trust, Caymus Vineyards, Inc. Profit Sharing Plan and Trust and Caymus Vineyards, Inc. Pension Plan and Trust on September 30, 1988, and by Respondents Smith Barney, Harris Upham & Co., Inc. on July 7, 1989 and Richard Grace on June 7, 1989. The hearing was conducted in San Francisco, California and lasted 17 sessions. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented

at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Smith Barney, Harris Upham & Co., Inc. is solely liable for and shall pay to Claimant Wagner Family Trust the sum of Fifteen Thousand Dollars and No Cents (\$15,000.00).

2. Respondent Smith Barney, Harris Upham & Co., Inc. is solely liable for and shall pay to Claimant James M. Talcott, M.D., Inc. Retirement Trust the sum of Twenty-Two Thousand, Five Hundred Dollars and No Cents (\$22,500.00).

3. Each and every claim against Respondent Richard Grace is dismissed.

4. Respondent Smith Barney, Harris Upham & Co., Inc. shall reimburse the filing fees deposited by:

- a. Wagner Family Trust et al. (\$1,000.00); and
- b. James M. Talcott, M.D., Inc. Retirement Trust et al. (\$1,000.00).

5. The parties shall each bear their respective costs including attorneys' fees.

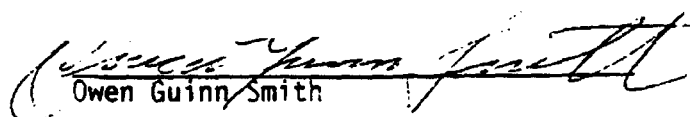
6. In accordance with Section 43 of the NASD Code of Arbitration Procedure, the NASD shall retain the \$2,000.00 filing fee previously deposited by the Claimants as an assessment of forum fees by the arbitrators. In addition, Respondent Smith Barney, Harris Upham & Co., Inc. is also assessed forum fees of \$15,000.00.

#### OTHER ISSUES

An opinion drafted by the panel is attached hereto.

PRESIDING ARBITRATORS

DATE SERVED: 07/17/90

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Owen Guinn Smith

## OPINION

WAGNER/TALCOTT v. SMITH BARNEY

[Same opinion to be used for each case]

In this matter the Smith Barney account executive, Richard Grace, negligently failed to make proper inquiry and "know his client" as required by NASD Rule, Article III, Section 1, and New York Stock Exchange Rule 405. This failure on the part of Respondent Grace was due solely to lack of proper training and supervision by Respondent Smith Barney.

As a proximate result of the failure sufficiently to know the financial needs and ability of the client, unsuitable investments were suggested by Mr. Grace and accepted by claimant. Losses accrued to claimant's margin account (but there were no losses found to his cash account) as a result of those suggested investments.

Claimant, however, was highly and contributorily negligent, which negligence was also a proximate cause of his losses. Consequently, any recovery for Claimant's losses was offset by his proportionate measure of negligence.

In addition to the award of damages, an award of attorneys fees was seriously considered by the arbitration panel. However no legal basis was found for such an award based upon the claim presented.

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Stuart A. Bronstein

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Stuart A. Bronstein

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*Frank G. Casella, Jr.*

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Owen Guinn Smith