

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)

Name of Claimant(s))

Sandra F. Borchers)

Name of Respondent(s))

Smith Barney Harris Upham & Co., Inc.)

James Strainer)

Mark D. Gilbert)

Case No. 90-00931

Heard before the members of the Arbitration Panel:

Randy R. Freedman, Esq.

Harold Alenick

Lionel P. Greenbaum

Public

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Industry

REPRESENTATION

Claimant, Sandra F. Borchers ("Borchers"), was represented by Kenneth R. Mikos, Esq. of Kenneth R. Mikos, P.A.

Respondent, Smith Barney Harris Upham & Co., Inc. ("SBHU"), was represented by Paul K. Barenholtz, Esq. of SBHU; James Strainer ("Strainer"), was represented by Edward J. Marko, Esq. of Marko & Stephany; and, Mark D. Gilbert ("Gilbert"), was represented by Stuart H. Singer, Esq. of Greenberg, Traurig, Hoffman, Lipoff, et al.

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on March 29, 1990. Claimant alleged that she was an inexperienced, unsophisticated investor; that Respondents, Drexel Burnham Lambert, Inc. ("Drexel"), SBHU, Gilbert and Strainer, through Gilbert, induced transactions in equity securities, options and junk bonds that were unsuitable for Claimant's expressed investment goals and financial needs; failed to disclose the substantial risks involved; made misrepresentations of and omitted to state material facts; churned the account; that Respondents' actions constituted fraud, negligent safekeeping and investment, negligent supervision, negligent retention, breach of fiduciary duty, violations of Sections 12(1) and (2) of the 1933 Securities Act and Section 517.301, Florida Statutes; and, as a result of Respondents' actions, Claimant sustained a loss.

In separate Statements of Answer filed with the NASD on January 21, 1991, Respondents, SBHU and Gilbert, denied all allegations of wrongdoing and alleged that Claimant was fully knowledgeable of all trading in the account; that she monitored the account along with her accountants and husband at all time;

discussed the trading on a daily basis with Gilbert; that her account objective was short term trading for profits; that Claimant acknowledged activity letters from Strainer and, after discussing more conservative strategies with Strainer, elected to continue to trade for profit; and, that Claimant understood and approved of the strategy and risks.

SEHU alleged the affirmative defenses of failure to state a claim; bar by statute of limitations; bar by ratification, estoppel, laches and waiver; and, alleged damages are speculative and excessive.

Gilbert alleged the affirmative defenses of failure to state a claim; failure to plead fraud with the requisite particularity; bar by ratification and waiver; and, failure to mitigate damages.

In a Statement of Answer filed with the NASD on April 18, 1991, Respondent, Strainer, denied all allegations of wrongdoing and adopted the Answer of Gilbert, paragraph 1 through 54, 71 through 79, prayer for relief and affirmative defenses. In addition, Strainer adopted the Answer of SEHU.

RELIEF REQUESTED

Claimant requested damages in the amount of \$895,000.00, interest, punitive damages in the amount of \$8,950,000.00, rescission, attorney's fees and costs.

Respondents requested dismissal and costs. Respondent, Gilbert, further requested attorney's fees.

AWARD

On April 23, 24 and 25; August 2, 6, 8 and 9; and, September 23, 24 and 25, 1991, in Fort Lauderdale, Florida, during a hearing lasting twenty-one (21) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on March 26, 1990; by Paul K. Barenholtz on behalf of SEHU on January 15, 1991; by Gilbert on January 29, 1991; and, on April 23, 1991 by Strainer.

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. The Claimant and Respondent, Gilbert, have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the above-named parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.
2. Respondent, Gilbert, is found liable and shall pay to the Claimant the amount of \$40,000.00, inclusive of interest. This amount was determined after the Panel took into consideration the fact and amount of Claimant's settlement with Respondents, SEHU and Strainer.
3. Claimant's requests for attorney's fees, costs and punitive damages are denied.

4. Respondent, Gilbert's, request for attorney's fees is denied.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$21,000.00 (21 sessions x \$1,000.00). Claimant is hereby assessed \$5,250.00 in forum fees plus \$240.09 for 25% of the expenses to bring arbitrator Alenick to Florida for the August and September 1991 hearing sessions (pursuant to the agreement of the parties) for a total of \$5,490.09, for which the NASD shall retain the \$5,131.38 previously deposited in partial satisfaction thereof. Respondent, Gilbert, is hereby assessed \$5,250.00 in forum fees plus \$240.09 for 25% of Mr. Alenick's expenses, for a total of \$5,490.09, for which the NASD shall retain the \$5,131.38 previously deposited in partial satisfaction thereof. Respondent, SEHU, is hereby assessed \$5,250.00 in forum fees plus \$240.09 for 25% of Mr. Alenick's expenses, for a total of \$5,490.09, for which the NASD shall retain the \$5,131.38 previously deposited in partial satisfaction thereof. Respondent, Strainer, is hereby assessed \$5,250.00 in forum fees plus \$240.09 for 25% of Mr. Alenick's expenses, for a total of \$5,490.09, for which the NASD shall retain the \$5,131.38 previously deposited in partial satisfaction thereof.

2. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

Fees are payable to the National Association of Securities Dealers, Inc.

OTHER ISSUES

Drexel Burnham Lambert, Inc. filed for bankruptcy and was removed as a party pursuant to the automatic stay created by the bankruptcy.

On September 23, 1991, when the hearing was reconvened for the sixteenth session, the Claimant advised the Panel that Respondents, SEHU and Strainer, had settled with Claimant. Therefore, no findings regarding liability or damages were made regarding these Respondents.

Concurring Arbitrators' Signatures



Randy R. Freedman, Esq.



Harold Alenick



Lionel P. Greenbaum

Date of Decision: October 22, 1991