

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)

Name of Claimant(s))

Stephen A. & Pamela A. Avera)

Name of Respondent(s))

Smith Barney Harris Upham & Co., Inc.)

Case No. 90-01362

Heard before the Arbitrator:

Patricia A. Shub, Esq.

Public

REPRESENTATION

Claimants, Stephen and Pamela Avera ("Avera's"), were represented by Michael Kelley, Esq. of the Law Offices of Michael F. Kelley, Esq.

Respondent, Smith, Barney, Harris, Upham & Co., Inc. ("Smith Barney"), was represented by Linda Alpert, Esq., of Smith Barney.

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on May 14, 1990. Claimants alleged that Respondent was liable for: wrongfully seizing their joint account after Mr. Avera refused to deliver in securities or to pay a debit caused by Smith Barney's unauthorized sale, and subsequent buy-in, of certain penny stocks.

In a Statement of Answer filed with the NASD on June 8, 1990 Respondent denied all allegations of wrongdoing and alleged that: Claimant placed a firm order to sell the stock; the customer agreement signed by Mr. Avera gave Smith Barney the right to hold assets in his joint account as security for the debit; after placing the sell order Mr. Avera informed Respondent that, due to a reverse stock split, he could not deliver the number of shares that had been sold and, when informed that the stock could not be bought back without a loss, failed to deliver any shares to Respondent; and pursuant to S.E.C. Rule 15(c)(3)(3), if a customer sells securities and fails to timely deliver them to the broker-dealer, the broker-dealer must close out the transaction by buying in the securities for the customer's account.

Respondent alleged that the buy-in resulted in a debit balance in Mr. Avera's individual account which Respondent has counterclaimed for. Respondent asserted affirmative defenses of: failure to state a claim; authorization; ratification; failure to timely complain; failure to exercise due diligence; failure to mitigate damages; waiver; and, estoppel.

In a Statement of Reply filed with the NASD on June 15, 1990 and amended on June 6, 1991 pursuant to Claimants' Motion to Amend Reply which was granted at the hearing, Claimants denied the affirmative defenses; denied liability, and asserted affirmative defenses to the counterclaim of: failure to state a claim; failure to mitigate damages; failure to exercise due diligence; waiver; estoppel; failure to comply with the Statute of Frauds; failure to adhere to applicable laws and regulations; and, failure to conform to standard securities industry practice and usage of trade.

RELIEF REQUESTED

Claimants requested release of their account funds plus interest, costs and attorney's fees and dismissal of the counterclaim.

Respondent requested dismissal of the claim and counterclaimed for damages in the amount of \$7,213.70 plus interest, costs and expenses.

AWARD

On June 6, and 7, 1991, in Fort Lauderdale, Florida, during hearings lasting five (5) sessions, the undersigned arbitrator heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants, on April 30, 1990 and signed on June 7, 1990 by Linda Alpert, Esq., on behalf of Respondent, Smith Barney.

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant/Counter Respondents, the Averas, are found liable, jointly and severally, and shall pay to the Respondent/Counter Claimant, Smith Barney, the amount of \$1,803.43.
2. Respondent/Counter Claimant, Smith Barney, shall upon receipt of payment of \$1,803.43 from the Averas, release the funds held in the Averas' joint account.
3. Claimants' and Respondent's requests for costs and attorneys' fees are denied.

FORUM FEES

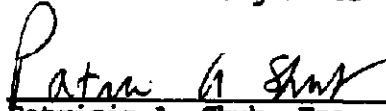
1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Arbitrator has assessed forum fees in the amount of \$1,500.00 (5 sessions x \$300.00 per session). Claimants are hereby assessed \$750.00, for which the NASD shall retain the \$125.00 previously deposited in partial satisfaction thereof. The NASD shall retain \$75.00 of the \$200.00 previously deposited by

Claimants in satisfaction of the non-refundable filing fee. Smith Barney is hereby assessed \$750.00 payable to the National Association of Securities Dealers, Inc. The NASD shall retain the \$300.00 previously deposited by Respondent in partial satisfaction thereof.

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

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

Arbitrator's Signature


Patricia A. Shub, Esq.

Date of Decision: August 9, 1991