

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Edwin L. Lauterstein

90-02206

Name of Respondent(s)

Smith Barney Harris Upham & Co., Inc.
Michael Dudman

REPRESENTATION

For Claimant: Edwin L. Lauterstein was represented by Joel H. Pullen, Esq. of Kaufman, Becker, Pullen & Reibach, Inc., San Antonio, Texas.

For Respondents: Smith Barney Harris Upham & Co., Inc. and Michael Dudman were represented by Hugh M. McGovern, Esq. of Smith Barney Harris Upham & Co., Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: August 13, 1990

Claimant's Submission Agreement signed on: August 3, 1990

Joint Statement of Answer filed by Respondents Smith Barney Harris Upham & Co., Inc. and Michael Dudman on: October 3, 1990

Respondent Smith Barney Harris Upham & Co., Inc.'s Submission Agreement signed on: October 2, 1990 by Hugh M. McGovern

Respondent Michael Dudman's Submission Agreement signed on: November 21, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: November 21, 1991 for two (2) sessions

Hearing Location: Houston, Texas

CASE SUMMARY

Claimant Edwin L. Lauterstein ("Lauterstein") alleged that Respondent Michael Dudman ("Dudman"), while employed by or acting as an agent for Respondent Smith Barney Harris Upham & Co., Inc. ("Smith Barney"), made several unauthorized transactions in Lauterstein's account as follows:

1. On February 14, 1989, Lauterstein authorized the purchase of 25 calls of Armstrong World Industries, but upon receipt his monthly statement showed 50 calls. Upon inquiry, Dudman told Lauterstein that the additional 25 calls had been purchased for himself and that he would send a check to Lauterstein in the near future. No check was received and the calls were not removed from Lauterstein's account;

2. On May 18, 1989, Lauterstein authorized the purchase of 75 calls of Smithkline-Beckman and Dudman again purchased an additional 25 calls for himself. Dudman agreed to pay for his share, but has not done so;

3. On February 28, 1989, without Lauterstein's authorization or consent, 50 calls for USF&G were purchased in his account. Dudman stated he would get Lauterstein out of the trade, but has never done so;

4. On March 3, 1989, Dudman purchased 2,000 shares of Circle K Corporation for Lauterstein's account without authorization. Dudman indicated that he would remove the stock from the account at no loss, but never did so and the stock has declined in value; and

5. On August 14, 1989, Lauterstein sold 2,000 shares of Consilium, Inc. and was to have received a check in the sum of \$23,498.00. When the check was not received, Lauterstein called Dudman and was informed that \$4,209.00 had been placed into Lauterstein's money market account and the balance used to pay off Claimant's margin balance. Claimant was unaware of any trades which could have generated that type of margin interest.

Lauterstein had refrained from complaining to Smith Barney because of his close, personal relationship with Dudman, but finally complained when it became apparent that Dudman was not going to correct the above transactions. Smith Barney refused to take any action. Based upon the above allegations, Lauterstein asserted claims for violations of the Federal Securities laws and the Texas Deceptive Trade Practices Act-Consumer Protection Act, intentional fraud, overreaching and breach of fiduciary duty.

Respondents Smith Barney and Dudman denied the material allegations of the Statement of Claim, alleging that Lauterstein was a wealthy, experienced and sophisticated investor who would have complained immediately and discharged Dudman as his broker if Dudman had been engaging in the type of activity of which he is accused. Respondents further alleged that:

1. The relationship between Dudman and Lauterstein deteriorated after May 5, 1989 when Dudman accused Lauterstein of "free-riding" and refused to accept further orders from Lauterstein unless sufficient funds were on deposit;

2. Dudman had been an account executive for over 15 years without any customer complaints and was well aware that trading in a customer's account was prohibited. It was incomprehensible that

Dudman would risk his career over the negligible sums (approximately \$6,315.00) he would have realized from these "unauthorized" transactions;

3. The \$19,289.00 payment of the margin debit balance was not for payment of margin interest, but for payment of principal which Lauterstein had borrowed from Smith Barney to buy the securities on margin;

4. Lauterstein waited until September of 1989 to complain of the "illegal" activity in his account; and

5. Lauterstein received monthly statements in which he was advised of the debit balance in his account.

In addition, Respondents asserted as affirmative defenses the doctrines of waiver, estoppel and ratification; that any losses were the result of market forces beyond Respondents' control, the risk of which was assumed by Lauterstein; and that Lauterstein failed to mitigate his damages.

RELIEF REQUESTED

Claimant Lauterstein requested entry of an award against Respondents for his total losses of approximately \$50,000.00; punitive damages in an unspecified amount; pre-judgment and post-judgment interest; and reasonable attorneys' fees.

Respondents Smith Barney and Dudman requested that the Statement of Claim be dismissed and denied in its entirety, and that costs be awarded to Respondents.

OTHER ISSUES CONSIDERED & DECIDED

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 originals remain on file with the NASD.

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. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Two (2) hearing sessions x \$400.00 = \$800.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$120.00 and refund the hearing session deposit of \$630.00 previously deposited by the Claimant Edwin L. Lauterstein. Respondent Smith Barney Harris Upham & Co., Inc. is liable for and shall pay to the NASD forum fees in the sum of \$800.00.

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

BY THE ARBITRATION PANEL

Dated:

Patrick Lanier
Patrick Lanier, Esq.
Public Arbitrator
Chairperson

January 13, 1992

John W. Field
John W. Field
Public Arbitrator

January 15, 1992

Robert M. Birenbaum
Robert M. Birenbaum
Industry Arbitrator

January 13, 1992

Date Served: _____