

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Doris A. Weinberg

91-02163

Name of Respondents

Smith Barney Harris Upham & Co., Inc. (n/k/a  
Smith Barney Shearson)  
Charles W. Rainwater

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REPRESENTATION

For Claimant Doris A. Weinberg ("Claimant"): Jack M. H. Frazier, Esq. of the law firm of Reasoner, Davis & Fox and Katherine H. Kalinowski, Esq. of the law firm of Baber & Kalinowski, P.C.

For Respondent Smith Barney Harris Upham & Co., Inc. ("Smith Barney"): Paul K. Barenholz, Vice President, Law Department of Smith Barney Shearson.

Respondent Charles W. Rainwater ("Rainwater") appeared pro se on June 3 and 4, 1993 and was thereafter represented by counsel Robert A. W. Boraks of the law firm of Boraks & Jamnback.

CASE INFORMATION

Statement of Claim filed: July 12, 1991

Claimant's Submission Agreement signed on: July 11, 1991

Answer and Cross-Claim filed September 12, 1991

Submission agreement executed by Smith Barney was undated.

Statement of Answer filed by Rainwater on September 11, 1991

Rainwater's Submission Agreement signed on: September 9, 1991

### HEARING INFORMATION

Pre-Hearing Conference: April 30, 1992 - one session  
Hearing Dates/Sessions: June 3, 1993 - two sessions  
June 4, 1993 - two sessions  
August 9, 1993 - two sessions  
August 10, 1993 - two sessions  
August 16, 1993 - two sessions  
August 20, 1993 - two sessions  
August 30, 1993 - one session

Hearing Location: NASD Offices and Claimant's counsel Jack M. H. Frazier's  
Offices in Washington, D.C.

### CASE SUMMARY

Claimant alleged, among other things, that she advised Rainwater that she wished to follow a conservative, non-speculative investment strategy. Claimant alleged that she informed Rainwater that she wished to concentrate her resources in tax-free investments with ready liquidity. Claimant alleged that she informed Rainwater that she was an unsophisticated investor. Claimant alleged that in reliance upon Rainwater's advice she authorized the purchase of 5,000 shares of Summa Medical, Inc. ("Summa"). Claimant alleged that Rainwater made material misstatements of fact to induce Claimant to invest in Summa. Claimant alleged that Rainwater failed to disclose the risks related to the investment in Summa and failed to inform Claimant that Summa did not meet the objectives of her investment strategy. Claimant alleged that the original purchase of Summa was unsuitable for her.

Claimant alleged that between July 9, 1990 and July 27, 1990, Rainwater made 11 unauthorized purchases of Summa in her account. Claimant alleged that the trades totaled 65,000 shares of Summa at a cost of \$226,275.29. Claimant alleged that she immediately complained to Rainwater regarding these purchases. Claimant alleged that Rainwater denied that there was any wrongdoing but rather that the transactions were in error and that he would see to it that the trades were "corrected". Claimant alleged that since her account did not have the necessary cash to cover the unauthorized purchases, Smith Barney liquidated Claimant's "Vantage Account" and "loaned" money against Claimant's other assets to cover the purchases of Summa.

Claimant alleged that in August of 1990, Rainwater told Claimant that he was

in dire need of a short term loan. Claimant alleged that she agreed to loan Rainwater \$80,000 for a one month period with interest if he would execute a promissory note. Claimant alleged that she loaned Rainwater the money but that he failed to honor the terms of their agreement. Moreover, Claimant alleged that when she finally deposited a check to her from Rainwater for \$100,000 in February, 1991, the check was returned by the bank as "Payment Stopped".

Claimant alleged that Smith Barney failed to supervise its broker, Rainwater, and her account. Claimant alleged that Respondents Rainwater and Smith Barney (hereinafter referred to as "Respondents") violated both state and federal securities laws. Claimant alleged that Respondent engaged in common law fraud and deceit and that they breached their fiduciary duty owed to Claimant. Claimant alleged that Respondents violated the NASD Rules of Fair Practice. Claimant alleged that Respondent Rainwater breached his contract with Claimant by failing to promptly repay Claimant in accordance with his agreement to do so.

Smith Barney maintained that Claimant failed to promptly complain about the alleged unauthorized transactions. Smith Barney maintained that it is not liable for a private loan arrangement made between Claimant and Rainwater. Smith Barney maintained that had Claimant timely repudiated the allegedly unauthorized purchase, the position could have been liquidated at no loss or possibly a profit. Smith Barney maintained that if there had actually been a series of unauthorized trades and had the broker falsely told Claimant that the shares had been sold, Claimant was on notice that she should promptly contact the firm. Smith Barney maintained that Claimant's failure to promptly notify Smith Barney indicates that she had authorized the purchase of Summa. Smith Barney maintained that Claimant's claim is without merit, that Claimant's claim is barred in whole or in part by the applicable statutes of limitation, and that Claimant's claim is barred by the doctrines of waiver, laches and estoppel.

Smith Barney cross-claimed against Rainwater and asserted that should the Panel find Claimant's losses were caused in any part by the wrongful acts of Rainwater, any award should be assessed directly against him. Smith Barney asserted that if the Panel finds Smith Barney responsible for any portion of Claimant's losses that Smith Barney is entitled to be indemnified and made whole by Rainwater.

Respondent Rainwater maintained that the initial investment in Summa was made after a thorough presentation was made to Claimant and her attorney

and advisor, Mr. Ellwood Davis. Rainwater maintained that during this presentation he informed Claimant of both the risks and benefits attendant to this investment. Rainwater maintained that the initial investment in Summa was suitable for Claimant. Rainwater maintained that the initial investment was approved by both Claimant and Mr. Davis. Rainwater maintained that although a series of Summa purchases had been made in Claimant's account, Rainwater had discussed the transaction with Claimant. Rainwater maintained that Claimant decided to hold the Summa investment. Rainwater maintained that Claimant had given him authority to sell Summa when it had broken even or was about even. Rainwater maintained that Claimant had the authority to instruct him to sell Summa at any time, but Claimant decided to hold her investment. Rainwater maintained that the loan from Claimant was a personal loan and had nothing to do with their business relationship.

#### **RELIEF REQUESTED**

Claimant in her pleading requested compensatory damages in the amount of \$367,465.26, plus punitive damages in the amount of \$350,000, plus interest costs and attorneys' fees.

Respondent Smith Barney requested that the Claimant's claim be dismissed in its entirety and that should any liability be found against it, Smith Barney requested that it be indemnified by Rainwater.

Rainwater requested that all claims and cross claims asserted against him be dismissed in their entirety.

#### **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 and hearing briefs, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. That Respondents Smith Barney and Rainwater are jointly and severally liable to the Claimant and shall pay to the Claimant the sum of TWO HUNDRED EIGHTY FIVE THOUSAND AND 00/100 DOLLARS (\$285,000); inclusive of interest.
2. That Rainwater is liable to the Claimant for the unpaid personal loan from the Claimant to him and that he shall pay to the Claimant the sum of ONE HUNDRED THOUSAND 00/100 DOLLARS (\$100,000); inclusive of interest.
3. That the Panel finds and concludes that the acts of Rainwater in this case constituted fraud in regard to the unauthorized purchase of 65,000 shares of Summa Medical, Inc. stock in Claimant's account during the month of July, 1990 and in regard to the loan transaction that Rainwater entered into with the Claimant in the fall of 1990.
4. That Claimant's claim for punitive damages is denied in its entirety.
5. That the parties shall bear their respective costs, including attorneys' fees, except for as specifically provided for herein.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

(13 sessions X \$1000) plus one prehearing session \$300 = \$13,300 minus hearing session deposit of \$1,000 from Claimant minus \$1,000 hearing session deposit by Smith Barney = net \$11,300 due.

The Panel has determined that the remaining fees in the amount of \$11,300 shall be assessed against Respondents Smith Barney and Rainwater jointly and severally.

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

Concurring Arbitrator's Signature

Name

Wendie L. Wachtel

Wendie L. Wachtel

Public/Industry

Industry Arb

Date of Decision: October 19th, 1993

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

Concurring Arbitrator's Signature  
Name

Public/Industry

David Freund  
David Freund

Public

Date of Decision: October 19th, 1993

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

Concurring Arbitrator's Signature

Name

Public/Industry

Perry E. Wallace, Jr., Esq.

Public

Date of Decision: October 19th, 1993