

N.A.S.D. Regulation, Inc. AWARD

NASD Regulation

---

In the Matter of the Arbitration Between

Name of Claimant(s)

Donald Zucker  
Edward Jackowitz

91-03634

Name of Respondent(s)

Smith Barney, Inc., f/k/a Shearson  
Lehman Brothers, Inc., f/k/a  
E. F. Hutton & Co., Inc.

---

**REPRESENTATION**

For Claimants Donald Zucker and Edward Jackowitz: Robert B. Miller, Esq. and N. Fraser Schuh, Esq. of Muskat, Odessky, Miller & Schuh, P.A., Miami, Florida.

For Respondent Smith Barney, Inc., f/k/a Shearson Lehman Brothers, Inc. f/k/a E. F. Hutton & Co. Inc.: Peter W. Homer, Esq. of Greer, Homer & Bonner, P.A., Miami, Florida.

**CASE INFORMATION**

The Statement of Claim was filed on November 15, 1991; the Amended Claim was filed on June 11, 1992; the Second Amended Claim was filed on November 20, 1993; and the Third Amended Claim was filed on December 28, 1994.

Claimants' Submission Agreement was signed on November 15, 1991.

Respondent's Statement of Answer and Counterclaim were filed on February 6, 1995.

Respondent's Submission Agreement was signed on March 2, 1992 by Rick Apicella, Vice President, Associate General Counsel of Shearson Lehman Brothers Inc.

Claimants' Answer, Defenses and Affirmative Defenses to Counterclaim and Motion to Dismiss Counterclaim were filed on March 6, 1995.

### **HEARING INFORMATION**

On November 10, 1992 and January 24, 1994, prehearing conferences lasting two (2) sessions were conducted in Fort Lauderdale, Florida via telephone conference call with NASD Regulation staff presiding. On August 26, 1994, September 20, 1994, October 30, 1996 and January 15, 1997 prehearing conferences lasting six (6) sessions were conducted in Fort Lauderdale, Florida via telephone conference call and/or in person with the full Panel presiding.

On June 16; September 20, 27, 28, and 29; October 12, 13, and 14; November 2, 3, and 4; and December 12, 13, and 14, 1994; January 12, and 13; February 2, 13, 14, 15, and 16; March 13, 14, 15, and 16; April 24, 25, 26, and 27; May 23, 24, 25, and 26; June 26, 27, 28, and 29; July 7, 10, 25, and 31; August 15, 16, 17, and 18; September 18, 19, 20, and 21; October 31; November 1, 2, 3, 28, 29, and 30; and December 1, 1995; January 9 and 12; February 27, 28, and 29; March 28 and 29; April 2, 3, 12, 15, 16, and 30; May 1, 28, 29, and 30; June 25, 26, 27, and 28; July 11, 12, 30, and 31; August 1, 2, 9, and 12; September 16, 17, and 18; October 15, 16, 17, and 18; November 12, 13, 14, and 15; December 10, 11, 12, and 13, 1996; and February 14, 1997, hearings lasting 201 sessions were conducted in Fort Lauderdale, Florida.

### **CASE SUMMARY**

Claimants Donald Zucker and Ed Jackowitz initiated this industry dispute as registered representatives who had been employed by Shearson Lehman Brothers, Inc. from 1979 through 1989. Claimants alleged that by reason of a subsequent merger transaction between Shearson and Smith Barney, Inc., Smith Barney (along with Lehman Brothers, Inc.) also became liable for the predecessor firms' responsibilities in this dispute; that Respondent provided false, fraudulent, misleading and incomplete information concerning limited partnerships that the firms originated, marketed, and sold under false pretenses; that those actions by Respondent caused the loss of the majority of Claimants' clients, resulting in substantial damages to their livelihood within the securities industry; and, that Respondent subsequently engaged in the malicious pursuit of third-party arbitration claims and the filing of defamatory U-5 amendments. Claimants maintained that Respondent's actions constituted violations of the federal RICO statute, fraudulent misrepresentation, and breach of fiduciary duty.

Claimants charged securities fraud in the origination, sales and marketing, operations, reporting, record keeping and retention of documents with respect to numerous limited partnerships vended by the Respondent in the mid to late 1980's and largely still operating to this day. Claimants denied responsibility for the improper sale to innocent public customers of these limited partnerships based upon the fact that they did not know at the time of the improper activities of the firm at the national level; and further that, as a result of those activities, the Claimants based their recommendations to their clients upon misleading materials, training, and information that had been provided by their employer.

Respondent denied all allegations of wrongdoing and alleged that no misrepresentations or omissions occurred at any time in connection with the limited partnerships; that when those investments were recommended by Claimants to customers, they were accompanied by offering and subscription documents which fully detailed the nature of the investments, the investment risk factors, the potential conflicts of interest, and the offering costs; that Claimants were responsible for reviewing and familiarizing themselves with the offering documents, providing the information contained therein to potential investors, and making suitable investment recommendations; that Claimants were fully aware of the potential risks associated with limited partnerships at the time that they recommended them; that the unsatisfactory performance and losses, if any, incurred by Claimants' customers resulted from declines in the specific markets and overall economic conditions in the late 1980's and early 1990's. Respondent maintained that the damages Claimants' requested were merely a result of disclosed risks which came to pass and not of any alleged wrongdoing by Respondent; that, to the extent Claimants asserted that they relied upon oral statements or internal use materials that were directly contradicted by the written offering materials, Respondent contended that such reliance was unreasonable as a matter of law; and, that Claimants failed to demonstrate that they actually lost customers as a consequence of wrongdoing by Respondent or that they sustained legally cognizable damages.

Respondent raised defenses including, but not limited to, the following: Claimants were aware of and assumed the risks; the losses were the direct result of market forces; the damages sought by Claimants were not compensable as a matter of law; Claimants failed to mitigate their alleged damages; Respondent acted in good faith; Claimants' claims were time-barred by the applicable statutes of limitations and by Rule 10304 (formerly Section 15) of the NASD Code of Arbitration Procedure ("Code"); Claimants approved, authorized and/or ratified Respondent's actions; Claimants were estopped from recovery; contributory negligence; no private right of action existed for violation of Respondent's internal policy or procedures; Respondent maintained adequate and reasonable supervision and control over its employees and acted in good faith; Claimants were entitled to no relief for alleged oral representations which were directly contradicted by written disclosures; Claimants' claims were barred by the doctrine of unclean hands; Respondent was not responsible or liable for acts or omissions of third parties; alleged damages were caused by Claimants' own conduct or negligence; punitive damages were not recoverable and were prohibited by New York law; and, Claimants were barred from maintaining a cause of action by virtue of their release of claims against Respondent.

Respondent filed a counterclaim against Claimants which alleged counts for slander and libel and for tortious interference with advantageous business relationships.

In response to the counterclaim, Claimants denied all allegations of wrongdoing, asserted truth as an absolute defense and further claimed the litigation privilege.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of eight million dollars (\$8,000,000.00), treble damages under the RICO statute, punitive damages of twenty-three million dollars (\$23,000,000.00), interest, costs, and a determination of entitlement to reasonable attorney's fees, the amount of such fees to be determined by a court of competent jurisdiction. Claimants also sought the dismissal of the counterclaim.

Respondent requested dismissal of all claims asserted against it by Claimants, an award of damages and punitive damages associated with its counterclaim, plus an award of all costs and expenses incurred in this matter.

### **OTHER ISSUES CONSIDERED & DECIDED**

1. On June 16, 1994 Respondent's Motion for Summary Judgment under the RICO statute was denied by this Panel.
2. On August 26, 1994 former arbitrator Ralph Beyer recused himself and the parties were given until August 31, 1994 to determine whether they would proceed with two arbitrators. On September 20, 1994 the parties accepted arbitrator Robert P. Root as Mr. Beyer's replacement.
3. During the course of the hearings, the parties made a number of motions for sanctions for alleged discovery violations and this Panel deferred ruling on all sanction requests until the conclusion of the case. At the conclusion of the hearing, there were motions for sanctions pending against each party. All pending motions for sanctions are hereby denied. However, the Panel finds that Respondent's actions with respect to the production of documents created a significant delay in the commencement of the evidentiary hearing in this matter.
4. At the conclusion of the Claimants' case-in-chief, Respondent moved to dismiss all claims asserted by Claimants including the RICO claim. The Panel reserved ruling at that time. Respondent's Motion to Dismiss is hereby denied.
5. NASD Regulation shall retain one complete set of Claimants' and Respondent's exhibits, all transcripts and one-page daily summaries of the hearing.
6. 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 a conformed copy 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 post hearing submissions, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is found not liable and, therefore, all claims against it are hereby dismissed.
2. Claimants' requests for punitive damages, treble damages under the RICO statute, costs and expenses, including attorney's fees, are denied.
3. Claimants are found not liable on the counterclaim and, therefore, all claims against them are hereby dismissed.
4. Respondent's requests for costs, expenses and punitive damages are denied.
5. All references and notations on the Form U-5 of Claimant Zucker, made by counsel for Smith Barney, Inc., Jeffrey L. Friedman, shall be expunged. If industry standards so require, said U-5 shall be amended to be consistent with the language prepared by counsel for Lehman Brothers, Inc., Linda Alpert. Respondent's counsel, Peter Homer, agreed to cooperate in affecting such expungement.
6. Claimants shall pay Two Thousand Two Hundred Fifty Dollars (\$2,250.00) to Respondent in reimbursement for Respondent's payment of additional hearing session deposits in excess of the amount assessed against Respondent for forum fees. (See paragraphs 2 and 4 in the "Forum Fees" section of this Award.)
7. Other than the above reimbursement, the parties shall each bear their own costs, expenses, and attorney's fees incurred by them in connection with this proceeding.

**FORUM FEES**

1. Pursuant to Rule 10205 (formerly Section 44(c)) of the Code, the Panel has assessed forum fees in the amount of Two Hundred Seven Thousand Dollars (\$207,000.00) (for six prehearing conferences plus 201 hearing sessions x \$1,000.00 per session).
2. Claimants are hereby assessed One Hundred Three Thousand Five Hundred Dollars (\$103,500.00), for which NASD Regulation, Inc. shall retain the Ninety Four Thousand Dollars (\$94,000.00) previously deposited by the Claimants in partial satisfaction thereof, leaving a balance due to NASD Regulation of Nine Thousand Five Hundred (\$9,500.00). Of that amount, Claimants shall pay Two Thousand Two Hundred Fifty Dollars (\$2,250.00) directly to the Respondent, as provided in paragraph 6 of the "Award" section of this decision. Claimants shall pay the balance of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00) to NASD Regulation, Inc.

3. NASD Regulation shall retain the non-refundable filing fee of Five Hundred Dollars (\$500.00) paid by the Claimants.
4. Respondent is hereby assessed One Hundred Three Thousand Five Hundred Dollars (\$103,500.00) for which NASD Regulation shall retain One Hundred Three Thousand Five Hundred Dollars (\$103,500.00) of the amount previously deposited by the Respondent in full satisfaction thereof, with a credit due the Respondent in the amount of Two Thousand Two Hundred Fifty Dollars (\$2,250.00) which shall be reimbursed by Claimants as set forth above.
5. NASD Regulation shall retain the non-refundable filing fee of Two Hundred Fifty Dollars (\$250.00) paid by the Respondent.
6. NASD Regulation shall retain the One Thousand Dollar (\$1,000.00) postponement fee previously paid by the Respondent.

Fees are payable to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

/s/	
<u>Peter J. Lavezzoli</u>	Industry
/s/	
<u>Phillip E. Norman</u>	Industry
/s/	
<u>Robert P. Root</u>	Industry

Date of Decision: March 10, 1997