

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Carol Banko Rogers/Estate of August F. Banko,
Claimant,

v.

No. 92-02093

Smith Barney Harris Upham & Co., Inc. and
Robert Guenther,

Respondents.

REPRESENTATION OF PARTIES

Claimant Carol Banko Rogers/Estate of August F. Banko ("Claimant") appeared on her own behalf.

Respondents Smith Barney Harris Upham & Co., Inc. and Robert Guenther ("Respondents") were represented by Paul K. Barenholtz, Esq., of Smith Barney, New York, New York.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about August 26, 1992. Claimant's Submission Agreement was signed on August 26, 1992.

Respondents' Submission Agreements were signed on November 18, 1992, and October 18, 1992, respectively. Respondents' Pre-Answer Motion to Dismiss was filed on or about October 20, 1992.

HEARING INFORMATION

On February 21, 1995, pursuant to Section 14 of the NASD Code of Arbitration Procedure (the "Code"), a hearing was convened by telephone for the purpose of allowing the parties to present their respective positions to the arbitrators on the issue of standing to bring this arbitration. The hearing lasted a total of one session. The undersigned arbitrators, Claimant, and Respondents' attorney were present during the course of the hearing.

CASE SUMMARY

In her Statement of Claim, Claimant alleged that Respondents sold certain stocks in the name of August F. Banko without prior authorization and placed into a joint account without proper contracts or power of attorney. Claimant further alleged that dividend checks issued to August F. Banko were

not endorsed by him before being deposited into certain accounts. Claimant further alleged that the transfers of stock were done at a time when he was not mentally capable of handling and/or understanding his financial affairs. Claimant's claims arose out of, but are not limited to the following securities transfers: Reading and Bates, 337 shares; Raytheon, 1112 shares; Units Tax Ex Sec Tr Insd Natl Ser 11 (13 units); Wabash, Inc., 150 shares; Litton, 130 shares; and Great Northern, 162 shares.

Respondents filed their Pre-Answer Motion to Dismiss in October of 1992. Respondents asserted that Claimant is the daughter, and beneficiary of the late August F. Banko, and that her claim seeks to challenge transactions in or for his account prior to his death. Respondents also asserted that Claimant is not the legal representative of her late father's estate and has no standing to act as such. Respondents also asserted that: An heir or distributee has not standing to sue to bring a direct claim in favor of an estate; and that Claimant was not Respondents' customer and therefore may not compel them to arbitrate.

Claimant's response to Respondents' position has been to assert that the Indiana Courts, in particular, Judge Lensing, Probate Judge of Vanderburgh County, Indiana, granted her standing to bring this arbitration. Claimant also asserted that she was granted standing to bring this arbitration through the NASD's assigning an arbitration case number to her file, assigning arbitrators to this case, and setting, initially, a date for hearing in this matter.

RELIEF REQUESTED

In her Statement of Claim, Claimant requested compensatory and punitive damages, the total of the claims not to exceed \$500,000.00. Claimant also requested that the stocks in question be considered as individually owned stock in the name of August F. Banko.

OTHER ISSUES CONSIDERED & DECIDED

The claim was filed in or about August of 1992. In October of 1992, Respondents filed with the NASD a Pre-Answer Motion to Dismiss the Statement of Claim on the grounds that the Claimant did not have standing to bring this arbitration. The case was transferred from the New York office of the NASD Arbitration Department to the Chicago Regional office for administration. A hearing date was initially set for February 2 through 4, 1993. The dates were postponed due to actions pending in the Indiana Court system which related to this arbitration.

In May of 1994, in response to a request made by the NASD that she provide a document from a court that indicated that she had standing, Claimant forwarded a copy of a letter from Judge Lensing, Probate Judge, Vanderburgh County, Indiana, asserting that the letter granted her standing to bring this arbitration. After having the parties restate their respective positions relative to the issue of

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standing, and after further review of the file, the parties were informed by the NASD that the undersigned arbitrators would hear and decide the present motion made by the Respondents.

The arbitrators were sent the documents listed below, for their consideration prior to making a ruling on Respondents Motion to Dismiss. The following documents were made a part of the arbitrators' exhibits: June 8, 1992 letter from Claimant to the NASD; August 25, 1992 letter from Claimant to the NASD; August 31, 1992 letter from NASD to Respondents; October 20, 1992 letter from Respondents to NASD; October 21, 1992 letter from NASD to the Claimant; November 3, 1992 letter from NASD to the Claimant; November 3, 1992 letter from Claimant to the NASD; November 18, 1992 letter from Claimant to the NASD; November 20, 1992 letter from NASD to the Claimant; November 25, 1992 letter from Respondents to the NASD; December 23, 1992 letter from the NASD to the Claimant; February 2, 1993 memorandum from the NASD to the parties; April 14, 1993 letter from Respondents to the NASD; November 4, 1993 letter from Respondents to the NASD; November 16, 1993 letter from Claimant to the NASD; December 13, 1993 letter from Respondents to the NASD; December 20, 1993 letter from Claimant to the NASD; January 12, 1994 letter from Respondents to the NASD; March 23, 1994 letter from the NASD to the Claimant; April 1, 1994 letter from Claimant to the NASD; May 9, 1994 letter from the Claimant to the NASD; July 18, 1994 memorandum from the NASD to the parties; August 2, 1994 letter from Claimant to the NASD; August 15, 1994 letter from Respondents to the NASD; September 16, 1994 letter from Respondents to the NASD; September 26, 1994 letter from Respondents to the NASD; September 26, 1994 letter from the NASD to the Claimant; October 3, 1994 letter from the NASD to the Claimant; January 20, 1995 letter from the Claimant to the NASD; February 2, 1995 letter from the NASD to the Claimant; February 3, 1995 letter from the NASD to the arbitrators; February 17, 1995 letter from the NASD to the arbitrators. The listing of documents sent to the arbitrators, and made part of the arbitrators' exhibit includes any attached exhibits/documents to those documents listed above.

After hearing the parties present their positions concerning the issue of standing, review of the pleadings, the above-referenced documents, and deliberation, the arbitrators granted Respondents motion.

AWARD

Pursuant to Section 14 of the Code, a hearing was convened by the arbitrators for the purpose of determining the issue of Claimant's standing to bring this arbitration. After considering the pleadings, the documents that were made a part of the arbitrators' exhibits, and the argument presented by the parties at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Smith Barney Harris Upham & Co., Inc.'s and Robert Guenther's Pre-Answer Motion to Dismiss Claimant's claims for lack of standing to bring this arbitration is granted. Therefore, Claimant Carol Banko Rogers/Estate of

August F. Banko's claims against the Respondents are, and each of them, denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 hearing sessions @ \$750.00 per session = \$750.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall refund the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimant.

Additional Forum Fees in the amount of \$750.00 are assessed against the Respondents.

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

CONCURRING ARBITRATORS

Dated:

Name:

March 13, 1995

Dale E. Hunt /s/
Dale E. Hunt
Presiding Chair
Public Arbitrator

March 14, 1995

George W. Harding /s/
George W. Harding
Public Arbitrator

April 19, 1995

Beth Schmidt /s/
Beth Schmidt
Industry Arbitrator

11-70-95