

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Thomas Heller as trustee for the Thomas
Heller Trust, Paul Heller and Ruth Heller

93-00764

Name of Respondent(s)

Smith Barney Harris Upham & Co., Inc.
James H. Mahoney, Jr.

REPRESENTATION

For Claimant Thomas Heller as trustee for the Thomas Heller Trust ("Trust"), Paul Heller and Ruth Heller ("Hellers"): Randall W. Henley, Esq. of Henley & Brabham, P.A., West Palm Beach, Fl.

For Respondents, Smith Barney Harris Upham & Co., Inc. ("Smith Barney") and James H. Mahoney, Jr. ("Mahoney"): David Levy, Esq. and Linda Alpert, Esq. of Smith Barney, New York, N.Y.

CASE INFORMATION

Statement of Claim filed: March 2, 1993. Claimant's Submission Agreement signed by Thomas Heller on behalf of the trust and the Hellers on: March 22, 1993.

Statement of Joint Answer filed by Respondents, Smith Barney and Mahoney on: June 1, 1993. Respondent, Smith Barney's Submission Agreement signed on: June 1, 1993 by David Levy as a Vice President of Smith Barney.
Respondent, Mahoney's Submission Agreement signed on: June 18, 1993.

HEARING INFORMATION

On April 21, 1994, in Fort Lauderdale, Florida, a Hearing lasting two (2) Sessions was held.

CASE SUMMARY

Claimants, alleged that Respondent, Mahoney made false statements and misrepresentations in connection with the purchase and continuing values of an investment in Mariott Residence Inn II, Limited Partnership ("M-LP"); Respondent Mahoney recommended the sale of MFS Inter-Income Trust fund and stated that no commission would be charged; Claimants were in fact charged commission; Respondent Mahoney withdrew the amount of the commission from the Claimants' money market account, misrepresenting it to the Claimants as a refund of commission; Respondent Mahoney, purchased shares in American Income Partners ("AIP") without authorization and misrepresented the continuing value of the investment; and Respondent Smith Barney is responsible for the acts of Mahoney as a control person pursuant to Florida Statute Section 517 and the doctrine of respondereat superior.

Respondents denied all allegations of wrongdoing and alleged that the Claimants were fully informed about the risks and material facts of all investments made; the Claimants' decisions to purchase all investments were made by them; Claimants were offered the opportunity to rescind the AIP transaction after expressing reservations about it and declined to rescind the transaction; Claimants were fully aware that a commission would be charged on the sale of investments and agreed to the commission. Respondents set forth the affirmative defenses of: failure to state a claim upon which relief can be granted; statute of limitations; failure to mitigate damages; assumption of risk; waiver; laches and estoppel.

RELIEF REQUESTED

Claimants requested: unspecified amounts for actual damages; punitive damages; interest; attorneys fees and costs.

Respondents requested: dismissal of all claims and an award of attorneys fees and costs.

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 original(s) 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. Respondents are found not liable and all claims against them are therefore, dismissed
2. Claimants' request for costs, attorney's fees and punitive damages is denied.
3. Respondents request for an award of attorneys fees and costs is denied.

OTHER COSTS

Other than Forum Fees discussed below, the parties shall each bear their own costs of this proceeding.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$1200. (2 sessions X \$600)

Claimant is hereby assessed \$600 for which the NASD shall retain the \$600 previously deposited in full satisfaction thereof.

Respondents are hereby assessed \$600, jointly and severally, payable to the NASD.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

/s/
Arthur J. Leibell, Esq., Chair

Public

/s/
Abe Mintz, Panelist

Public

/s/
Beverly B. Kennedy, Panelist

Industry

Date of Decision:

6/18/94