

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

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In the Matter of the Arbitration Between

Name of Claimants

Ron, Kenneth and Herman Winkelhake

and

93-01072

Name of Respondents

Smith, Barney, Harris Upham & Co., Inc. and Richard Guercio

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**REPRESENTATION OF PARTIES**

Ron, Kenneth, and Herman Winkelhake ("Claimants") were represented at the hearing Pro Se by Ron Winkelhake.

Smith, Barney, Harris Upham & Co., Inc. ("Smith Barney") was represented at the hearing by Paul K. Barenholtz, Esq. of Smith Barney Shearson, Inc., New York, New York. Respondent Richard Guercio ("Guercio") was represented at the hearing Pro Se.

**CASE INFORMATION**

The Statement of Claim was filed on March 18, 1993. Submission Agreement of Claimant was signed on March 13, 1993 .

Statement of Answer was filed by Respondent Smith Barney on July 2, 1993. Submission Agreement of Respondent Smith Barney was signed on July 2, 1993.

**HEARING INFORMATION**

A pre-hearing conference was held on June 17, 1994 for one session.

The hearing was held on June 20, 1994 in Chicago, Illinois for a total of two sessions.

**CASE SUMMARY**

Claimants alleged that one of their accounts held with Respondent Smith Barney and serviced through its representative, Respondent Guercio, was never credited for the commission overcharge incurred in the account by \$1,125.00 as a result of the purchase and sale of an IBM

option. Claimants also alleged that Guercio and Smith Barney charged excessive commissions and engaged in an unauthorized trade in their accounts held with Smith Barney.

Respondent Smith Barney generally denied the claims asserted against them. Smith Barney stated in its Answer to the Claim that the claim fails to state a claim for which relief may be granted, the claims are barred by waiver, estoppel and ratification, that the claims are barred by the statute of limitations, that the claim is barred by claimant's failure to mitigate their damages, that any recovery must be proportionately reduced because of claimant's own conduct, and that the claim must be dismissed because claimant's voluntarily assumed the risk.

### **RELIEF REQUESTED**

Claimants requested full reimbursement of commissions charged from the sale of their stock, full reimbursement of the stock that was sold in their account, and the \$1596 from the last trade that was sold was covered when the trade was made.

Respondent Smith Barney requested that the claim be dismissed.

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

Respondent Richard Guercio did not file with the N.A.S.D. a properly executed submission to arbitration, but is required to submit to arbitration pursuant to Section 8 of the N.A.S.D. Code of Arbitration Procedure ( the "Code") and having appeared and testified at the hearing, is bound by the determination of the arbitration panel on all issues submitted.

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 N.A.S.D..

### **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 panel determined not to award claimants any damages other than that specified in number 2 below. Therefore, the Claimants' Statement of Claim is denied and dismissed in its entirety;
2. Respondent Smith Barney shall pay to the Claimants \$1125 which represents an over-charge of commission as previously ordered by the panel in the conference call between the parties of Friday, June 17, 1994;

3. Each of the parties shall bear their own costs and expenses except as otherwise provided herein.

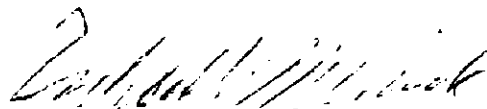
**FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference. There were two hearing sessions x \$750 = \$1500 plus one prehearing conference session = \$1800.

Pursuant to Section 44(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall retain the non-refundable filing fee in the amount of \$200.

Total Forum Fees Due to the N.A.S.D.: Claimants shall pay \$300 and Respondents Smith Barney and Richard Guercio, jointly and severally, shall pay \$1500 to the N.A.S.D.\*

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



Richard L. Merrick, Esq.  
Public Arbitrator, Presiding Chair

Dated:



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Willis E. Brown, Esq.  
Public Arbitrator

\_\_\_\_\_  
Frank R. Niederman  
Industry Arbitrator

Date Award Served By The N.A.S.D.: 7-15-94

\*The panel assessed forums fees against Respondents as a result of their delay in rectifying the clerical error within a reasonable amount of time as alleged in Claimant's Statement of Claim.

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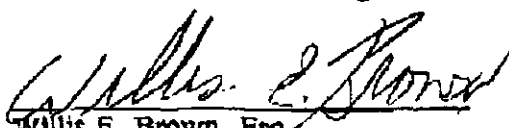
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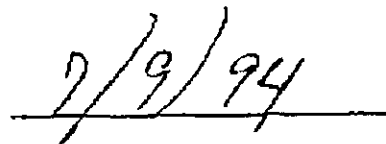
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Public Arbitrator, Presiding Chair

  
Willis E. Brown, Esq.  
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N.A.S.D. Award 93-01072

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Dated:

Richard L. Merrick, Esq.  
Public Arbitrator, Presiding Chair.

Willis E. Brown, Esq.  
Public Arbitrator

Frank R. Niederman  
Industry Arbitrator

7-7-94

Date Award Served By The N.A.S.D.:

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