

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Carl J. McCurdy

93-03266

Name of Respondent

Smith Barney Harris Upham & Co., Inc.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on August 20, 1993, Claimant Carl J. McCurdy, who appeared Pro Se, alleged that he placed an open order, good till cancelled, with Respondent Smith, Barney, Harris Upham & Co., Inc., by and through Mr. Michael J. Witherill, Second Vice President, on July 17, 1992 for 1,000 shares of Resurgens Communications Group, Inc. ("RCG") at 3 1/2 and subsequently, on August 12, 1992 Resurgens Communications Group declared a 1 for 4 reverse split, at which time, since Claimant owned shares of RCG, he received a "Letter of Transmittal" advising him of the split, whereby Claimant advised Respondent, by and through Mr. Witherill, of the pending stock split when the open order was placed on July 17, 1992. Claimant further alleged that he had a number of open orders placed with Respondent and did not follow all of them on a daily basis whereby Respondent, by and through Mr. Witherill, assured Claimant that the orders were in Respondent's computer system, and would be followed and executed without fail, at which time, Respondent did, in fact, execute a considerable number of open orders for Claimant in a timely manner. Claimant contended that early in 1993, he reviewed his portfolio and noted that RCG had fallen below 14 for calendar year 1992, at which time, Claimant contacted Respondent to ask why the RCG order had not been executed, whereby Respondent, by and through Mr. Witherill, advised him that the stock had not dropped below 14 after July 17, 1992. Claimant further contended that he informed Respondent that H. Hobart Corwin, Vice President of Finance for Resurgens Communications advised him that the stock traded at 13 3/4 on October 5, 1992, at which time, Claimant requested that Respondent resolve the matter. Claimant asserted that Respondent stated that the stock did drop to 13 3/4 but that there was not enough of a spread for the specialist to execute the order and that Respondent considered the order cancelled and the matter closed. Claimant further asserted that the order should have been

executed at 13 3/4 on October 5, 1992, thus Respondent should purchase 250 shares of Resurgens Communications stock inside his IRA or reimburse him for the difference between the price and the current market value.

Respondent Smith Barney, Harris Upham & Co., Inc., by and through their in-house counsel Ann Parry, maintained that on July 17, 1992 Claimant Carl J. McCurdy requested that Respondent, by and through Mr. Witherill, the financial consultant servicing the account, placed a "good till cancelled" order to buy 1,000 shares of Resurgens Communication Group, Inc. ("RCG") at \$3 1/2 whereby RCG was not a stock that was followed by Respondent, and Claimant's order was unsolicited. Respondent further maintained that at the time the order was placed, Resurgens was trading at \$4 1/2, but Claimant told Mr. Witherill that he anticipated that the stock would reverse split 1 for 4, at which time, pursuant to Claimant's request, Mr. Witherill completed an order ticket and submitted the order ticket to the wire operator. Respondent contended that Claimant's July monthly statement reflects the placement of the order of the 1,000 shares of RCG, and at the time the stock split occurred, Claimant owned RCG stock and was obviously following the stock. Respondent further contended that on August 12, 1992, RCG indeed declared a 1 for 4 reverse stock split and at the time of the reverse split, RCG closed at \$16 1/2, at which time, due to the stock split, trading in RCG common stock was suspended whereby the good till cancelled order was automatically removed from the system because it was too far away from the market, and accordingly, it did not appear on Claimant's August monthly statement. Respondent asserted that on October 5, 1992, RCG reached a high/ask of \$14 1/2 and a low/bid of \$13 3/4 at which time RCG closed the market with a bid of \$13 7/8 whereby Claimant's order was not filled because the order had been removed from the system. Respondent further asserted that in around April 1993, Claimant for the first time questioned Mr. Witherill about his order for 1,000 shares of RCG, at which time, the price of RCG was approximately \$38 1/2. Respondent further maintained that their monthly statements provide that "Statements shall be deemed conclusive if not objected to within ten (10) days by contacting in writing, the manager of the office servicing the account". Respondent further contended that Claimant failed to object within ten days of his receipt of the August 1992 monthly statement which first reflected the deletion of the RCG order, and instead, waited until April 1993, when the price of RCG had risen to approximately \$40.00 per share, to question the RCG order, whereby there is simply no justification for such a delay.

RELIEF REQUESTED

Claimant Carl J. McCurdy requested the sum of \$7,250.00 in actual damages.

Respondent Smith Barney, Harris Upham & Co., Inc. requested the claim be dismissed in its entirety.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Diana P. Friedman, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on August 11, 1993 and by the Respondent on October 4, 1993.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Smith Barney, Harris Upham & Co., Inc. is liable and shall pay to the Claimant Carl J. McCurdy the sum of \$7,225.00 in damages, whereby Claimant is being awarded loss net of Respondent's commission.

If possible, settlement should be made inside Claimant's IRA account. No consideration is provided in this decision for taxes, and if such costs are incurred, they are Claimant's costs.

2. The parties shall bear their respective costs.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Carl J. McCurdy shall be retained by the NASD, Inc. Respondent Smith Barney, Harris Upham & Co., Inc. is liable and shall pay to the Claimant the sum of \$150.00, as reimbursement.

AFFIRMATION

I, **DIANA P. FRIEDMAN**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.


Signature of Arbitrator

DATE OF DECISION: January 5, 1994