

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James W. Venner

94-00188

Name of Respondents

Smith Barney Shearson, Inc.
Mitchell Haberman

REPRESENTATION

For Claimant: David A. Lewis, Esq., Morristown, New Jersey.

For Respondent: Douglas C. Wurth of Smith Barney Shearson Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: January 14, 1994.

Claimant's Submission Agreement signed on: January 7, 1994.

Joint Statement of Answer filed by Respondents Smith Barney Shearson, Inc. and Mitchell Haberman on: March 14, 1994.

Respondent Smith Barney Shearson, Inc.'s Submission Agreement signed on: Respondent Smith Barney Shearson, Inc. did not submit a Submission Agreement as required pursuant to Section 25(b)(1) of the NASD Code of Arbitration Procedure.

Respondent Mitchell Haberman's Submission Agreement signed on: Respondent Mitchell Haberman did not submit a Submission Agreement as required pursuant to Section 25(b)(1) of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Dates / Sessions: November 7, 1994 / Two Sessions.
 December 8, 1994 / Two Sessions.
 December 9, 1994 / Two Sessions.

Hearing Location: National Association of Securities Dealers Offices located
at 33 Whitehall Street, New York, New York.

CASE SUMMARY

Claimant alleged that during the period beginning on or about January 10, 1991 and ending on or about January 14, 1993 Respondent Mitchell Haberman ("Haberman"), acting in his capacity as a financial consultant for Respondent Smith Barney Shearson, Inc. ("Smith Barney"), mismanaged Claimant's account and caused Claimant's account to suffer a loss. In addition, Claimant alleged that investments made in four different municipal funds in Claimants account during the two year period were questionable. Claimant further alleged that Respondent Haberman engaged in a series of "churning" transactions involving the purchase and sale of a series of municipal funds culminating in the consolidation of all Claimants funds into the Lord Abbett Fund in January 1993. Claimant alleged that Haberman's explanations for these transactions were inadequate and revealed a lack of purpose and philosophy in Haberman's management of Claimant's account. Claimant also alleged that Respondent Haberman breached his fiduciary duty to Claimant. Claimant also maintained that Claimant's return on his investments for the two year period in question was 5.1%, or an average annual return of 2.55%.

Respondents, Smith Barney and Haberman, maintained, in their joint answer, that in November of 1990 Haberman, while employed at Shearson Lehman Brothers, was assigned to handle Claimant's account which consisted exclusively of holdings in tax free bonds and mutual funds. Respondents further maintained that in January of 1991 Claimant informed Haberman that he wanted his account to make investments in tax free vehicles that generated monthly dividends and had low levels of volatility. Respondents also maintained that Claimant stated to Haberman that he wanted to receive a monthly check from earnings made on his investments and that dividend and interest earnings would not be reinvested.

Respondents maintained that in January and February of 1991 Claimant instructed Haberman to invest approximately \$18,637 in a Unit Investment Trust and approximately \$50,000 in the Nuveen New Jersey Municipal fund ("Nuveen Fund"), and that both investments were consistent with Claimant's investment objectives. Respondents next maintained that in August of 1991 Haberman

informed Claimant that the account had experienced a profit in the Nuveen Fund and that Claimant stated to Haberman that he wanted to capture the profit and invest in similar funds. Respondents maintained that Haberman sold Claimant's position in the Nuveen Fund and invested in UTS Trust in August of 1991 and that Claimant received \$4,464 in dividends from the investment. Respondents further maintained that in March of 1992 Haberman recommended to Claimant that he sell the UTS Trust when Haberman realized that certain bonds held in the UTS Trust were in a position to be called and that Claimant sold the UTS Trust at a slight loss.

Respondents maintained that Haberman recommended and Claimant approved investments into the Franklin New Jersey Tax Free Income Fund of approximately \$60,018 and the SLB New Jersey Municipal bond fund of approximately \$50,000. Respondents further maintained that Haberman made six further investments in the Franklin New Jersey Tax Free Income Fund two in the SLB New Jersey Municipal bond fund for Claimant's account and that Claimant received dividends of approximately \$14,257 on these investments. In addition, Respondents maintained that in January 1993 Haberman recommended that Claimant shift his position to the Lord Abbett Fund based upon the fund's 9.2% return for 1992. Respondents maintained that on January 14, 1993 Claimant instructed Haberman to sell Claimant's position in the SLB New Jersey Municipal bond fund and to invest the proceeds in the Lord Abbett Fund.

Respondents maintained that when Claimant moved his account away from Respondents the account had a net gain of \$21,637. Respondents further maintained that Claimant, in his Statement of Claim, failed to recognize approximately \$42,093 in dividends earned by Claimant while his account was under Haberman's supervision.

Respondents maintained as an affirmative defense that Claimant's Statement of Claim failed to state a cause of action upon which relief could be granted. Respondents further maintained as affirmative defenses that Claimant was barred from asserting his claim because he initiated and ratified all transactions complained of in his account and that Respondents acted in compliance with all applicable rules and regulations and acted in good faith, that any damages, if any, suffered by Claimant were caused by Claimant's failure to mitigate damages. Additionally, Respondents maintained as an affirmative defense that Claimant's Statement of Claim was barred, in whole or in part, by applicable Statutes of Limitations. Respondents also maintained as an affirmative defense that any damages allegedly suffered by Claimant had no causal relationship with any act committed by or legally attributed to Respondents. Respondents maintained that Claimant did not reasonably rely, to his detriment, on any action or inaction of Respondents, and that Respondents discharged their duties to Claimant in a

accordance with accepted brokerage procedure and all exchange and governmental regulations. Respondents maintained that no misrepresentations, omissions or misstatements were made to Claimant with respect to the investments in Claimant's account.

Respondents also maintained that the due process clause of the United States Constitution and applicable provisions of the New York State Constitution precluded Claimant from recovering punitive damages. Respondents further maintained that New York law governed the dispute and that under New York law Claimant was barred from recovering punitive damages.

RELIEF REQUESTED

Claimant requested:

1. An award in the amount of \$20,173 in actual damages.
2. Attorney's fees and costs.

Respondents requested:

1. The Statement of Claim be dismissed.
2. Costs be awarded to Respondents.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents are liable jointly and severally and shall pay to Claimant the sum of \$14,202.
2. Each party shall bear their respective costs, including attorneys' fees.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

Page 5

NASD Award #94-00188

6 sessions X \$300 = \$1,800.

Forum fees Assessed Against:

1. Claimant is assessed \$400 which represents the \$100 filing fee paid by Claimant plus \$300 hearing session deposit paid by Claimant.
2. Respondents are assessed \$1,500 which represents the balance of the forum fees due. Respondents are liable jointly and severally and shall pay to the NASD the sum of \$1,500.

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

Page 6

NASD Award #94-00188

Arbitrator's Signature

Name

Public Chairperson

Diane Getzler, Esq.
Diane Getzler, Esq.

Date of Decision: December 27, 1994

Page 7

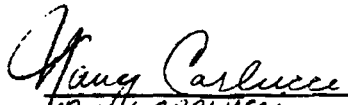
NASD Award #94-00188

STATE OF: CONNECTICUT

ss: STAMFORD

COUNTY OF: FAIRFIELD

On this 23rd day of December , 1994, before me personally appeared Diane J. Getzler, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



MARY CARLUCCI
NOTARY PUBLIC (My Comm Exp. 1/31/16)