

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Ray A. Smith, and
Geraldine Smith,

Claimants

and

No. 94-01752

Shearson Lehman Brothers, Inc., n/k/a
Smith Barney
PaineWebber Incorporated,
Daniel Zessinger, and
Prudential Securities, Inc.,
Respondents

REPRESENTATION OF PARTIES

Ray A. Smith, and Geraldine Smith ("Claimants") were represented by Edward C. Cody, Esq., St. Louis, Missouri.

Prudential Securities, Inc. ("PSI") was represented by H. Todd Iverson, Esq., of Green, Hoffmann & Dankenbring, P.C., Clayton, Missouri.

Daniel Zessinger ("Zessinger") failed to appear at the hearing.

Shearson Lehman Brothers, Inc. ("SLB") was represented by Rick Apicella, Esq., of Smith Barney, New York, New York.

PaineWebber Incorporated ("PWI") was represented by John W. Shaw, Esq., of Bryan Cave, Kansas City, Missouri.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about May 10, 1994. Claimants' Submission Agreement was signed on January 31, 1993. Claimants' Amended Statement of Claim was filed on or about April 6, 1995.

PSI's Statement of Answer was filed on or about October 13, 1994. PSI's Submission Agreement was signed on October 21, 1994. PSI's Amended Statement of Answer was filed on or about August 29, 1995.

PWT's Statement of Answer was filed on or about September 8, 1994. PWT's Submission Agreement was signed on September 8, 1994.

SLB's Statement of Answer was filed on or about September 7, 1994.

The NASD does not have a record of Zessenger having filed an Answer to the Statement of Claim or a Submission Agreement.

HEARING INFORMATION

A pre-hearing conference was held on March 17, 1995 for one (1) session.

The hearing was held on September 18 and 19, 1995 for two (2) sessions each day, and September 20, 1995 for one (1) session, in St. Louis, Missouri, for a total of five (5) sessions. SLH was dismissed as a respondent prior to the hearings in this matter. PWI settled with the Claimants and did not participate in the hearings.

CASE SUMMARY

Claimants alleged that respondent Zessenger, acting alone or, in concert with PSI, and PWI, willfully employed devices, schemes, and artifices to defraud, and willfully omitted to state material facts, and wilfully engaged in acts, practices, and courses of business which operated as a fraud and deceit on Claimants. Claimants further alleged that Zessenger: Used the proceeds obtained from Claimants securities transactions to pay off debts or obligations of Zessenger and investment returns promised to other investors by Zessenger; made untrue statements to Claimants that he was investing with a real estate buyer in the area of Hermann, Missouri, for the purpose of purchasing foreclosed real estate, when such was not true; made misleading and untrue statements as to the value of Claimants' accounts; omitted to state material facts; made unauthorized transactions and unauthorized use of Claimants' funds; committed fraud; made unsuitable purchases and sales for Claimants' accounts; and churned Claimants' accounts. Claimants also alleged that PSI and PWI: Were careless and negligent in failing to properly instruct and supervise Zessenger; and were careless and negligent in hiring Zessenger without conducting an adequate and complete pre-employment investigation of Zessinger; breached their fiduciary duty to Claimants. Moreover, Claimants alleged that PWI and Zessinger charged excessive commissions, and also alleged that PSI and Zessinger engaged in "in-and-out" trades. The allegations arose out of transactions in the following securities as set forth in the Amended Statement of Claim PaineWebber Insured Mortgage Partners I Limited Partnership; Putnam Tax Free Income Trust (Insured Fund); Putnam Tax Free Income Trust Hi Yield Fund; ACM Gov't Income Fund; ACM Gov't Sec. fund Im.; Colonial Hi Inc. Muni Tax SB7; Japan OTC Eq. Fund, Inc.; MFS Inter Inc. Tr SBI; Putnam Master Inter Inc. TR SB; Putnam Premium, Inc. Tr. SBI; American Barrick; American Steel and Wire Corp shares; Archer Communications, Inc. shares; BeautyLabs, Inc. shares; First American Bancorp, Inc. shares; Enstar Group, Inc. shares; Measurement Specialties shares; Rochester Community Savings Bank shares; Sage Analytics Int'l shares; Software Toolworks, Inc. shares; Anheuser-Busch 14% Bond; FICO Strip Ser 13% Bonds; FICO Strip Ser 16% Bonds; GNMA 9% Bonds; GNMA Bonds; Midway, Texas 9% bonds; SW Bell 8.25% bonds; Providence, R.I. Public Housing Authority 3.75% Bond; CACI International, Inc.

Class A Bond; Interface, Inc. Class A bonds; LA Gear, Inc. shares; Nat'l Lampoon, Inc. shares; Occidental Oil shares; Brilly Twp N. Jersey MBIA Bonds; Mt. Vernon, MO Bonds; and First Seimic shares; Special Devices shares; Choice Drug Systems, Inc.

PWI denied being liable to the Claimants for damages in any manner whatsoever. PWI asserted the following affirmative defenses: The statement of Claim failed to state a cause of action upon which relief could be granted; PWI acted in compliance with all applicable rules and regulations and acted in good faith and did not directly induce the alleged act or acts, if any, constituting alleged violations of law; the damages suffered by the Claimants have no causal relationship with any act committed by or legally attributable to PWI; estoppel; the doctrines of ratification, affirmance, laches, and waiver; the injuries, if any, alleged were caused, in whole or in part, by the conduct of the Claimants; failure to mitigate damages; Claimants' claim is barred by the applicable statute of limitations, assumption and risk of loss; Claimants did not reasonably rely to their detriment on any action or inaction of PWI or any action or inaction legally attributable to PWI; the transactions complained of were authorized by Claimants, who were, at all times, in sole control of the assets; and Claimants knew and assumed the risks associated with the investments made in their account through PWI and represented themselves as willing and able to assume those risks.

PSI denied each and every allegation of wrongdoing asserted against it in the Statement of Claim. In addition, PSI asserted the following affirmative defenses: Claimants failed to state a claim upon which relief may be granted; the Claimants are barred by the applicable statutes of limitations; Claimants are barred from recovery under the doctrines of laches, waiver, estoppel, and ratification; Claimants have failed to mitigate their damages; and Claimants' claims for punitive damages and attorneys' fees are not available under governing law.

RELIEF REQUESTED

Claimant requested an award and judgement against Respondents, and each of them, for pre-judgement or pre-award interest on sums found due and owing Claimants, together with an accounting, and for such other and further relief as may be just and proper in the premises. Specifically, Claimants requested: An accounting and request for award and judgement against Respondents for \$600,000.00; punitive damages against the Respondents and each of them in the amount of \$2,000,000.00; and actual damages of \$650,000.00 and a total of \$1,850,000.00 in treble damages against Zessenger.

PWI requested that the claims asserted against it be denied in their entirety and that it be awarded its' costs.

PSI requested that the claims asserted against it be denied in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

On or about September 2, 1994, SLB filed a Motion to Dismiss Claimants' Statement of Claim Pursuant to the NASD Code of Arbitration Procedure §§ 16, 25 and 32(d)(1). After considering the

pleadings and relevant motion documents, and arguments presented by counsel during a pre-hearing held on March 17, 1995, the arbitrators granted the motion. The arbitrators also granted Claimants leave to file an Amended Statement of Claim.

On or about September 7, 1995, notice of settlement between the Claimants and respondent PWI was filed with the NASD. PWI's participation in this arbitration terminated at that time.

Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondent Zessenger has been properly served with the Statement of Claim pursuant to §13 and §25 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondent Zessenger had received due notice of the hearing as required under §26 of the Code and that arbitration of the matter would proceed pursuant to §29 of the Code.

Respondents Zessenger and SLB did not file with the NASD executed submissions to arbitration but are required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and are bound by the determination of the arbitration panel on all issues submitted.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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 PSI and Zessenger are jointly and severally liable for, and shall pay to the Claimants the sum of \$83,325.00 as satisfaction of their claim for compensatory damages.
2. Respondent Zessenger is liable for, and shall pay to the Claimants the sum of \$250,000.00 as satisfaction of their claim for punitive damages.
3. All other requests for damages/claims for relief not specifically set forth in this Award are denied and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000.00 per hearing session and \$300 for each prehearing conference, if any. There were five (5) regular sessions x \$1,000.00 = \$5,000.00 and one (1) prehearing conference session x \$300.00 totaling \$5,300.00 in forum fees. Pursuant to §43(b) of the Code, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the National Association of Securities Dealers, Inc. ("NASD") shall **retain** the non-refundable filing fee in the amount of \$250.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,000.00 previously deposited with the NASD by the Claimants.

Pursuant to §39(b), the NASD shall retain postponement fees in the amount of \$1,000.00 previously deposited with the NASD by PWI.

Pursuant to §45 of the Code, PWI is liable for, and shall pay to the NASD the sum of \$200.00 as payment of its member surcharge.

Pursuant to §45 of the Code, PSI is liable for, and shall pay to the NASD the sum of \$200.00 as payment of its member surcharge.

Pursuant to §45 of the Code, SLB is liable for, and shall pay to the NASD the sum of \$200.00 as payment of its member surcharge.

Additional forum fees in the amount of \$2,650.00 are assessed against respondent PSI.

Additional forum fees in the amount of \$1,650.00 are assessed against the Claimants.

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

Dated:

Thomas A. Cipolla
Thomas A. Cipolla
Public Arbitrator, Presiding Chair

s/s

October 31, 1995

Mark R. Lee
Mark R. Lee
Public Arbitrator

s/s

November 1, 1995

Richard L. Johannrsman
Richard L. Johannesman
Industry Arbitrator

s/s

November 1, 1995