

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

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimant**

Michael Schou

Case No.: 94-03356

**Name of Respondent**

Smith Barney Shearson, Inc.

**Name of Third Party Respondent**

Donald Zucker

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**REPRESENTATION**

For Claimant, Michael Schou ("Schou"): Robert Miller, Esq. of Muskat, Odessky, Miller, & Schuh, P.A. of North Miami, Florida.

For Respondent, Smith Barney Shearson, Inc. ("Smith Barney"): Lonnie K. Browne, Esq. of Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, P.A. of West Palm Beach, Florida.

For Third Party Respondent, Donald Zucker ("Zucker"): N. Fraser Schuh III, Esq. of Muskat, Odessky, Miller & Schuh, P.A. of North Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed on September 30, 1994.

Claimant's Submission Agreement signed on September 1, 1994.

Statement of Answer filed by Respondent, Smith Barney on November 18, 1994.

Respondent, Smith Barney's Submission Agreement signed on November 18, 1994.

Third Party Respondent, Zucker did not file an answer.

Third Party Respondent, Zucker did not file an executed Submission Agreement as required under Rules 10301 and 10314 of the Code of Arbitration Procedure (see "Other Issues").

### **HEARING INFORMATION**

A Pre-Hearing Telephone Conference lasting one (1) session was conducted on May 22, 1996.

On June 13 and 14, October 30 and 31, and November 1, 2, 4, 5, 6, 7, and 8, 1996, in Fort Lauderdale, Florida, hearings lasting twenty (20) sessions were conducted.

### **CASE SUMMARY**

Claimant alleged securities fraud in the origination, sales and marketing, operations, reporting, and record keeping and retention of documents with respect to the Mendik real estate limited partnership and other limited partnerships vended by the Respondent in the mid-1980's and still operating to this day.

Third Party Respondent, Zucker denied responsibility for the improper sale to Claimant of the Mendik limited partnership based upon the fact that he did not know at the time of the improper activities of the firm at the national level, and that this resulted in Mr. Zucker basing his recommendation to the Claimant upon misleading materials that had been provided by the firm. Mr. Zucker moved for a directed verdict based upon the absence of any evidence to show wrong-doing on his part in relying upon the materials distributed to him by his own firm.

Respondent, Smith Barney alleged that a reasonable basis existed for the creation, marketing and sale of Mendik Real Estate Limited Partnership Respondent further asserted that the partnership was suitable for Claimant and that Claimant was contributorily negligent for failing to read the prospectus and other public reports provided by the General Partners. Respondent denied all allegations of fraud in the origination, marketing, sale and reporting of Mendik Real Estate Limited Partnership and asserted compliance with the rules of the SEC and self-regulatory organizations in all such activities. Respondent affirmatively defended the claims on the grounds that the claimed wrongful acts did not proximately cause Claimant's losses. Respondent asserted that the claims were barred by Rule 10304 of the NASD Code of Arbitration Procedure, as well as various statutes of limitation. Respondent requested dismissal of the case in its entirety and asserted entitlement to attorney's fees pursuant to Fla. Stat. 517.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$120,000, together with interest, treble damages, punitive damages, attorney's fees, and costs.

Respondent, Smith Barney requested dismissal of the Statement of Claim, attorney's fees, and costs.

**OTHER ISSUES CONSIDERED & DECIDED**

1. 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.
2. This Panel finds that Third Party Respondent, Zucker was required to file a Statement of Answer and sign a Submission Agreement pursuant to Rules 10301 and 10314 of the Code of Arbitration Procedure, Zucker being a person associated with an NASD member firm at the time the facts giving rise to this controversy arose.

**AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, Smith Barney is found liable and shall pay to Claimant the sum of Two Hundred and Eighteen Thousand Five Hundred and Seventy-six dollars (\$218,576.00) which is inclusive of interest.
  - a. Respondent, Smith Barney is found liable under counts 3, 6, and 8 of the Statement of Claim.
  - b. Counts 1, 2, 4, 5, 7, 9, 10, and 11 of the Statement of Claim are hereby denied.
2. Respondent, Smith Barney's Counterclaim is hereby denied.
3. Claimant's request for attorney's fees, treble damages and punitive damages is hereby denied.
4. Respondent's request for attorney's fees and costs is hereby denied.

Respondent, Smith Barney shall pay to Claimant costs in the amount of Twenty-five Thousand dollars (\$25,000.00).

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of Fifteen Thousand Seven Hundred and Fifty dollars (\$15,750.00) (one (1) pre-hearing conference x \$750.00 plus twenty (20) hearing sessions x \$750.00).

1. Respondent, Smith Barney is hereby assessed forum fees in the amount of Fifteen Thousand Three Hundred (\$15,300.00), \$750.00 of which shall be paid directly to the Claimant and the remaining \$14,550.00 shall be paid to the NASD, Inc.
2. The NASD shall retain the non-refundable filing fee of Two Hundred dollars (\$200.00) paid by the Claimant.
3. Respondent, Smith Barney shall reimburse the Claimant Two Hundred dollars (\$200.00) for the non-refundable filing fee.

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

### Concurring Arbitrators' Signatures

Public/Industry

Public/Chairman

Public

## Industry

**Date of Decision:** December 11, 1996