

## NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between

Bell Sports Corp.,

Claimant,

v.

No. 95-00108

Wesley D. Tate, and

Smith Barney Shearson, Inc., nka

Smith Barney Inc.,

Respondents.

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### REPRESENTATION OF PARTIES

Bell Sports Corp. ("**Claimant**") was represented by Howard Ross Cabot, Esq., of Brown & Bain, Phoenix, Arizona.

Wesley D. Tate ("Tate"), and Smith Barney Shearson, Inc. nka Smith Barney Inc. ("SB") (collectively referred to as "**Respondents**") were represented by Harry T. Walters, Esq., of Smith Barney Inc., New York, New York.

### CASE INFORMATION

Claimant's Statement of Claim was filed on or about January 6, 1995. Claimant's Submission Agreement was signed on January 3, 1995.

Respondents' Statement of Answer was filed on or about March 9, 1995. Respondent Submission Agreement of was signed on

### HEARING INFORMATION

A pre-hearing conference was held on September 6, 1995 for one (1) session.

The hearing was held on February 27, 28, and 29, 1996 for two (2) sessions each day, March 1, 5, and 7, 1996 for two (2) sessions each day, March 6, 1996 for three (3) sessions, and June 5 and 6, 1996 for two (2) sessions each day in Phoenix, Arizona for a total of 19 sessions.

### **CASE SUMMARY**

Claimant alleged that Respondents: Violated §§12(2) and 15 of the Securities Act of 1933; violated §§10(b) and 20(a) of the Securities Act of 1934 and Rule 10b-5; violated NASD and NYSE Rules; violated Ill. Rev. stat. ch. 815, act 5, §12, A.R.S. §44-1991 and other similar state securities laws that may be held to apply; violated Ill. Rev. stat. ch. 815, act 505, §§1 and 2, A.R.S. §44-1522 and other similar statutes that may be held to apply; committed fraudulent misrepresentation and concealment; committed negligent misrepresentation; breached their fiduciary duty; breached their contract; committed negligence and negligent supervision; and violated A.R.S. §13-2314. The allegations arose out of transactions in: Central Marine Power \$100 par issue; Commonwealth Edison \$100 par issue; Washington Natural Gas fixed rate preferred stock; Espirito Santo Overseas, Ltd. fixed rate preferred stock; and other securities more fully presented at the hearings in this matter.

Respondent denied the allegations set forth in the Statement of Claim. Respondents also asserted the following affirmative defenses: The Statement of Claim fails to state a claim upon which relief can be granted; Respondents did not make any false representations to Claimant, or Claimant did not reasonably rely on any such representations, or the representations were not material to Claimant; Respondents did not act with scienter in any respect concerning the accounts; the claims are barred, in whole or in part, by the applicable limitations period, eligibility requirement and by principles of laches; Claimant failed to mitigate its damages; to the extent any losses or diminution in the value of Claimant's account has occurred, such losses were within the risks Claimant assumed; the purported wrongdoing on the part of Respondents was not the proximate cause of the losses for which Claimant seeks recovery; Claimant's comparative fault, lack of diligence and failure to conduct its own financial affairs reasonably and responsibly bars any recovery of damages from Respondents; the transactions in Claimant's accounts were suitable for it in light of its financial circumstances and investment objectives; Claimant ratified, approved and acquiesced in the transactions in the account, and is barred by laches, waiver and estoppel; punitive damages are not available in this forum and may be unconstitutional under certain circumstances; the losses complained of were not the result of market forces and not culpable conduct by Respondents.

### **RELIEF REQUESTED**

Claimant requested an award in the amount as follows: Punitive damages in an amount to be proven at the arbitration hearing; for rescission, including the return of all securities in Claimant's possession to Smith Barney in exchange for a return of the purchase price, plus interest thereon at the maximum legal rate allowed by law from the original date of payment, and for rescissionary damages as to any securities no longer in Claimant's possession, for a total rescissionary recovery in an amount estimated to exceed \$35,000,000; alternatively, for recovery of its losses in an amount to be proven at the arbitration hearing, but estimated to exceed \$13,900,000; for treble damages pursuant to A.R.S. §13-2314(A); for reasonable costs and attorneys fees pursuant to A.R.S. §12-341.01 and all other statutes raised in the Statement of Claim that permit such recovery; for pre- and post-judgement interest at the maximum legal rate; and for such other relief as the panel deemed just and proper.

Respondents requested that the claims asserted against it be dismissed in their entirety and that SB be awarded its' costs and attorneys' fees.

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

On or about April 21, 1995, SB filed a motion to transfer the situs of this matter from Phoenix, Arizona to Chicago, Illinois. The NASD referred the decision on the motion to the arbitrators. On or about June 5, 1995, SB filed an objection to the NASD's decision, again requesting that the Director of Arbitration make the decision on their April 21, 1995 motion. The objection was denied. The parties agreed to an in-person pre-hearing conference in Phoenix, Arizona on August 14 through 18. After hearing arguments, review of the relevant documents and pleadings, the arbitrators denied the motion to change the situs of the hearing.

The NASD does not have a record of Respondents having filed properly executed submissions to arbitration but are required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing 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 and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Respondent Smith Barney Inc. is liable for, and shall pay to the Claimant the sum of \$1,400,000 as an award of compensatory damages. Respondent Wesley D. Tate is liable for, and shall pay to the Claimant the sum of \$400,000 as an award of compensatory damages.

All other claims/requests for relief not specifically set forth herein are, and each of them, denied with prejudice.

Each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each prehearing conference, if any. There were 19 regular sessions x \$1,500 and one (1) pre-hearing session x \$300 = \$28,800 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (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 NASD shall **retain** the non-refundable filing fee in the amount of \$300 and shall **refund** the hearing session deposit in the amount of \$1,500 previously deposited with the NASD by the Claimant.

Pursuant to §45 of the Code, the NASD shall retain the member surcharge fee in the amount of \$200 previously paid by SB.

Additional forum fees in the amount of \$28,800 are assessed against the Respondents. This is to be offset by the funds previously sent in to the NASD on July 26, 1995, and August 8, 1995 totaling \$2,000. The remaining balance of the forum fees is \$26,800.

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

**Concurring Arbitrators**

Dated:

Glenn C. Johnson

/s/

June 29, 1996

Glenn C. Johnson

Public Arbitrator, Presiding Chair

David W. Martin

/s/

July 16, 1996

David W. Martin

Industry Arbitrator

**Dissenting Arbitrator**

Howard W. Shannon

/s/

June 28, 1996

Howard W. Shannon

Public Arbitrator