

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Yvonne R. Acuna and Rodolfo Acuna, *et al.*, Claimants vs. Smith Barney, Inc., Sterling Smith and Frank Maggio, Respondents.

Case Number: 95-03048

Hearing Site: Houston, TX

REPRESENTATION OF PARTIES

Yvonne R. Acuña and Rodolfo Acuña, Esther A. Almaraz and Ernst G. Arnold, Colibri Holdings, Inc., Rene Gutierrez Jimenez, Mercedes Lenz de Gutierrez and Adriana Gutierrez Lenz, Irazu Enterprises, Ltd., Kale Financial, Ltd., Magnolia Enterprises, Ltd., Alejandro Rosenstein and Lourdes L. de Rosenstein, Paule A. Rosenstein and Dr. Emilio Rosenstein, Rosfamsa, S.A., Carlos Saenz, Individually and as Trustee for Karen Vanessa Saenz, Saenz-Beach, Inc., Sagittarius Industries, Ltd., Maria Sten, Yorkshire International Corporation, and Zayil, Ltd. ("Claimants") were represented by Theo W. Pinson and Glenn R. LeMay of Law Offices of Pinson & Associates, P.C., Houston, Texas.

Respondents Smith Barney, Inc. and Frank Maggio were represented by Paul W. Stivers and Dan F. Laney III of Rogers & Hardin, Atlanta, Georgia.

Respondent Sterling R. Smith was represented by Andrew R. Harvin of Doyle, Restrepo, Harvin, & Robbins, L.L.P., Houston, Texas.

CASE INFORMATION

Claimants' Statement of Claim was filed on or about June 21, 1995, and First Amended Statement of Claim was filed on February 8, 1996.

Claimants' Submission Agreements were signed on June 21, 1995.

The "Answer of Smith Barney Inc., Frank Maggio and David Standridge to Statement of Claim and Counterclaim of Smith Barney" was filed on or about October 20, 1995. On or about February 7, 1996, Smith Barney and Frank Maggio filed their "Answer of Smith Barney Inc. and Frank Maggio to Claimants' First Amended Statement of Claim". On February 21, 1996, Respondents Smith Barney Inc., Frank Maggio and David Standridge filed their "Answer of Smith Barney Inc., Frank Maggio and David Standridge and Counterclaim of Smith Barney to Claimants' Fourth Version of Their Statement of Claim".

Smith Barney's and Frank Maggio's Submission Agreements were signed on July 26, 2000.

Respondent Sterling R. Smith filed his Answer to the Statement of Claim on or about October 20, 1995. On February 6, 1996, the "Amended Answer of Sterling R. Smith to Claimants' First Amended Statement of Claim" was filed.

Sterling R. Smith's Uniform Submission Agreement was signed on September 6, 1995.

CASE SUMMARY

Claimants submitted the following case summary:

Claimants were all customers of Smith Barney, and their accounts were all assigned to Sterling R. Smith, the broker, who was under the supervision of Frank Maggio, the branch manager of the Smith Barney office in the Houston Galleria. The Claimants' accounts all contained high-yield bonds purchased while Sterling R. Smith was the Claimants' broker and, except for one Claimant account belonging to a minor, all accounts were leveraged through the use of margin.

Claimants alleged that Respondents owed a fiduciary duty to Claimants and that the Respondents breached their fiduciary obligations by their failure to know their customers, failure to comply with investor suitability requirements, failure to supervise Sterling R. Smith, failure to comply with Smith Barney's own internal procedures (including the making of principal trades where discretion was exercised by the broker:), failure to comply with NASD rules, and failure to comply with the duty of good faith and fair dealing. Claimants further alleged that the Respondents breached their fiduciary duty by failing to disclose numerous facts, including that the trades made in the Claimants' accounts were made for the benefit of the Respondents rather than the Claimants, that the trades were unsuitable for each of the Claimants based on the facts disclosed by Claimants to Respondents, and that there was an undue concentration of issues of bonds in the Claimants' accounts.

Claimants further alleged that the Respondents' conduct violated Section 17.46(b) of the Texas Deceptive Trade Practices Act ("DTPA"), in that Respondents represented that the investment scheme employed was not risky because of the particular expertise of Respondents, and that the employees of Smith Barney were properly supervised. Further, Claimants alleged that Respondents violated Section 17.46(b)(23) and 17.50(a)(3) of the DTPA through the conduct described above.

Further, Claimants alleged that the act of Respondents described above also violated the Texas Securities Act.

Claimants further alleged that Respondents violated Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 by intentionally or recklessly violating the "know your customer" rule and recommending unsuitable securities for the Claimants' accounts, as well as excessively trading such accounts for the Respondents' benefit, over which accounts the Respondents exercised control. Claimants further alleged that the above

conduct of Respondents violated Section 27.01 of the Texas Business and Commerce Code, and constituted common law negligence and breach of contract.

Claimants further alleged that Smith Barney acted as a principal in the transactions in question and was an active participant in aiding and abetting the activities in question, and that Smith Barney and Frank Maggio were liable to the Claimants as a result of their involvement in the transactions, as well as under the doctrine of *respondeat superior*, control person liability, and their negligent failure to supervise Sterling R. Smith.

As a result of the above allegations, Claimants sought recovery from Respondents of Claimants' damages, attorneys fees and expenses, forum fees, and pre-judgment interest. Claimants further requested recovery of punitive damages, alleging that Respondents' conduct constituted gross negligence, a "knowing" violation of the DTPA, and a punishable breach of fiduciary duty.

Respondents submitted the following case summary:

Unless otherwise admitted therein, Respondents denied the allegations set forth in the Statement of Claim. Respondents also alleged the following affirmative defenses: Claimants' Statement of Claim fails to state a cause of action upon which relief can be granted, Claimants are precluded from recovery by their failure to mitigate their damages, Claimants are barred from recovery by the doctrine of ratification, Claimants losses were proximately caused by market forces or other events not within the control of Respondents and/or by Claimants' own conduct, Claimants are barred from recovery due to Claimants' negligence, contributory negligence, or comparative negligence, Claimants voluntarily assumed the risks involved, Claimants' losses were due to market forces beyond Respondents' control, Claimants are not DTPA "consumers", Claimants' DTPA claims fail because the DTPA does not apply to securities transaction and the DTPA is inconsistent with the Texas Securities Act's "due diligence" provisions, Claimants' punitive damage claims would abridge state and federal constitutional rights, Claimants' tort claims fail because the parties' rights and responsibilities are governed by the contracts between the parties, Claimants have no right to recover attorneys fees, and Claimants' claims are barred in whole or in part by the applicable statutes of limitations.

By way of counterclaim, Respondents sought to recover from those Claimants with debit balances in their Smith Barney investment accounts, the amount of such debit balances.

Respondents also requested that they be awarded their costs, expenses and attorneys fees.

RELIEF REQUESTED

Claimants requested an award of the following: rescission and/or compensatory damages plus pre-judgment interest through May 31, 2000 in the amount of \$7,401,173.63, plus pre-judgment interest from May 31, 2000 until the date of the arbitration award at the per diem rate of \$1,411.62, plus disgorgement of commissions on churned accounts in the amount of \$1,020,402.35, plus attorneys fees and expenses (including forum fees) in the

amount of \$1,467,501.18, plus contingency fees in the amount of 10% of the arbitration award (excluding attorneys fees), punitive damages in an amount the arbitrators deem appropriate, and such other relief in favor of Claimants as the arbitrators deemed just and appropriate under the circumstances.

Respondents requested that the Claimants take nothing on their claims. By way of counterclaim, Respondents sought to recover from those Claimants with debit balances in their Smith Barney investment accounts, the amount of such debit balances.

Respondents also requested that they be awarded sanctions, their costs, expenses and attorneys fees.

OTHER ISSUES CONSIDERED AND DECIDED

Numerous motions over the course of three years were filed by the parties. However, the panel ruled on most motions during the course of the arbitration, and for any motions pending at the conclusion, the panel unanimously rules on each of those consistent with this award. It is also ruled that all the matters overruled go to the weight of the evidence and not the admissibility.

Orders of the Arbitration Panel regarding Interim Forum Fees were filed on or about October 17, 1997, November 12, 1999 and July 21, 2000.

AWARD

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

Liability of Sterling Smith and Frank Maggio

1. The panel unanimously dismisses Sterling Smith and Frank Maggio as parties to the arbitration and from any individual liability with a ruling of no individual liability;

Liability of Smith Barney, Inc.

Summary:

2. The total aggregate award to the Claimants, collectively, for attorneys fees and compensatory damages is \$4.5 Million Dollars and no/cents; The total aggregate award to the Respondents on their attorneys fees is \$1 Million Dollars and no/cents; and the division of the award is set forth more particularly as follows:

Compensatory Damages Awarded to Claimants

Compensatory damages are awarded to Claimants exclusively. The panel unanimously awards to Claimants, collectively and exclusively against Smith Barney, Inc. for

compensatory damages and attorneys fees, the sum of \$4,500,000.00 (Four and One Half Million Dollars and no cents);

Interest

No interest shall accrue on this compensatory damage award until after the 60th day following Respondents' receipt of the award. However, if any sums remain unpaid after the 60th day, then interest shall accrue at 12% per annum on the unpaid balance of the award; This amount shall be paid exclusively by Smith Barney, Inc. and this sum shall be paid to Claimants, collectively, on or before the sixtieth (60th) day after Respondents' receipt of this award. If any sums remain unpaid after the 60th day following Respondents' receipt of the award then interest shall begin to accrue at 12% per annum on any unpaid balance;

Compensatory Damages, Attorney's Fees, Costs and Expense Reimbursement to the Respondents, Collectively

4. The panel unanimously awards to the Respondents, Sterling Smith and Frank Maggio, only to be applied solely to reimburse them for attorneys fees, and to Smith Barney, Inc., for reimbursement toward attorneys fees, forum fees, costs, expenses and on their counter-claims, the aggregate and total sum of \$1,000,000.00 (One Million Dollars and no cents) against Claimants. This sum shall be paid by the Claimants, collectively, to the Respondents on or before the eightieth (80th) day after Claimants' receipt of the award. If any sums remain unpaid after the 80th day following claimants' receipt of the award then interest shall begin to accrue at 12% per annum on any unpaid balance;

5. Any and all relief not specifically addressed herein, including punitive or treble damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
Counter claim/Cross claim/Third Party Claim filing fee	= \$ 500.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$ 500.00
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Adjournment Fees

Adjournments requested during these proceedings:

Hearing Dates: September 24, 1996

September 25, 1996

September 26, 1996

September 27, 1996

October 7, 1996

October 8, 1996

October 9, 1996

October 10, 1996

October 11, 1996

October 21, 1996

October 22, 1996

October 23, 1996

October 24, 1996

October 25, 1996

One half of adjournment fee for adjourned block of dates
charged to Claimants

= \$ 750.00

One half of adjournment fee for adjourned block of dates
charged to Respondents

= \$ 750.00

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Eleven (11) Pre-hearing sessions with a single arbitrator x \$300.00= \$ 3,300.00

Pre-hearing conferences:	July 18, 1996	1 session
	July 19, 1996	1 session
	August 2, 1996	1 session
	September 4, 1996	1 session
	September 16, 1996	1 session
	September 19, 1996	1 session
	October 2, 1996	1 session
	October 23, 1996	1 session
	December 11, 1996	1 session
	June 2, 1998	1 session
	February 11, 2000	1 session

One Hundred Ninety Eight (198) Hearing sessions x \$1500.00=\$ 297,000.00

Hearing Dates: August 11, 1997 2 sessions

August 12, 1997	2 sessions
August 13, 1997	2 sessions
August 14, 1997	2 sessions
August 15, 1997	2 sessions
September 22, 1997	2 sessions
September 23, 1997	2 sessions
September 24, 1997	2 sessions
September 25, 1997	2 sessions
September 26, 1997	2 sessions
October 20, 1997	2 sessions
October 21, 1997	2 sessions
October 22, 1997	2 sessions
October 23, 1997	2 sessions
October 24, 1997	2 sessions
November 19, 1997	2 sessions
November 20, 1997	2 sessions
November 21, 1997	2 sessions
April 6, 1998	2 sessions
April 7, 1998	2 sessions
April 8, 1998	2 sessions
April 9, 1998	2 sessions
April 27, 1998	2 sessions
April 28, 1998	2 sessions
April 29, 1998	2 sessions
April 30, 1998	2 sessions
May 1, 1998	2 sessions
May 20, 1998	2 sessions
May 21, 1998	2 sessions
May 22, 1998	1 session
June 15, 1998	2 sessions
June 16, 1998	2 sessions
June 17, 1998	2 sessions
June 18, 1998	2 sessions
June 19, 1998	2 sessions
July 7, 1998	2 sessions
July 8, 1998	2 sessions
July 9, 1998	2 sessions
July 10, 1998	2 sessions
July 28, 1998	2 sessions
July 29, 1998	2 sessions
July 30, 1998	2 sessions
July 31, 1998	2 sessions
September 14, 1998	2 sessions
September 15, 1998	2 sessions
September 16, 1998	2 sessions

September 17, 1998	2 sessions
September 18, 1998	2 sessions
September 28, 1998	2 sessions
September 29, 1998	2 sessions
September 30, 1998	2 sessions
October 20, 1998	2 sessions
October 21, 1998	2 sessions
October 22, 1998	2 sessions
October 23, 1998	2 sessions
November 16, 1998	2 sessions
November 17, 1998	2 sessions
November 18, 1998	2 sessions
November 19, 1998	2 sessions
November 20, 1998	2 sessions
December 15, 1998	2 sessions
December 16, 1998	2 sessions
December 17, 1998	2 sessions
December 18, 1998	2 sessions
March 22, 1999	2 sessions
March 23, 1999	2 sessions
March 24, 1999	2 sessions
March 25, 1999	2 sessions
March 26, 1999	2 sessions
June 21, 1999	2 sessions
June 22, 1999	2 sessions
June 23, 1999	2 sessions
June 24, 1999	2 sessions
June 25, 1999	2 sessions
September 13, 1999	2 sessions
September 14, 1999	2 sessions
September 15, 1999	2 sessions
September 16, 1999	2 sessions
September 17, 1999	2 sessions
November 8, 1999	2 sessions
November 9, 1999	2 sessions
November 10, 1999	2 sessions
November 11, 1999	2 sessions
November 12, 1999	2 sessions
December 14, 1999	2 sessions
December 15, 1999	2 sessions
December 16, 1999	2 sessions
December 17, 1999	2 sessions
January 11, 2000	2 sessions
January 12, 2000	2 sessions
January 13, 2000	2 sessions

January 14,2000	2 sessions
February 15,2000	2 sessions
February 16,2000	2 sessions
February 17,2000	2 sessions
February 18,2000	2 sessions
May 23,2000	2 sessions
May 24,2000	1 session
May 25,2000	2 sessions
May 26,2000	2 sessions

Total Forum Fees = \$ 300,300.00

The Panel has assessed \$150,150.00 of the forum fees to Claimants, collectively.
The Panel has assessed \$150,150.00 of the forum fees to Smith Barney, Inc.

Fee Summary

Claimants, be and hereby are solely liable for:

Initial Filing Fee	= \$	300.00
Adjournment Fee	= \$	750.00
Forum Fees	= \$	150,150.00

Total Fees	= \$	151,200.00	—
<u>Less payments</u>	= \$	152,550.00	
Balance Due NASD Dispute Resolution, Inc.	= \$	(1,350.00)	

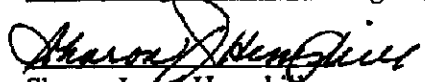
2. Respondent, Smith Barney, Inc. be and hereby is solely liable for:

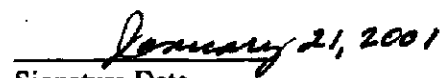
Filing Fee	= \$	500.00
Member Fees	= \$	500.00
Adjournment Fee	= \$	750.00
Forum Fees	= \$	150,150.00
		Total Fees
	= \$	151,900.00

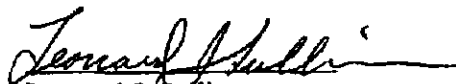
<u>Less payments</u>	= \$	152,000.00
Balance Due NASD Dispute Resolution, Inc.	= \$	(100.00)

All balances are due to NASD Dispute Resolution, Inc.


Concurring Arbitrators' Signatures


Sharon Jeverl Hemphill
Public Arbitrator, Presiding Chair


Signature Date January 21, 2001


Leonard J. Sullivan
Public Arbitrator, Panelist

January 30, 2001
Signature Date


Nick Sacaris
Industry Arbitrator, Panelist

Feb. 1, 2001
Signature Date/

2/5/01
Date of Service (For NASD-DR office use only)