

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jacob Berdah

95-04220

Name of Respondents

Smith Barney Shearson, Inc.
Wesley McKenney

REPRESENTATION

For Claimant Jacob Berdah ("claimant") appeared Cheryl Dresner, Esq. and Ron Dresner, Esq. of the law firm Dresner & Henle located in New York, New York.

For Respondent Smith Barney Shearson, Inc. ("Smith Barney") appeared Sean J. Coughlin, Esq. of Smith Barney, Inc. located in New York, New York.

Respondent Wesley McKenney ("Mr. McKenney") appeared pro se.

CASE INFORMATION

A Statement of Claim was filed on September 5, 1995.
Claimant's Submission Agreement was signed on August 23, 1995.

A Statement of Answer was filed by respondent Smith Barney Shearson, Inc. on October 27, 1995.
Respondent Smith Barney Shearson, Inc.'s Submission Agreement was signed on October 30, 1995.

Respondent Wesley McKenney did not file an Answer to the Statement of Claim nor did he submit an executed Uniform Submission Agreement.

HEARING INFORMATION

Hearing Dates/Session: August 20, 1996 - 2 Sessions

CASE SUMMARY

Claimant alleged that on August 26, 1994 he deposited \$100,000.00 into a money market account at Smith Barney Shearson, Inc. ("Smith Barney"). Claimant further alleged that from September 2, 1994 until January 1995, respondents traded funds in his money market account without his authorization. Claimant also alleged that at no time since the execution of the new customer application, did respondents receive any written or oral authorization from him to make trades with his funds. Claimant asserted that he did not receive any notification of the trades by confirmation orders; that he never received any monthly statements from the respondents until February 1995, when his attorney requested the information; and that he had no knowledge of the trades until the monthly statements were received by his attorney. Claimant contended that he never met or spoke to the respondents as he is not conversant in English and that Respondent McKenney did not speak French. Therefore, oral communication between the Claimant and Respondents was not possible. Claimant also contended that his money market account was reduced to \$27,150.21 within five months of depositing the money at Smith Barney and that the funds remain at Smith Barney as a result of Smith Barney placing a freeze on the account.

Respondent Smith Barney Shearson, Inc. ("respondent") maintained that claimant was introduced to Wesley McKenney ("McKenney") over the telephone by claimant's relative Charles Gregoire Rothschild ("Rothschild"). Respondent further maintained that during the interview, claimant gave McKenney an address in Israel where his monthly statements were to be sent. Respondent also maintained the McKenney recorded all of the information on the New Account Form, and gave copies of the account agreement to Mr. Rothschild, who stated that he would obtain claimant's signature. Respondent contended that the statements were returned to their office with what was purportedly claimant's signature on the form. Respondent further contended that claimant signed the bottom of the New Account form which contained the address that his monthly statements and confirmations were to be sent to.

Respondent also contended that approximately eight days after claimant signed the customer agreement, they received a wire transfer for \$100,000.00. Respondent maintained that respondent McKenney called and received permission from claimant and Rothschild before every transaction. Respondent further maintained that McKenney called claimant when he became aware that claimant's monthly statements were being returned from Israel and told McKenney "not to worry about it".

Respondent contended that claimant is asserting the he deposited \$100,000.00 with respondents and never sought to invest in securities. Respondent further contended the claimant knew exactly where his funds were, and how the funds were being managed. Respondent also categorically denied that McKenney ever engaged in an unauthorized transaction.

Respondent Wesley McKenney failed to file an Answer to the Statement of Claim, but did appear at the hearing.

RELIEF REQUESTED

Claimant Jacob Berdah requested that the panel find in his favor and award the following: (1) \$72,849.79 in actual damages; (2) The release of \$27,150.21 of his funds which are in Smith Barney's possession; (3) Plus interest the funds would have earned had the funds been maintained in the money market account since August 26, 1994.

Respondent Smith Barney, Inc. requested that the claims of the claimant be denied in its entirety, with costs, including attorneys' fees being assessed against the claimant.

Respondent Wesley McKenney failed to file an Answer to the Statement of Claim.

OTHER ISSUES CONSIDERED & DECIDED

The arbitration panel made the following rulings concerning the respondent Wesley McKenney, who did not file a Statement of Answer and a Submission Agreement:

1. Pursuant to Section 1 of the NASD Code of Arbitration Procedure, the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that respondent Wesley McKenney was a member of the NASD at the time this controversy arose. Consequently, the panel found personal jurisdiction over respondent Wesley McKenney, pursuant to Section 12 of the NASD Code of Arbitration Procedure.
3. In view of the two (2) above, the panel found that respondent Wesley McKenney was required to file with the NASD a Statement of Answer and a properly executed Submission Agreement pursuant to Section 25(b) of the NASD Code of Arbitration Procedure. In this regard, the panel found that the Statement of Claim was properly served upon respondent Wesley McKenney, pursuant to Section 25(a) of the Code.
4. In addition, in accordance with Sections 21, 26 and 29 of the NASD Code of Arbitration Procedure, the panel found that the NASD provided respondent Wesley McKenney with "due notice" of the hearing conducted in this matter by regular and certified mail.

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 originals remain 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. Respondent Smith Barney Shearson, Inc. be and hereby liable and shall return to the claimant \$27,150.00 held in his money market account.
2. All other relief requests are denied.
3. The parties shall bear their respective costs and attorneys' fees.

FORUM FEES

Pursuant to Section 43c the NASD Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 non-refundable filing fee previously deposited by claimant Jacob Berdah and have assessed the following Forum Fee:

2 sessions X \$750	= \$1,500.00
minus claimants' \$750.00 deposit	= <u>\$ 750.00</u>
total outstanding	= \$ 750.00

1. Claimant Jacob Berdah be and hereby liable and shall pay to the NASD the sum of \$750.00 representing one-half of the forum fees assessed. However, claimant previously deposited \$750.00 with the NASD. Therefore, the amount due is zero.
2. Respondent Smith Barney Shearson, Inc. is liable and shall pay to the NASD the sum of \$750.00 representing one-half of the forum fees assessed.

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

Concurring Arbitrators' Signatures
Name

Robert J. Hyman
Robert J. Hyman, Esq.
Public Arbitrator - Chairperson

Francis J. LaSalla
Industry Arbitrator

Robert E. Tobin
Public Arbitrator

I, **Robert J. Hyman, Esq.**, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.

Robert J. Hyman
Robert J. Hyman, Esq.

Date of Decision: November 14, 1996

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Concurring Arbitrators' Signatures
Name

Robert J. Hyman, Esq.
Public Arbitrator - Chairperson



Francis J. LaSalla
Industry Arbitrator

Robert E. Tobin
Public Arbitrator

I, Francis J. LaSalla, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules,
that this is my decision in the above captioned matter.

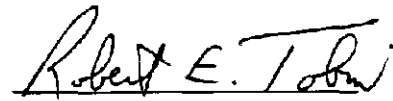

Francis J. LaSalla

Date of Decision: November 14, 1996

Concurring Arbitrators' Signatures
Name

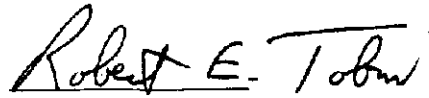
Robert J. Hyman, Esq.
Public Arbitrator - Chairperson

Francis J. LaSalla
Industry Arbitrator



Robert E. Tobin
Public Arbitrator

I, **Robert E. Tobin**, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.



Robert E. Tobin

Date of Decision: November 14, 1996