

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Robert S. Lawton

95-04413

Name of Respondents

Smith Barney Shearson, Inc.
Mercer Securities Ltd.
Mercer Securities Inc.
Steven Schappell

REPRESENTATION

Claimant Robert S. Lawton ("Claimant") was represented by Merrit A. Cole, Esq. and Michael J. Taichman Robins, Esq., Dilworth, Paxson, Kalish & Kauffman, Philadelphia, PA.

Respondent Smith Barney Shearson, Inc. ("SB") was represented by Harry Walters, Esq., Smith Barney, Inc., New York, NY.

Respondents Mercer Securities, Ltd. and Mercer Securities, Inc. (collectively "Mercer") did not appear.

No Representative for the Estate of Steven Schappell, deceased ("Schappell") appeared.

CASE INFORMATION

The Statement of Claim was filed September 15, 1995.

Claimant's Submission Agreement was signed on July 28, 1995.

Statement of Answer filed by Respondent, SB, was filed on January 2, 1996.

Respondent SB did not submit an executed agreement to arbitrate.

Respondents Mercer did not file an Answer or an executed agreement to arbitrate.

The Estate of Respondent Schappell did not file an Answer or an executed agreement to arbitrate.

HEARING INFORMATION

Hearing Dates/Sessions:

August 5, 1997/two sessions
August 6, 1997/two sessions
October 20, 1997/two sessions
December 17, 1997/two sessions
December 18, 1997/two sessions

Hearing Location:

NASD Regulation District Office
Philadelphia, PA

CASE SUMMARY

Claimant alleged that Respondents SB, Mercer and Schappell (collectively "Respondents") induced him to authorize unsuitable investments through fraudulent misrepresentations and omissions. In addition, Claimant alleged that Respondents engaged in excessive trading in his account and negligently over-concentrated his portfolio in unsuitable investments. Claimant asserted that Respondents actions breached their contracts with him as well as their fiduciary duty and were violations of the anti-fraud provisions of state and federal securities laws.

Claimant asserted that he retired from his position as manager of government projects with General Electric Corporation ("GE") in January 1989 and deposited his retirement funds of approximately \$349,000.00 with Respondent Schappell at Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch"). Claimant further asserted that when Schappell left Merrill Lynch and became employed by Respondent Smith Barney, Claimant followed Schappell and transferred his account of approximately \$455,500.00 into a non-discretionary IRA account with SB in September 1990. Claimant asserted that Schappell continued to be Claimant's account executive in charge of the account at SB. As a retiree, with no significant source of earnings other than from his investments, Claimant alleged that he told Schappell that the funds in the SB IRA account had to be invested conservatively. Indeed, Claimant asserted that the reason he chose to remain with Schappell and transfer his account to SB was because Schappell recommended a conservative investment strategy. However, Claimant alleged that Schappell invested the assets in the SB IRA account in extremely speculative and volatile securities which were totally unsuitable for Claimant.

Claimant alleged that SB failed to properly supervise Schappell and neither Schappell nor SB disclosed the risks to which Claimant's account was being exposed. Claimant alleged that these failures and omissions, among others, of SB and Schappell were the direct and proximate cause of the losses suffered at SB and later, at Mercer. Moreover, even though the SB IRA account was a non-discretionary account, Claimant alleged that Schappell generally made trades without Claimant's prior authorization, knowledge or consent, and would often seek Claimant's consent to the trades after the fact, without disclosing the risks involved in the investments.

Claimant alleged that Schappell left SB and became a broker with Respondent Mercer Securities in August 1993, and Claimant transferred his IRA account to Mercer shortly thereafter. Claimant alleged that at Mercer, as he had done under the indifferent eye of SB, Schappell further concentrated Claimant's retirement funds in extremely speculative securities.

Claimant alleged that the fraudulent, unlawful and improper conduct of Respondents which resulted in Claimant's losses included, but are not limited to, the following: unsuitable investments; over-concentration of such investments; fraudulent misrepresentations and omissions; excessive trading; breach of contract; breach of fiduciary duty; negligence; violations of the anti-fraud provisions of federal and state securities laws; and violations of federal and state securities laws relating to supervisory duties.

Respondent SB denied all allegations of wrong-doing and denied that it was liable to Claimant in any amount. SB maintained that Claimant did not suffer losses at SB; to the contrary, his account had a positive total return of \$248,000.00 at SB. In fact, SB asserted that Claimant lost money on purchases made at Mercer, after he followed Schappell to Mercer.

SB maintained that Claimant transferred securities from Merrill Lynch when he opened an account with SB in 1990, which included a high-yield convertible bond and an exploratory oil and gas company, Kelley Oil. SB maintained that at both Merrill Lynch and SB, Claimant was informed that he held some

aggressive securities, but he chose each time to hold those securities and transfer them with Schappell to Schappell's new broker-dealer, Mercer. SB contended that after he left SB, Claimant bought securities at Mercer which created the losses for which he now claims. SB maintained that while his account was with SB, Claimant's account was suitably balanced and profitable.

SB asserted the affirmative defenses of a failure to state a claim upon which relief can be granted; no misstatement of material fact upon which Claimant reasonably and detrimentally relied; failure to mitigate damages; ratification; claims are barred by laches, waiver and estoppel; investments in SB account were appropriate for Claimant; SB did not act with scienter; no punitive damages available in this forum; and the losses complained of were the result of market forces and not culpable conduct by SB.

Mercer did not file a response to the Statement of Claim.

The Estate of Schappell did not file a response to the Statement of Claim.

RELIEF REQUESTED

Claimant requested damages in the amount of approximately \$388,626.00 for realized and unrealized losses, plus pre-award interest at the rate of ten percent (10%), lost opportunity costs; reimbursement for all Claimant's costs and expenses, including reasonable attorneys' fees and experts' fees; punitive damages in an amount equal to five times the realized and unrealized losses incurred by Claimant.

Respondent SB requested that the Statement of Claim be dismissed and that all costs of this arbitration be assessed to Claimant.

OTHER ISSUES CONSIDERED & DECIDED

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.

The panel determined that Respondent SB is required to arbitrate pursuant to the by-laws of the NASD notwithstanding its failure to submit an executed agreement to arbitrate. Therefore, SB is bound by the rulings of the panel.

The panel determined that Respondents Mercer Securities, Ltd. and Mercer Securities, Inc. and the Estate of Schappell were served with the Statement of Claim pursuant to Rule 10314 of the NASD Regulation Code of Arbitration Procedure ("Code") and the notice of hearing pursuant to Rule 10315 of the Code and are required to arbitrate pursuant to the by-laws of the NASD, notwithstanding their failure to submit Answers or executed agreements to arbitrate. Therefore, Mercer and the Estate of Schappell are bound by the rulings of the panel.

AWARD

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

1. That the Estate of Respondent Schappell and Respondents Mercer Securities, Ltd. and Mercer Securities, Inc. are liable to and shall pay to Claimant \$295,000.00; and
2. That the claims as to Respondent SB are denied; and
3. That the claim for punitive damages is denied; and
4. That each party shall bear its own costs and expenses including attorneys' fees with the exception of Forum Fees as specified below; and
5. That any and all relief not specifically addressed herein is denied.

OTHER COSTS

Pursuant to Rule 10333 of the Code, SB and Mercer are each assessed a member surcharge of \$350.00.

FORUM FEES

Pursuant to Rule 10332(c) of the Code, the following Forum Fees are assessed:

10 sessions x \$750.00 = \$7,500.00

Forum Fees are assessed to Claimant at \$3,750.00 and to Respondents SB, Mercer and the Estate of Schappell, jointly and severally, at \$3,750.00.

Claimant shall receive credit for the \$750.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net Forum Fees assessment due from Claimant of \$3000.00.

Respondents Smith Barney, Inc., Mercer Securities, Ltd., Mercer Securities, Inc. and the Estate of Schappell, jointly and severally, have an assessment due of \$3,750.00.

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

DATE

Jan 13, 1998

CONCURRING ARBITRATORS' SIGNATURES

Fred S. Pieroni

Fred S. Pieroni, Presiding
Public Arbitrator

Joseph F. Lynch
Public Arbitrator

Dale A. Pope
Industry Arbitrator

Date Decision Served by NASD Regulation:

January 22, 1998

DATE

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1/14/98

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