

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Abraham J. Friedman,
Claimant

v.

No. 94-04810

Jerry Steinberger, and
Smith Barney, Inc.,
Respondents.

REPRESENTATION OF PARTIES

Abraham J. Friedman ("Claimant") was represented by Jon A. Titus, Esq., and David R. Jordan, Esq., of Titus, Brueckner & Berry, Scottsdale, Arizona.

Jerry Steinberger ("Steinberger") and Smith Barney, Inc. ("SBI") (collectively referred to as "Respondents") were represented by Larry Irom, Esq., of Smith Barney, Inc. ("Respondents") were represented by Larry Irom, Esq., of Smith Barney, Inc.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about November 11, 1994. Claimant's Submission Statement of Claim Agreement was signed on November 11, 1994.

Respondents' Statement of Answer was filed on or about January 19, 1995. Respondents' Submission Agreements were signed on December 15, 1994, and January 18, 1995 respectively.

HEARING INFORMATION

Telephonic pre-hearing conference were held on May 22, 1995 for one (1) session, November 14, 1995 for one (1) session, and January 18, 1996 for one (1) session.

The hearing was held on April 29, 1996 in Scottsdale, Arizona for a total of two (2) sessions.

CASE SUMMARY

In his Statement of Claim, Claimant alleged that: He was approached by Steinberger to invest in Marriott Diversified American Hotels, L.P. (the "Partnership") on or about December, 1989; he was informed by Steinberger that the proposed investment was involved in the ownership of real estate and that the investment would produce income at the rate of 9.2% annually for the first five years, and that the return was guaranteed by Marriott Corporation; despite the contents of the prospectus, he was convinced by Steinberger that the investing in the Partnership was not risky because of the 9.2% guaranteed annual return; he relied solely and totally on the investment advice given to him

by Steinberger and that Steinberger's affiliation with SBI meant that Claimant was receiving sound business and investment advice; when the Partnership failed to deliver the annual 9.2% return, Claimant discovered that the Partnership was in the hotel management business, not in the real estate ownership business, and that the six hotels were heavily in debt;; his investment in the Partnership is unmarketable; Claimant has never purchased real estate private placements or been involved in any financially significant manner in real estate investments; Steinberger repeatedly informed Claimant that the prospectus was "boilerplate" and that there was no risk associated with the investment because the returns were guaranteed by the Marriott Corporation; Steinberger knew that Claimant was relying solely on the information that Steinberger relayed to Claimant; and at no time did Steinberger mention any risk or risk factors whatsoever concerning Claimant's proposed investment in the partnership.

Unless otherwise admitted therein, Respondents denied the allegations set forth in the Statement of Claim. Respondents also asserted the following affirmative defenses: Claimant failed to state a claim upon which relief may be granted; Claimant was fully aware from the onset of the risks of profits and losses associated with investing in limited partnerships, and voluntarily assumed such risk; Claimant ratified the transaction about which he complains; Claimant is barred by the principles of laches and estoppel; Claimant has waived his right to maintain this action against SBI; the injuries, if any, alleged to have been sustained by Claimant were caused, in whole or in part, by Claimant's failure to mitigate his damages; there can be no claims for fraud in light of the fact that Claimant did not justifiably rely on Respondents in connection with his trading activities; Claimant's claims are barred because any damages allegedly suffered were not caused by SBI; Claimant's claims are barred by the applicable statutes of limitations; Claimant failed to state a cause of action for fraud, negligence, and breach of fiduciary duty on the grounds that the underlying contract or contracts between the parties govern their respective rights and liabilities, and therefore, as a matter of law, Claimant is not entitled to seek tort damages in the absence of personal injury or property damages, neither of which was alleged; and there can be no breach of fiduciary duty since SBI did not owe a fiduciary duty to Claimant in light of the fact that he had a non-discretionary account.

RELIEF REQUESTED

Claimant requested an award of his \$100,000 investment, plus interest at 9.2% per annum for 1990, 1991, 1992 1993 and 1994 compounded annually less any distributions received for a total relief sought of \$124,636.54

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and disbursements involved in defending this proceeding.

OTHER ISSUES CONSIDERED & DECIDED

On or about September 5, 1995, Claimant filed a request that the arbitration panel recuse itself. Respondents did not concur. The request was forwarded to the arbitrators to review in light of Canon II E of the Code of Ethics for Arbitrators in Commercial Disputes. After review of the request, and separate deliberation, the arbitrators declined to recuse themselves.

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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are, and each of them, denied with prejudice.

Each party shall bear its own costs and expenses associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were two (2) regular sessions x \$750 and three (3) pre-hearing sessions x \$300 = \$2,400 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 \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimant.

Additional forum fees in the amount of \$450 are assessed against the Claimant.

Additional forum fees in the amount of \$1,200 are assessed against Respondents.

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

Dated:

George A. Schade
George A. Schade
Public Arbitrator, Presiding Chair

s/s

5-31-96

Keith Folkman
Keith Folkman
Public Arbitrator

s/s

6-7-96

William L. Olson
William L. Olson
Industry Arbitrator

s/s

5-30-96