

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Simmons Pump Stock Bonus Trust,

Claimant,

and

No. 95-05121

Smith Barney Shearson, Inc., and Hutchison Financial Group,

Respondents,

REPRESENTATION OF PARTIES

Claimant Simmons Pump Stock Bonus Trust was represented by Barry Kirschner, Esquire, of Raven, Kirschner & Norell, P.C., located in Tucson, Arizona.

Respondent Smith Barney Shearson, Inc. was represented by Sean J. Coughlin, Esquire, of Smith Barney Shearson, Inc., located in New York, New York.

Respondent Hutchison Financial Corp. neither responded to the Statement of Claim nor appeared at the arbitration hearing in this matter.

CASE INFORMATION

Claimant Simmons Pump Stock Bonus Trust's Statement of Claim was filed on or about October 30, 1995. Claimant Simmons Pump Stock Bonus Trust's Opposition to Respondent's Motion to Dismiss was filed on or about March 5, 1996. Claimant Simmons Pump Stock Bonus Trust's Submission Agreement was signed on October 16, 1995 by Johnny Bowdoin and Ken Brightwell as Trustees of the Simmons Pump Stock Bonus Trust.

Respondent Smith Barney Shearson, Inc.'s Statement of Answer and Motion to Dismiss was filed on or about January 31, 1996. Respondent Smith Barney Shearson, Inc.'s Submission Agreement was signed on January 30, 1996 by Sean Coughlin, Vice President of Smith Barney, Inc.

The NASD Regulation, Inc. Office of Dispute Resolution has no record of either a Statement of Answer or a signed Submission Agreement from respondent Hutchison Financial Corp.

HEARING INFORMATION

The hearing was held on January 15, 1997 for three (3) sessions in Scottsdale, Arizona.

CASE SUMMARY

Claimant Simmons Pump Stock Bonus Trust ("Claimant" or the "Trust") alleged that respondents Smith Barney Shearson, Inc. ("Smith Barney") and Hutchison Financial Corp. ("Hutchison") (hereinafter Smith Barney and Hutchison may be collectively referred to as "Respondents") are liable for damages incurred by the Trust resulting from churning, unsuitable trades, violation of regulations of the NASD and the NYSE, breach of contract, breach of fiduciary duty, and misrepresentation of material facts. According to Claimant, the Trust is an employee stock option ownership plan subject to the provisions of the Employee Retirement Income Security Act. Claimant further stated that one or both Respondents had a relationship with a registered representative by the name of Marshall Austin who had a relationship with George C. Schwelling of Smith Barney. These individuals, Claimant continued, sold investments in the Trust that had gains in order to make an appearance of realized gain, and held on to investments that had suffered losses in order to avoid the appearance of realized loss. Claimant asserted that this conduct of holding on to losing investments, in addition to the charging of high commissions for short-term trading and purchasing stocks which involved more risk than was represented, lead to losses in the Trust of between \$35,000 and \$49,000. Claimant further asserted that Respondents failed to exercise appropriate management supervision and control, which led to the mismanagement of the Trust.

Respondent Smith Barney denied the allegations set forth in the Statement of Claim. Smith Barney stated that this was not the first action that has been litigated between Claimant and Smith Barney; according to Smith Barney, Claimant filed an action against it in United States Federal Court in 1991, which was dismissed, and another two years later in the Superior Court of the State of Arizona, which was subsequently withdrawn. Smith Barney made the following affirmative defenses: (1) the Statement of Claim fails to state a claim upon which relief can be granted; (2) Smith Barney did not make any misrepresentations, omissions, or misstatements with respect to the investments made in the Trust; (3) the Trust's losses, if any, were within the risk that the Claimant assumed; (4) the Trust's diminution in value, if any, is the result, in whole or in part, of unforeseen market fluctuations, and not from intentional or negligent acts by Smith Barney or its employees; (5) the Statement of Claim fails to set forth ultimate facts sufficient to state a claim for the recovery of punitive damages; and (6) Claimant has not incurred any damages arising from the actions of Smith Barney. Smith Barney also moved to dismiss the claims asserted against it pursuant to the applicable statute of limitations. Lastly, Smith Barney moved to amend George C. Schwelling's Disclosure Reporting Page to expunge this latest filing as well as all the previous filings relating to these allegations, which were and are time barred and without merit.

RELIEF REQUESTED

Claimant Simmons Pump Stock Bonus Trust requested an award for compensatory damages in an amount no less than \$35,000 and no more than \$49,000, plus costs incurred in this arbitration.

Respondent Smith Barney Shearson, Inc. requested that the claims asserted against it be dismissed in their entirety and that it be awarded its costs and attorney fees.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of the file and the representations made by/on behalf of claimant, the undersigned arbitrators have determined that respondent Hutchison Financial Corp. has been properly served with the Statement of Claim pursuant to §10302 and §10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that respondent Hutchison Financial Corp. had received due notice of the hearing as required under §10315 of the Code and that arbitration of the matter would proceed pursuant to §10318 of the Code.

Respondent Hutchison Financial Corp. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the Code and is bound by the determination of the arbitration panel on all issues submitted.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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. That respondent Hutchison Financial Corp., who did not appear and thus defaulted, is liable for and shall pay claimant Simmons Pump Stock Bonus Trust for compensatory damages in the amount of \$10,603, plus simple interest at 10% (the Arizona rate) accruing from January 9, 1991, or \$6,360 to date of hearing.
2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were three (3) hearing sessions x \$400 = \$1,200 in forum fees. Pursuant to §10332(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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$120 and shall **retain** as forum fees the hearing session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Simmons Pump Stock Bonus Trust.

Claimant Simmons Pump Stock Bonus Trust is liable for and shall pay forum fees in the amount of \$200 (= ½\$1,200 total forum fees - \$400 hearing session deposit).

Respondent Smith Barney Shearson, Inc. is liable for and shall pay forum fees in the amount of \$600 (= ½\$1,200 total forum fees).

Respondent Smith Barney Shearson, Inc. is also liable for and shall pay the member surcharge pursuant to §10333 of the Code in the amount of \$200.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Jeffrey B. Messing
Jeffrey B. Messing
Public Arbitrator, Presiding Chair

/s/

January 31, 1997

Daniel J. Danvir
Daniel J. Danvir
Public Arbitrator

/s/

February 4, 1997

Stephen T. Yeargan
Stephen T. Yeargan
Industry Arbitrator

/s/

January 31, 1997