

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

---

In the Matter of the Arbitration Between

Name of Claimants

Michael and Yvonne Graber

96-00111

Name of Respondents

Smith Barney, Inc.  
Alan Cole

---

**REPRESENTATION**

For Claimants Michael and Yvonne Graber ("the Grabers"): Frank R. Brady, Esq. of the law offices of Frank R. Brady, Boca Raton FL.

For Respondents Smith Barney, Inc. ("Smith Barney") and Alan Cole ("Cole") Linda Alpert, Esq. of Smith Barney, Inc., New York, NY.

**CASE INFORMATION**

Statement of Claim filed: January 10, 1996. Claimants' Submission Agreement signed on: December 28, 1995.

Statement of Answer filed by Respondents, on: February 22, 1996. Respondent, Smith Barney's Submission Agreement signed on February 21, 1996 by Linda Alpert on behalf of Smith Barney. Respondent Cole's Submission Agreement signed on: January 31, 1996.

**HEARING INFORMATION**

On September 21, 1996 in Ft. Lauderdale, Florida, a hearing lasting two sessions was conducted.

**CASE SUMMARY**

Claimants, alleged that Respondents were liable for breach of contract, violation of Rule 10b-5 of the Securities Exchange Act of 1934, and violation of Chapter 517 of the Florida Statutes,

Claimants alleged that, on or about July 23, 1993 a deposit in the amount of \$7,800.00 was credited to Claimants' account by Smith Barney which deposit did not belong to Claimants. Upon receipt of the account statement showing this deposit, Claimants notified Cole via telephone of the error. At this time of the erroneous deposit, Claimants' account value was approximately \$59,768.58 (exclusive of the erroneous deposit), consisting of \$62,805.30 worth of stock mutual funds and \$3,036.72 of loans made by Smith Barney pursuant to the Client Agreement. At the end of the month of the erroneous deposit, Claimants' account statement (including the erroneous deposit) showed a value of \$67,571.03, consisting of stock mutual funds valued at \$62,805.30 and money market funds valued at \$4,763.28. At the time Claimants notified Respondents of the error, the loan balance shown on their account statement was \$3,036.72 and constituted only 5.08% of the aggregate value of the account (exclusive of the \$7,800.00 deposit made in error). Claimants alleged that, despite having notified Respondents of the error in August 1993, the error was not corrected until October 20, 1994, over 15 months later. As a result of the delay, Claimants' loan balance at the time the error was corrected was approximately 88% of the value of the account's assets. Claimants alleged that, if the error had been corrected promptly, the loan balance of Claimants' account may not have required the liquidation of assets of the account. As a result of the high ratio of loans to mutual fund investments, Respondents liquidated shares of the two mutual fund investments and withdrew \$10,726.63 of the proceeds to repay the loan balance causing Claimants to suffer an actual loss of \$4,722.00.

Respondents alleged that Claimants took advantage of the error by withdrawing in the following month \$32,000.00 and writing checks on their margin account of over \$6,200.00, amounts which were greater than the cash they actually owned. Respondents alleged that Claimants approved the sale of the investments and benefitted from the error in reduced margin charges and in the ability to withdraw extra funds from the account. Respondents alleged affirmative defenses of: failure to state a claim, the transactions were appropriately entered and confirmed in accordance with industry, legal and regulatory requirements, statutes of limitations, ratification, failure to timely complain, waiver and estoppel, failure to mitigate damages and other affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested: damages in the amount of \$4,722.00 plus punitive damages, attorney's fees, costs, interest and such other relief as the arbitrator deems appropriate.

Respondents requested: dismissal of the claim, plus costs and sanctions.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that a handwritten, signed Award may be entered. In this case, the parties have agreed to receive a conformed copy 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 and post hearing submissions (if any), the undersigned arbitrator has decided in full and final resolution

of the issues submitted for determination as follows:

1. Respondents are found liable, jointly and severally, and shall pay to Claimant the amount of \$1,137.16, plus interest from October 30, 1994 through September 20, 1996 in the amount of \$209.09 for a total due to Claimant of \$1,346.25.
2. Claimants' request for costs, punitive damages and attorney's fees is denied.
3. Respondents' request for costs and sanctions is denied.

#### **OTHER COSTS**

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

#### **FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the arbitrator has assessed Forum Fees in the amount of \$200.00 (two sessions x \$100.00 per session).

1. Respondent, Smith Barney is hereby assessed \$200.00 which shall be paid directly to the Claimants as a refund of the \$100.00 hearing session deposit paid by Claimants and a partial refund of the \$300.00 overpayment by Claimants.
2. The NASD shall refund to Claimants the balance of the overpayment in the amount of \$200.00.
3. The NASD shall retain the \$50.00 non-refundable filing fee paid by Claimants.
4. The NASD shall retain the \$100.00 member surcharge paid by Smith Barney.

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

Arbitrator's Signature

\_\_\_\_\_/s/\_\_\_\_\_  
Arthur J. Leibell, Esq., P.A.

Public

Date of Decision: December 13, 1996