

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

12/96

961212

In the Matter of the Arbitration Between

Name of Claimant

John P. Persons

96-00520

Name of Respondent

Smith Barney Shearson, Inc.

**REPRESENTATION**

For Claimant John P. Persons ("claimant") appeared Andrew D. Schau, Esq. of Patterson, Belknap, Webb & Tyler, New York, New York.

For Respondent Smith Barney Shearson, Inc. ("respondent") appeared Marion S. Chan, Esq.. Smith Barney Shearson, Inc.. New York, New York.

**CASE INFORMATION**

Statement of Claim filed:	February 5, 1996
Claimant's Submission Agreement signed on:	January 29, 1996
Statement of Answer filed:	April 15, 1996
Respondent's Submission Agreement signed on:	April 11, 1996

**HEARING INFORMATION**

Hearing Date/Sessions: November 11, 1996/ Two sessions

The hearing was held at the offices of the National Association of Securities Dealers, New York. New York.

**CASE SUMMARY**

Claimant alleged that respondent failed to execute a sale of municipal bonds as instructed and claimed that respondent sold the bonds prematurely at the wrong price to the wrong purchaser. Claimant alleged that he inherited \$95,000.00 principal amount of revenue bonds ("Winterset bonds") issued to finance a housing development ("Winterset project") in 1986. Claimant alleged that he deposited the bonds in a brokerage account at respondent's predecessor firm, Shearson Lehman Hutton. Claimant also asserted that the bonds were guaranteed by Mutual Benefit Life Insurance Co. ("Mutual Benefit").

961211

Claimant alleged that the Winterset bonds dropped sharply in value in July 1991 when Mutual Benefit entered rehabilitation. Claimant alleged that on or about October 9, 1992, the GMS Group, Inc. ("GMS") initiated a tender offer for a minimum of 70% of the Winterset bonds for a purchase price between 54 and 67 depending upon the percentage of bonds tendered. Claimant also alleged that on February 19, 1993, respondent advised him that, if claimant chose to tender his bonds to GMS, he was required to do so by February 26, 1993. Claimant alleged that he decided not to tender his bonds at that time.

Claimant alleged that he continued to receive information throughout 1993 and 1994 from both respondent and Nationsbank, the bankruptcy trustee, concerning ongoing bankruptcy proceedings instituted by the owner of the Winterset project which secured the Winterset bonds. Claimant maintained that, during this period, he received information from respondent and Nationsbank regarding the Debtor's Plan of Reorganization (the "Plan"). Claimant alleged that the Plan contemplated refinancing the Winterset bonds through the issuance of refunding bonds. Claimant asserted that he decided to vote in favor of the Plan.

Claimant maintained that on or about September 1, 1994, he received through respondent a Notice from Nationsbank dated August 11, 1994 advising bondholders that the Plan had been approved by the bondholders. Claimant alleged that the Notice also contained news with regard to a possible sale of the Winterset project on terms that would enable the bondholders to recover, in cash, 100% of the principal value of the bonds plus interest. Claimant alleged that he was advised by Nationsbank on November 16, 1994 that the Debtor had abandoned this plan to sell the Winterset property.

Claimant alleged that he subsequently received a notice from NationsBank advising bondholders that the Debtor was contemplating a sale of the property again, but that such sale was subject to approval from the Bankruptcy Court. Claimant asserted that, on May 24, 1995, NationsBank sent a notice to the Winterset bondholders advising them that the agreement to sell the property had been approved by the Bankruptcy Court. Claimant alleged that this notice also advised the bondholders that they would receive a cash payment of 100% of the principal amount of the bonds plus interest computed as provided in the notice. Claimant alleged that the May 24 notice advised the bondholders that the anticipated closing date was June 15, 1995 with provision for extension to July 15, 1995 if certain conditions were satisfied. Claimant further alleged that he contacted respondent on May 31, 1995 and instructed his broker to tender the Winterset bonds. Claimant maintained that he advised his broker that he had received notice from NationsBank and offered to send a copy of the May 25 notice to his broker.

Claimant alleged that on June 2, 1995, he received a telephone call from his broker advising claimant that the bonds had been tendered. Claimant alleged that he assumed that the Winterset bonds had been tendered to NationsBank as instructed. Claimant asserted that the confirmation statement he subsequently received from respondent indicated that respondent had sold the bonds to an unknown purchaser at a price of \$90. Claimant alleged that instead of receiving the full \$95,000 principal amount of the bonds plus accrued interest, he received \$85,500. Claimant also alleged that the Confirmation statement indicated that the offer to which the bonds had been sold had a due date of April 28, 1995. Claimant alleged respondent never advised him that such an offer even existed. Claimant maintained that, had respondent advised him that such an offer existed, he would have advised respondent not to sell his Winterset bond; at that price.

Claimant stated that when he contacted his broker to express his dismay at the sale of his bonds, his broker advised him that respondent sold the bonds as it did because it was unaware of the NationsBank tender offer. Claimant alleged that the sale of the Winterset property underlying the bonds realized an amount equal to the principal amount of the bonds plus an amount for interest accrued through July 7, 1995, the date the sale of the Winterset property was closed. Claimant further alleged that, but for

respondent's improper sale, he would have realized \$104,554.15. Claimant contended that the improper sale realized only \$85,500.00.

Claimant alleged that respondent breached its contract with claimant and acted negligently by selling the bonds prematurely at the wrong price and also alleged that respondent breached its fiduciary duty to claimant.

Respondent contended that any and all losses suffered by claimant were due to claimant's own actions. Respondent maintained that claimant was an attorney and a retired partner of a law firm and further contended that claimant was well-informed about the investment and the various legal proceedings involving the bonds from the time claimant inherited them. Respondent stated that claimant's account was transferred to one of respondent's financial consultants, M. David Sherrill ("Sherrill") in late 1994 upon the retirement of claimant's previous financial consultant. Respondent alleged that claimant telephoned Sherrill on May 31, 1995 and instructed him to tender his bonds under the current tender offer. Respondent also alleged that claimant did not refer to nor mention any notice from the bankruptcy trustee and further maintained that claimant did not offer to send Sherrill a copy of any such notice.

Respondent alleged that Sherrill tendered claimant's bonds under the offer of the International Trading Group ("ITG"). Respondent stated that ITG's tender offer dated April 28, 1995 and scheduled to expire on May 31, 1995 was the current tender offer. Respondent also alleged that ITG's offer was a \$90 tender offer. Respondent alleged that respondent sent written confirmation of the tender to claimant and that Sherrill notified claimant of the tender on June 2, 1995. Respondent alleged that claimant's contention that he instructed Sherrill to tender the bonds to the trustee pursuant to a notice dated May 24, 1995 is erroneous. Respondent alleged that the notice dated May 24, 1995 was sent by the trustee to inform bondholders of a possible full call redemption and alleged that the notice was distinct from a tender offer. Respondent maintained that the notice did not discuss or in any way constitute a tender offer. Respondent contended that it properly executed claimant's instructions and tendered the Winterset bonds under the tender offer current at the time claimant instructed Sherrill to tender claimant's bonds. Respondent asserted that it was not responsible for any losses allegedly suffered by claimant.

Respondent alleged that claimant had failed to state a claim upon which relief could be granted. Respondent also alleged respondent did not violate any rules, regulations, guidelines or other applicable law and that claimant is therefore barred from recovery. Respondent maintained that the damage;; claimant alleged were proximately caused by the conduct of claimant or persons other than respondent.

#### **RELIEF REQUESTED**

Claimant requested damages in the amount of \$19,504.15 as the proceeds lost in selling the bonds at the wrong time to the incorrect purchaser along with applicable interest and expenses including attorneys' fees.

Respondent requested that the statement of claim be dismissed in its entirety and further requested costs and attorneys' fees incurred in defense of this matter.

#### **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 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:

1. Respondent be and hereby is liable and shall pay claimant \$19,054.15 in compensatory damages **plus** interest of \$2,280.98.
2. Each party shall bear their respective costs, including attorneys' fees.

**FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$100.00 non-refundable ~~filing~~ fee previously deposited by claimant and have assessed the following forum fees:

2 sessions X \$400 =	\$800.00
minus hearing session deposit	<del>-\$400.00</del>
<b>TOTAL</b>	<b>\$400.00</b>

Claimant be and hereby is liable for the sum of \$400.00 representing one half of the forum fees assessed. Claimant has previously deposited \$400.00 with the NASD and thus owes nothing additional to the NASD.

Respondent be and hereby is liable for the sum of \$400.00 representing one half of the forum fees assessed. Respondent owes the NASD the sum of \$400.00.

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

961212

Concurring Arbitrators' Signatures  
Name

  
\_\_\_\_\_  
Lawrence A. Pittore, Esq.

\_\_\_\_\_  
G. Robert Abrams, Esq.

\_\_\_\_\_  
Ellen S. Hexter

I, Lawrence A. Pittore, Esq., do hereby certify that this is my decision in the above-referenced matter.

  
\_\_\_\_\_

NASD Date of Decision: December 20, 1996

Concurring Arbitrators' Signatures  
Name

Lawrence A. Pizzore, Esq.



G. Robert Abrams, Esq.

Ellen S. Hexter

I, G. Robert Abrams, Esq. do hereby certify that this is my decision in the above-referenced matter.




NASD Date of Decision: December 20, 1996

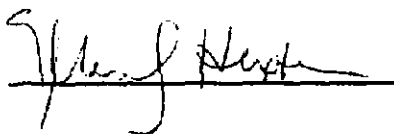
Concurring Arbitrators' Signatures  
Name

Lawrence A. Pittore. Esq.

G. Robert Abrams. Esq

  
Ellen S. Hexter

I, Ellen S. Hexter, do hereby certify that this is my decision in the above-referenced matter.



NASD Date of Decision: December 20, 1996