

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Willard D. Scolnik

96-00983

Name of Respondents

Smith Barney, Inc.
Ernest L. Raab

REPRESENTATION

For Claimant: John R. Kiefner, Jr., Esq. of the law firm of Riden, Earle & Kiefner, P.A., St. Petersburg, FL.

For Respondent Smith Barney, Inc. ("Smith Barney"): Victor A. Machinski, Jr., Esq., in-house counsel at Smith Barney, Inc.

For Respondent Ernest L. Raab ("Raab"): Lloyd S. Clareman, Esq., New York, NY.

CASE INFORMATION

Statement of Claim filed: March 5, 1996.

Claimant's Submission Agreement signed on: March 4, 1996.

Statement of Answer filed by Respondent Smith Barney on: May 13, 1996.

Respondent Smith Barney's Submission Agreement signed on: May 13, 1996.

Statement of Answer filed by Raab on: May 10, 1996.

Respondent Raab's Submission Agreement signed on: May 10, 1996.

HEARING INFORMATION

Four hearing sessions were conducted in this matter on June 17 and 18, 1997 in Tampa, Florida.

CASE SUMMARY

Claimant alleged he is a semi-retired architect, and has maintained approximately five or six individual and IRA accounts at brokerage firms between 1950-1990 and the account portfolios included mostly no-load mutual funds, and had grown in value from \$20,000.00 in 1950 to over \$400,000.00 by 1991, when the account with Respondents was opened.

Claimant next alleged that even though Respondent Raab knew Claimant was a conservative investor, he began talking heavily to Claimant about Grupo Gigante, S.A. DE C.V., a Mexican stock, representing that the stock was on Respondent Smith Barney, Inc.'s "recommended list." Further, Claimant alleged that Respondent Raab began providing Claimant with a considerable amount of literature from Smith Barney, Inc. via facsimile and mail. Next, Claimant contended that when Claimant agreed to purchase Grupo Gigante, Respondent Raab insisted that Claimant open an account at a Smith Barney, Inc. branch office in Florida rather than transacting business through Smith Barney Inc.'s New York office "because of Blue Sky laws." Claimant further alleged that when asked how much he should invest in Grupo Gigante, Claimant was instructed by Respondent Raab to invest \$76,000.00. Claimant maintained he purchased 76,000 shares at \$.92 per share on March 6, 1992 and the funds for the purchase were obtained through the liquidation of certain securities in the account.

Claimant next contended that in September, 1992, the value of the stock had fallen to \$.38 per share and when Claimant attempted to reach Respondent Raab, he was informed that Raab was no longer with Smith Barney, Inc. and that a "new customer" representative had been assigned to his account. Claimant maintained that during a subsequent conversation with the new account representative, Claimant learned that Grupo Gigante was never a Smith Barney, Inc. "recommended stock," a "fact" which originally had been a material factor in Claimant's decision to purchase Grupo Gigante. Claimant alleged he attempted to resolve the situation by requesting a reimbursement of his losses from Smith Barney, Inc., but his request was flatly denied.

Claimant maintained that as a result of the misrepresentations made by Respondent Raab and Respondent Smith Barney's failure to supervise and know its customer, Claimant has suffered very substantial losses.

Respondents denied Claimant's allegations of wrongdoing and alleged that Mr. Scolnik's purchase of Grupo Gigante stock was the result of his son Stuart Scolnik's decision to purchase a small position in that security. Respondents maintained that Mr. Scolnik was an aggressive investor who alone made the decision to allocate over \$70,000 to the stock after his son's purchase. Respondents further maintained that it was Mr. Scolnik's decision to hold the stock while it declined, recovered and then declined again over a period of more than four years. Respondents also alleged that, after the purchase, Mr. Raab remained available at all times for consultation with Mr. Scolnik; that Mr. Raab did not leave the firm until the end of 1993-more than a year after Mr. Scolnik claims he left; and, that Mr. Raab provided Mr. Scolnik with the address and telephone number of his new firm. Finally, Respondents alleged that Mr. Scolnik decided to have his Shearson Lehman Brothers, Inc. account technically domiciled in Florida for his own personal reasons, having to do with asset protection, and that Mr. Raab was not

involved in that decision other than to accommodate Mr. Scolnik's request to establish the account at a Florida branch office.

Respondents asserted affirmative defenses including failure to state a claim; assumption of risk; lack of causation; laches; waiver; estoppel; ratification; bar of applicable limitations; Claimant's comparative fault; lack of diligence and failure to manage his account reasonably and responsibly; and, Claimant's failure to mitigate his damages.

RELIEF REQUESTED

Claimant requested rescission of the transactions, damages in excess of \$100,000.00, statutory interest, attorneys' fees and costs, and punitive damages.

Respondents requested dismissal of the claim plus costs, expenses, attorneys' fees and forum fees. Respondent Raab further requested that all references to this arbitration proceeding be expunged from his CRD record.

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(s) remain on file with the NASD Regulation, Inc.

At the close of the Claimant's case, the Respondents made a motion to dismiss all claims asserted by the Claimant which was granted by the arbitration panel.

Counsel for each party is directed to submit one complete copy of their exhibits to NASD Regulation, Inc.

AWARD

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

1. All claims by the Claimants be and hereby are dismissed in all respects.
2. The Claimant's requests for punitive damages and rescission of the transactions are denied.
3. The parties did not agree to submit the issue of entitlement to and amount, if any, of attorneys' fees to this panel for a determination. Therefore, the panel refers the parties to a court of competent jurisdiction for a determination on this issue.
4. All references to this arbitration proceeding shall be expunged from the CRD record of Respondent Ernest L. Raab.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, forum fees in the sum of \$3,000.00 (4 sessions x \$750.00) are assessed as follows:

The Claimant is assessed the sum of \$3,000.00 less the \$750.00 previously deposited in partial satisfaction thereof leaving a balance due in the sum of \$2,250.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/S/

Sam A. Giunta

Public

/S/

Albert R. Neville, Jr.

Public

/S/

Forrest E. Sovring

Industry

Date of Decision: July 18, 1997