

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.**

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In the Matter of the Arbitration Between

**Name of Claimant**

Michael H. Weisser

96-01883

**Name of Respondent**

Smith Barney Inc.

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**REPRESENTATION**

For Claimant Michael H. Weisser ("Weisser"): Curtis Carlson, Esq. of Carlson & Bales, P.A., Miami, Florida.

For Respondent Smith Barney, Inc. ("Smith Barney"): Susan E. Harkins, Esq. of Smith Barney, Inc., New York, New York.

**CASE INFORMATION**

Statement of Claim filed: April 29, 1996.

Claimant's Submission Agreement signed on: April 22, 1996.

Statement of Answer filed by Respondent Smith Barney: August 5, 1996.

Respondent's Submission Agreement/Corporate Acknowledgment signed on: April 28, 1997 by Susan E. Harkins on behalf of the firm.

**HEARING INFORMATION**

A pre-hearing telephonic conference lasting one (1) session was conducted with the Chairman of the panel on February 28, 1997.

On March 20, 1997 and March 21, 1997 hearings lasting four (4) sessions were conducted in Fort Lauderdale, Florida.

### CASE SUMMARY

Claimant alleged that this claim was filed against the Respondent for the improper liquidation of his account, specifically with respect to 53,100 shares of Foundation Health Corporation ("FHC"); that on April 18, 1995, Smith Barney's Credit Department sent a wire to Claimant requesting payment of \$172,845.00 at the local Smith Barney branch by noon EST on April 21, 1995; that the next day, April 19, 1995, Smith Barney demanded that Claimant bring in \$156,000.00 by 4:00 p.m. that day; that on April 19, 1995, Claimant had a check delivered to Smith Barney in the amount of \$156,000.00; that the receipt of the check is reflected on Claimant's monthly statement as being received on April 19, 1995; that, nonetheless, Claimant's account was sold out that day; and, that soon thereafter the price of FHC increased significantly.

Respondent maintained that the decline in the price of FHC, the only marginable securities in Claimant's account, on April 19, 1995 caused Claimant's account to deteriorate to the point that it was close to having no equity (the stock opened at \$29 3/8 per share and fell to as low as \$27 per share, an 8% decline in the value of the stock); that on April 19, 1995, Smith Barney's branch office manager, Larry Brachfeld ("Brachfeld") telephoned Claimant to update him on the price of the stock and the status of his account and asked Claimant what he planned to do; that Claimant responded with an order to sell 15,000 shares of FHC stock and promised to deposit a check into the account by 4:00 p.m. that day; that at Claimant's instructions Respondent sold 15,000 shares of FHC stock; that the price of FHC continued to decline and as a result the branch manager asked Claimant to deposit a check before 4:00 p.m. but that no check was delivered and at about 3:46 p.m., Claimant's account executive, Stephen Jaffe ("Jaffe"), telephoned Claimant; that Claimant told Jaffe that there would be no check and directed Jaffe to sell another 15,000 shares of FHC; that Respondent sold 15,000.00 shares of FHC stock and that even after the second sale the equity in Claimant's account was less than 5%, well below the New York Stock Exchange's 25% margin maintenance requirement. Respondent alleged that thereafter, Brachfeld tried reaching Claimant to determine what to do with the remaining 23,100 shares in Claimant's account and left a message with Claimant's secretary stating that he needed to speak to Claimant before 4:00 p.m. and that if he did not speak to Claimant, Brachfeld would decide what to do with the remaining FHC shares in Claimant's account; that Claimant did not return Brachfeld's call and Brachfeld ordered the sale of the remaining 23,100 shares in Claimant's account. Respondent further alleged that although Claimant had a check delivered to Smith Barney on April 19, 1995, the check was not delivered until after the market closed and was not backed by sufficient funds and that Respondent was permitted, under the terms of the Client Agreement that Claimant entered into with Respondent, to sell securities in Claimant's account without prior notice or demand.

### RELIEF REQUESTED

Claimant requested compensatory damages of approximately \$750,000.00 based upon the difference between the price at which his position was sold out and the price the stock reached a reasonable time thereafter. Claimant also sought interest and the costs of this proceeding.

Respondent requested dismissal of the claim and that attorneys' fees, costs and expenses be assessed against Claimant.

### **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 originals remain on file with 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. Respondent Smith Barney is found not liable and, therefore, all claims against it are hereby dismissed.
2. Claimant's requests for interest and costs are hereby denied.
3. Respondent's requests for attorneys' fees, costs and expenses are hereby denied.

### **FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure ("Code"), the panel has assessed Forum Fees in the amount of \$4,300.00 (four (4) hearing sessions X \$1,000.00 + one pre-hearing telephonic conference X \$300.00).

1. Claimant is hereby assessed forum fees in the amount of \$4,300.00 for which NASD Regulation, Inc. shall retain the \$1,000.00 previously deposited in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. by the Claimant of \$3,300.00.
2. NASD Regulation, Inc. shall retain the claim filing fee of \$250.00 paid by the Claimant.
3. NASD Regulation, Inc. shall retain the member surcharge of \$500.00 paid by Respondent.

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

**ARBITRATION PANEL**

**Concurring Arbitrators' Signatures**

/s/

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Michael Lukasievich, Esq.

Public/Chairperson

/s/

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Bernard A. Becker

Public/Panelist

/s/

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Dione E. Pritchard

Industry/Panelist

Date of Decision: April 30, 1997