

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

William G. Herlihy

96-02862

Name of Respondents

Smith Barney, Inc.
Roger Diebel

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on July 5, 1996, Claimant William G. Herlihy ("Claimant"), who appeared Pro Se, alleged that on November 15, 1994, he contacted Respondent Roger Diebel ("Diebel"), a broker at respondent Smith Barney, Inc. ("Smith Barney"), opened an account and ordered 5000 shares of Physicians Reliance Network Inc. ("PHYN") an initial public offering which was underwritten by respondent Smith Barney. Claimant further alleged that Diebel stated that the minimum order would be 1000 shares at about \$15.00 per share. Claimant also alleged that he paid for the order with check #61, written for \$75,000.00 and drawn on his T. Rowe Price Prime Reserve account. Claimant contended that Diebel provided verbal confirmation of 500 PHYN (10% of 5000 order) for his individual account, but that he did not receive any shares for his profit sharing plan, although he had also ordered 1000 shares at a cost of \$15,000.00 for that account. Claimant further contended that Diebel promised to provide the balance of the shares through a "pot" being offered by Smith Barney. Claimant also contended that he decided to wait after he was told that the sale would be a commissioned sale.

Claimant asserted that PRNI started public trading on November 23, 1994, but was told by Diebel that he was only getting 200 shares at \$14.00 because his T. Rowe Price account balance was slightly below \$75,000.00. Claimant further asserted that despite his assurances about his ability to arrange for payment, Diebel requested that a stop order be placed on the \$75,000.00 check and that a new check be written to cover the actual cost of the transaction. Claimant alleged that there was gross mishandling of the IPO by Diebel and Smith Barney. Claimant further alleged that the confirmation for the 500 PHYN was retracted after the shares was already trading and that the order was denied in retaliation for him not having purchased the 4500 PHYN balance at regular market prices with commission. Claimant contended that if the price of PHYN had declined, Diebel would have filled his order completely. Claimant further contended that Diebel and Smith Barney were liable for his potential loss of capital gains on the 300 PHYN which were not given to him.

Respondents Roger Diebel and Smith Barney, Inc., through their representative and in-house counsel, John Bevilacqua, Esq., maintained that at the meeting with Claimant on November 14, 1994, he explained the possibility of Claimant not being allocated the number of shares requested. Respondents maintained that Diebel did not state or imply that a minimum order of 1000 PHYN was required by Claimant. Respondent also maintained that the second order for 1000 PHYN for Claimant's profit sharing plan could not be processed because that account was maintained at Merrill Lynch Pierce, Fenner & Smith, Inc. Respondent contended that Claimant's \$15,000.00 check was also returned to him since it could not be processed for the possible delivery versus payment purchase. Respondent Diebel further contended that he advised Claimant to put a stop payment order on the \$75,000.00 check since the account had insufficient funds to clear the check. Claimant was advised to re-issue a smaller check for the actual PHYN purchase, which he did. Respondent Diebel further contended that on November 23, 1994, he advised Claimant that he had been allocated 200 PHYN. Respondent maintained that Claimant expressed displeasure about the allocation, but declined to purchase any PHYN shares in the secondary market. Respondent further maintained that Claimant received a check for the balance of the cash in his account and subsequently closed his Smith Barney account. Respondents maintained that Claimant failed to mitigate and is the only one responsible for his alleged damages.

RELIEF REQUESTED

Claimant William G. Herlihy requested \$10,000.00 in actual damages or completion of the sale, which is 300 pre split shares at \$14 or 600 post split shares at \$7.

Respondents Smith Barney, Inc. and Roger Diebel requested that the claims of Claimant William G. Herlihy be dismissed in their entirety, plus costs.

AWARD

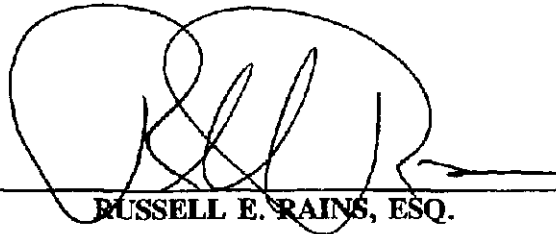
Pursuant to Section 10302 of the NASD Regulation, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Russell E. Rains, Esq, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant William G. Herlihy on July 1, 1996, by Respondent Smith Barney, Inc. on August 30, 1996, and by Respondent Roger Diebel on September 19, 1996.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of Claimant William G. Herlihy, against Respondents Smith Barney, Inc. and Roger Diebel are dismissed in their entirety.
2. All other relief requests are denied.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant William G. Herlihy, shall be retained by the NASD, Inc.
4. The parties shall bear their respective costs.

AFFIRMATION

I, **RUSSELL E. RAINS, ESQ.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by 'E' and 'R' in a cursive script, with a horizontal line extending to the right. The signature is positioned above a horizontal line.

RUSSELL E. RAINS, ESQ.

DATE OF DECISION: January 3, 1997