

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration between)	
)	
KATHLEEN ERBAR SMITH and JAMES)	
RODNEY SMITH,)	
)	
Claimants,)	Case No. 96-04654
)	
vs.)	
)	
LEW LIEBERBAUM & CO., INC., and)	
JEFFERY L. WILSON,)	
)	
Respondents.)	

REPRESENTATION OF PARTIES

Claimants, Kathleen Erbar Smith and James Rodney Smith were represented by P. David Newsome, Jr., Esq. and R. Richard Love, III, Esq. of Conner & Winters, P.C. located in Tulsa, Oklahoma.

Respondent, Lew Lieberbaum & Co., Inc. was represented by Brian Graifman, Esq. of Caro & Graifman, P.C. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about October 16, 1996.

The Statement of Answer of Respondent, Lew Lieberbaum & Co. was filed on or about December 18, 1996.

HEARING INFORMATION

The hearing was held on June 18, 1997 for two (2) sessions and on June 19, 1997 for two (2) sessions.

The hearing was held in Oklahoma City, Oklahoma.

CASE SUMMARY

Claimants Kathleen Erbar Smith and James Rodney Smith opened a joint account with registered representative Jeffery L. Wilson ("Wilson") of Lew Lieberbaum & Co., Inc. ("Lew Lieberbaum"). Claimants spoke with Wilson about making investments for Mrs. Smith's late-mother's trust (the "Trust"), for which Mrs. Smith was the trustee. The Trust agreement allegedly provided that investments could be made in the name of the trustee or of a nominee, and could be made without revealing the investment was for the Trust.

Claimants invested \$77,464 initially, using a check drawn on the account of Mrs. Smith's deceased parents, in a common stock of Response USA Inc. which was touted by Mr. Wilson as a special Lew Lieberbaum pick. The stock was purchased in the joint account, but the check was deposited into a new and separate Trust account at Lew Lieberbaum. Additional purchases were thereafter made for the Trust account, which the Claimants alleged were unauthorized. Mrs. Smith nevertheless sent a written authorization to Wilson to transfer all the stock of the joint account to the Trust account. When the additional purchases were not paid for by settlement date, Lew Lieberbaum wrote a memorandum to Lew Lieberbaum's Chief Operating Officer stating that Mr. Smith said he could not pay for the debt because the IRS had frozen the assets; that when the matter was settled, Respondent would be paid for the stock; yet the next day, when the branch manager spoke with Mrs. Smith, she claimed, for the first time, that the purchases were unauthorized. After extensions on sellout dates were obtained to accommodate the Claimants, sellouts were made in the Trust account. Following all of the sellouts, the Claimants received a check for \$9,740.85.

Claimants alleged that the purchases for the Trust were unauthorized, and that Wilson failed to disclose the substantial risks associated with the initial investment, and that the initial purchase was unsuitable.

Claimants asserted the following claims against Respondent: (1) breach of fiduciary duties; (2) common law fraud; (3) failure to supervise; (4) violations of 71 O.S. § 408.

Respondent denied the allegations of unsuitability, fraud, failure to supervise, and claims that all the trades were authorized, suitable, and handled in the ordinary course of business, and that the sellouts were handled in accordance with Regulation T.

RELIEF REQUESTED

Claimants requested the entry of judgment against Respondent and for an award of actual damages as follows:

Principal Loss:	\$ 67,698.15
Interest:	<u>34,274.98</u>
Total Loss:	\$101,973.13

Claimants also requested attorneys fees of \$40,789.25 and costs of \$1,300.00. In addition, Claimants sought punitive damages together with costs of the action and such other and further relief that the arbitrators deemed fair and equitable.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made by/on behalf of the Claimants, the panel determined that Respondent Jeffery L. Wilson had not been properly served with the Statement of Claim and notice of the hearing in accordance with the Code of Arbitration Procedure. Claimants elected to proceed with their claims against Respondent, Lew Lieberbaum & Co., Inc.

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 Regulation, Inc..

AWARD

After considering the pleadings and hearing the evidence presented, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination that judgment should be entered in favor of the Claimants and against Respondent as follows:

1. Respondent, Lew Lieberbaum & Co. Inc. is liable and shall pay for actual damages to Claimants, Kathleen Erbar Smith and James Rodney Smith in the amount of \$67,698.15.
2. Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay interest to Claimants, Kathleen Erbar Smith and James Rodney Smith in the amount of \$28,010.50 plus additional interest in the amount of \$18.55 per day beginning on June 19, 1997 until the award is paid in full.
3. Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay attorneys' fees to Claimants, Kathleen Erbar Smith and James Rodney Smith in the amount of \$42,283.46. In determining to award attorneys' fees, the arbitrators considered the

pleadings, the evidence and the testimony of the parties as well as the Oklahoma Stat. tit. 71, § 409(b), the legal authority provided by Claimants.

4. Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay costs to Claimants Kathleen Erbar Smith and James Rodney Smith in the amount of \$1,314.40.
5. Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay punitive damages to Claimants, Kathleen Erbar Smith and James Rodney Smith in the amount of \$10,000. In deciding to award punitive damages, the arbitrators considered the pleadings, the evidence and the testimony of the parties.
6. With the exception of forum fees which are specifically addressed below, any other requests for relief not specifically granted herein are hereby dismissed with prejudice and denied in their entirety.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session. There were four hearing sessions \times \$500 = \$2,000 in forum fees. Pursuant to Section 10332(c) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing with an arbitrator, which lasts four hours or less.

Pursuant to Section 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the \$500 hearing session deposit previously submitted by Claimants.

Pursuant to Section 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$300 member surcharge previously submitted by Respondent, Lew Lieberbaum & Co., Inc.

In accordance with Section 10332(c) of the Code, Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$1,500. Respondent, Lew Lieberbaum & Co., Inc. is liable for and shall pay to the Claimants the sum of \$500 as reimbursement of their hearing session deposit.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

NASD Regulation, Inc. Office of Dispute Resolution
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Signed:

Kelley L. Cornelius, Esquire
Kelley L. Cornelius, Esquire
Chairman
Public Arbirtator

Date: July 24, 1997

Robert N. Naifeh, Esquire
Robert N. Naifeh, Esquire
Public Arbitrator

Date: July 31, 1997

Thomas J. Cotrone, FA
Thomas J. Cotrone, FA
Industry Arbitrator

Date: July 24, 1997

Date Award served by the NASD: July 31, 1997