

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Sewell Gelberd and Barbara Gelberd,
Claimants and Counter-Respondents,

and

No. 96-04809

Smith Barney, Inc. and Jeff Mackevich,
Respondents and Counter-Claimants.

REPRESENTATION OF PARTIES

For Claimants: Sewell Gelberd and Barbara Gelberd ("Claimants") were represented by Vern J. Holzhall, Esq. of Uscian & Eccleston, located in Chicago, Illinois.

For Respondents: Smith Barney, Inc. ("Smith Barney") and Jeff Mackevich ("Mackevich") (collectively referred to as "Respondents") were represented by James S. Goddard, Esq. of Smith Barney, Inc., located in New York, New York.

CASE INFORMATION

Claimants' Statement of Claim was filed on: October 30, 1996.
Sewell Gelberd's Submission Agreement was signed on: October 30, 1996.
Barbara Gelberd's Submission Agreement was signed on: October 29, 1996.

Respondents' Statement of Answer and Counterclaim was filed on: December 27, 1996.
Smith Barney, Inc.'s Submission Agreement was signed by Jim Goddard, Esquire, First Vice President of Smith Barney, Inc on: December 19, 1996.
Mackevich's Submission Agreement was signed on: December 18, 1996.

HEARING INFORMATION

Pre-hearing conferences: None held.
Hearing dates/sessions: May 28, 1997 for two (2) sessions; and
May 29, 1997 for two (2) sessions.

The hearing was held in Chicago, Illinois.

CASE SUMMARY

Claimants brought this action to recover damages sustained by the alleged negligence and breach of fiduciary duty by Mackevich, a registered representative of Smith Barney at all relevant times. Claimants alleged that on August 8, 1996, Sewell Gelberd contacted Respondents regarding the sale of 10,000 shares of American Bio Medica Corp. ("Bio Medica") stock at a price of \$5.75 per share, informing Mackevich that the stock was "restricted," and asking whether the restriction would cause any problem with the sale. Mackevich advised them that, although there was no restriction on the legend of the shares, he would first check with his legal department. On August 13, 1996, Mackevich contacted Sewell Gelberd and advised in a telephone message that there was no problem with selling the stock at \$5.75 per share. Later on August 13, 1996, Respondents sold 10,000 shares of Claimants' Bio Medica stock at \$5.75 per share. On September 27, 1996, Respondents purchased 10,000 shares of Bio Medica at \$7.50 per share on Claimants' account, without prior consent or authorization from Claimants. On October 21, 1996, Respondents sent Claimants a letter, advising that the re-purchase of the stock created a debit balance in Claimants' account of \$39,454.26, and demanded that Claimants remit the sum to Respondents no later than October 28, 1996. Claimants further asserted that Respondents threatened to liquidate Claimants' accounts, including their individual retirement account, should the money not be forwarded. Claimants asserted the following causes of action: (1) breach of fiduciary duty; (2) negligence; (3) respondeat superior liability; and (4) negligence and breach of fiduciary duty (failure to supervise).

Respondents denied the material allegations set forth in the Statement of Claim. Respondents stated that on August 8, 1996, the 10,000 shares of Bio Medica were sold at \$5.75, which netted proceeds for Claimants in the amount of \$56,374.22. Sewell Gelberd instructed Mackevich to send him a check for \$20,000 via overnight mail, buy 200 shares of Nordstrom (for a total amount of \$7,697.75), and deposit the remaining proceeds in his money market fund, which Respondents did. Subsequent to September 24, 1996, the certificates were returned to Smith Barney containing several stamps, including a legend stating the shares were restricted under Rule 144, were not to be sold for a period of two years from the date of issuance, and were ineligible to be sold in August 1996. On September 27, Smith Barney purchased for Claimants' account 10,000 shares of Bio Medica at the prevailing market rate of \$7.50 because Claimants' account was short 10,000 shares of Bio Medica. As a result of the sale and repurchase transactions, Claimants were indebted to Smith Barney in the amount of \$39,454.26 and Claimants failed and refused to remit to Smith Barney the amounts they owed. Therefore, between November 18-20, 1996, Smith Barney liquidated the remaining assets in Claimants' joint account, which resulted in a debit balance. Respondents made the following affirmative defenses: (1) the Statement of Claim fails to state a claim upon which relief may be granted; (2) Respondents owed no fiduciary duties to Claimants as a matter of law, and under the facts of this case; (3) any duties owed to Claimants by Respondents were fully and faithfully carried out; (4) Claimants, by their conduct and under all the circumstances of this case, are estopped from asserting the claims made herein; and (5) Claimants are barred from recovery because they directly instructed, directed, authorized, and consented to the transactions in question.

Respondents brought their Counterclaim seeking the remaining debit balance in Claimants' account.

RELIEF REQUESTED

Claimants requested an award for compensatory damages in the amount of \$57,500; pre-judgment interest at the rate of 10% per annum compounded annually; punitive damages; attorney's fees and expenses for this action and appeal of this action; costs of this action; and post-judgment interest on the above total at the rate of 9% per annum.

Respondents requested that Claimants take nothing on their claims; that Respondents be awarded the amount of \$17,448.60 on their Counterclaim, plus interest at the applicable legal rate; and that Respondents further be awarded their costs, expenses, and such other and further relief as the Panel deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

Prior to the hearing in this matter, Claimants moved for entry of an immediate injunctive order precluding Respondents from liquidating any and all accounts maintained by Claimants with Respondents. Pursuant to Claimants' letter dated January 20, 1997, this motion was withdrawn given the early hearing dates set in this matter.

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 the NASD Regulation, Inc. Office of Dispute Resolution.

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. Smith Barney, Inc. is liable for and shall pay Sewell Gelberd and Barbara Gelberd compensatory damages in the amount of \$1,376.74, plus interest thereon at the rate of 5% per annum from November 18, 1996 to the date it is paid;
2. Smith Barney is to deliver to Sewell Gelberd and Barbara Gelberd 10,000 shares of restricted American Bio Medica held in safekeeping by Smith Barney, Inc.;
3. Smith Barney, Inc.'s Counterclaim is dismissed with prejudice and denied in its entirety;

4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
5. Any relief not specifically awarded is hereby denied with prejudice.

FORUM FEES

Pursuant to § 10332(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: Four (4) hearing sessions x \$500.00 per session = \$2,000.00.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$150.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$500.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimants Sewell Gelberd and Barbara Gelberd. Furthermore, Claimants Sewell Gelberd and Barbara Gelberd are liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$500.00 as forum fees.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$300.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Respondent Smith Barney, Inc. In addition, Respondent Smith Barney, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$700.00 (One-half of \$2,000 total forum fees - \$300.00 hearing session deposit).

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Smith Barney, Inc.

Concurring Arbitrators' Signatures

/s/ Barry E. Simon, Esq.
Barry E. Simon, Esquire
Chairperson/Public Arbitrator

July 28, 1997
Date

/s/ Theodore L. Leeb, Esq.
Theodore L. Leeb, Esquire
Public Arbitrator

July 28, 1997
Date

/s/ Robert H. Stachura, CPA
Robert H. Stachura, CPA
Industry Arbitrator

August 1, 1997
Date