

## NASD Regulation, Inc. AWARD

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In the Matter of the Arbitration Between

Name of Claimant

Leonard A. Calderone, Pamela K. Calderone,  
David A. Vore, Rosalie D'Amico,  
Maurice C. Latimer, and Larcia A. Latimer

and

96-04879

Name of Respondent

SunAmerica Securities, Inc.

Name of Third-Party Respondent

Michael A. Duby

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### REPRESENTATION OF PARTIES

Leonard A. Calderone, Pamela K. Calderone, David A. Vore, Rosalie D'Amico, Maurice C. Latimer, and Larcia A. Latimer (collectively as "**Claimants**") were represented by Kalju Nekvasil, Esq. and Stephen Krossschell, Esq., Goodman & Nekvasil, P.A., Safety Harbor, Florida and Thomas H. Bleakley, Esq., Bleakley & McKeen, P.C., Detroit, Michigan.

SunAmerica Securities, Inc. ("**Respondent**") was represented by Dennis J. Levasseur, Esq., Bodman, Longley & Dahling, LLP., Detroit, Michigan.

Michael A. Duby ("**Respondent Duby**") was represented by Walter L. Baumgardner, Esq., Musilli, Baumgardner, Wagner & Parnell, P.C., St. Clair Shores, Michigan.

### CASE INFORMATION

The Statement of Claim was filed on or about November 11, 1996. The First Amended Statement of Claim was filed on or about December 3, 1996. The Second Amended Statement of Claim was filed on or about March 26, 1997. Submission Agreement of Claimants Leonard A. Calderone and Pamela K. Calderone was signed on October 7, 1996. Submission Agreement of Claimant David A. Vore was signed on November 13, 1996. Submission Agreement of Claimant David A. Vore, Trustee of the Genesee Psychological Resources, P.C. Employee Profit Sharing Plan and Trust dated 2/25/81 was signed on March 11, 1998. Submission Agreement of Claimant David A. Vore, Custodian for Jeremy N. Vore UMIUGTMA was signed on March 11, 1998. Submission

Agreement of Claimant Rosalie D'Amico was signed on November 20, 1996. Submission Agreement of Claimants Maurice C. Latimer and Larcia A. Latimer was signed on March 11, 1997.

Answer and Affirmative Defenses to First Amended Statement of Claim was filed by Respondent SunAmerica Securities, Inc. on or about January 9, 1997. Answer and Affirmative Defenses to Second Amended Statement of Claim was filed by Respondent SunAmerica Securities, Inc. on or about May 18, 1997. Third Party Statement of Claim was filed on or about April 23, 1997. Motion to Dismiss Claimant Dr. Vore was filed on or about March 30, 1998. Submission Agreement of Respondent SunAmerica Securities, Inc. was signed on December 16, 1997 by Bridget M. Gaughan.

Statement of Answer was filed by Third-Party Respondent Michael A. Duby on or about September 25, 1997.

### **HEARING INFORMATION**

Pre-hearing conferences were held on August 26, 1997 for one (1) session and January 27, 1998 for one (1) session with Robert J. Scafuri, Esq., presiding. Pre-hearing conferences were held on September 9, 1997 for one (1) session, September 17, 1997 for one (1) session and February 16, 1998 for one (1) session with all arbitrators.

The hearing was held on March 9, 1998 for two (2) sessions, March 10, 1998 for two (2) sessions, March 11, 1998 for two (2) sessions, March 12, 1998 for two (2) sessions, May 18, 1998 for two (2) sessions, May 19, 1998 for two (2) sessions, May 20, 1998 for two (2) sessions, May 21, 1998 for two (2) sessions, June 8, 1998 for two (2) sessions, June 9, 1998 for two (2) sessions, June 10, 1998 for two (2) sessions, June 22, 1998 for two (2) sessions, and June 23, 1998 for two (2) sessions in Southfield, Michigan for a total of two (2) pre-hearing and twenty-nine (29) sessions.

### **CASE SUMMARY**

Claimants alleged that Respondent SunAmerica, acting through Michael R. Spencer and Donald T. White, Jr., recommended that Claimants invest in unregistered, fraudulent promissory notes issued by Jetlease Finance Corporation ("Jetlease"). Claimants alleged That Respondent SunAmerica made false representations to Claimants in connection with these recommendations, including, *inter alia*, that these promissory notes were conservative, safe investments, that SunAmerica had thoroughly checked out this investment and that SunAmerica agents had traveled to Ft. Lauderdale, Florida to review Jetlease's books and records, that Jetlease would generate distributions in the form of income, that Claimants' investments would be secured by an exclusive lien that was registered with the Federal Aviation Administration ("FAA") in Oklahoma City, Oklahoma on an aircraft that far exceeded in value the promissory notes purchased by Claimants, that Jetlease and its principals had a highly successful track record, that these investments were risk free, and that Claimants could liquidate their investment with only thirty day's notice. Claimants further alleged that Respondent

failed to conduct a proper due diligence review of these promissory notes and failed to make material disclosures to Claimants concerning their lack of due diligence and the background of the principals of Jetlease. Specifically, Respondent failed to disclose that Jetlease was a Ponzi scheme, that a state agency had brought an administrative action against the President of Jetlease for selling unregistered securities, that lawsuits had been filed against Jetlease alleging that the notes were not secured and that Jetlease was a fraud, that the Jetlease Promissory Notes were unregistered in violation of Michigan law, and that Claimants' investments were not collateralized by an exclusive lien that was registered with the FAA and worth far more than their investment. Claimants further alleged that Respondent failed to properly supervise Spencer and White, failed to establish proper supervisory measures over Spencer and White, and failed to comply with the supervisory procedures that were actually implemented.

Claimants alleged that Respondent's actions violated the Michigan Securities Act. Claimants also brought claims of breach of contract, common law fraud, breach of fiduciary duty, and negligence and gross negligence. Claimants alleged that Respondent was responsible for the actions of Spencer and White under the doctrines of *respondeat superior*, apparent authority, and inherent agency power. Claimants further alleged that SunAmerica was a controlling person under the Michigan Securities Act over the activities of Spencer and White and that SunAmerica violated the Michigan Securities Act and was liable pursuant to Claimants' common law claims because it failed to properly supervise Spencer and White. Claimants further alleged that Michael Duby was a sub-agent of SunAmerica and that SunAmerica was therefore responsible for Duby's actions and omissions.

Respondent SunAmerica denies the allegations of wrongdoing contained in the statement of claim and the amended statements of claim. It is SunAmerica's position that the JetLease Notes were, in fact, sold to claimants by third-party respondent Duby, who was not a registered representative, agent, or employee of SunAmerica at any time. Rather, Duby (who admitted making the sales to claimants) was a registered representative of Mariner Financial Services when claimant D'Amico purchased her JetLease Note in July 1995. SunAmerica argued that because it is undisputed that it was not a broker-dealer with whom Duby was an associated person, and it was not otherwise Duby's principal or employer, it is not responsible for Duby's actions or omissions.

SunAmerica argued that the Michigan Securities Act did not apply because neither Spencer nor White sold or offered to sell (as those terms are defined in that Act) the JetLease Notes to any of the claimants because, *inter alia*, they did not pass title or receive a fee or commission for the sale. Additionally, SunAmerica argued that there is no "control person" liability under the Michigan Securities Act, but that liability against a broker-dealer is solely limited to those situations where a broker-dealer materially aids in the sale of an offending product. Furthermore, SunAmerica argued that it was not a "control person" over Spencer and/or White in connection with JetLease, even if that theory of liability against a broker-dealer existed under the Act. Moreover, SunAmerica argued that even if Spencer and/or White were liable to any of the claimants, SunAmerica was not liable

because it did not know and, in the exercise of reasonable care, could not have known of the facts by which liability is alleged to have exist.

As to the claimants' remaining claims, such as breach of contract (for which it is SunAmerica's position claimants have produced absolutely no evidence), fraud, negligence, and breach of fiduciary duty, SunAmerica argued that it was not responsible because Spencer and/or White, if they were involved in the sales, were acting wholly outside the scope of their actual, apparent, and/or inherent authority. Moreover, it is SunAmerica's position that it more than reasonably supervised Spencer and/or White so that there is no basis for liability for failure to supervise.

SunAmerica alleged in its third-party statement of claim that Duby was solely responsible for claimants' alleged purchases of the JetLease Notes and that if claimants recovered an arbitration award and/or judgment against SunAmerica, SunAmerica should recover from Duby any and all such damages and sums including, but not limited to, attorney fees, costs, and expenses. Furthermore, SunAmerica argued that under the Michigan Tort Reform Act (and this Panel's inherent equity power), claimants' alleged damages should be reduced by that percentage in which Duby is responsible. Furthermore, SunAmerica argued that claimants' alleged damages should be reduced by their own conduct and/or negligence.

Third-party respondent Duby filed an answer to which he admitted that he sold the JetLease Notes to claimants, but denied that he was liable to SunAmerica in any way.

### **RELIEF REQUESTED**

Claimants requested actual damages, benefit of the bargain damages and lost opportunity damages and pre-judgment interest and rescission interest under the Michigan Securities Act in the amount of \$360,594.15, attorney's fees and costs, punitive damages, and such other relief as is deemed proper and necessary by the arbitration panel.

Respondent SunAmerica requested the dismissal of the claims. Respondent SunAmerica further requested that the arbitration panel award SunAmerica its costs and attorney's fees incurred in defending against the claims.

Respondent SunAmerica also requested that the arbitration panel enter an award of damages against Third-party Respondent Duby in the amount of any sums awarded by the panel against SunAmerica and award SunAmerica its costs, including attorney's fees incurred in defending against Claimants' claims.

Third-party Respondent Duby requested the arbitration panel Dismiss SunAmerica's Third-Party Claim and award him all attorney's fees and costs incurred as a result of the claim.

### **OTHER ISSUES CONSIDERED & DECIDED**

On June 24, 1997, Respondent SunAmerica filed a Motion to Sever Action. The arbitration panel issued a written ruling dated September 9, 1997, denying Respondent SunAmerica's Motion to Sever. Respondent SunAmerica also filed a Motion to Adjourn the Hearing on March 2, 1998. This Motion was denied by the arbitration panel prior to the hearing.

On September 17, 1997, and November 10, 1997, Third-party Respondent Duby filed a Motion to Dismiss. On March 27, 1998, Respondent SunAmerica filed a Motion to Dismiss Claimant Vore's claims. Respondent SunAmerica also filed a Motion to Exclude the Testimony of Expert Witness Professor Long. All these Motions are hereby denied.

Respondent Michael A. Duby did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the Third Party Claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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. Office of Dispute Resolution (the "NASD").

### **AWARD**

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

1. Respondent SunAmerica Securities, Inc. shall be and hereby is liable for, as a result of the acts of its agent Michael Spencer, and shall pay to Claimants Leonard A. Calderone and Pamela K. Calderone the sum of \$45,000.00 (**Forty Five Thousand Dollars**) as compensatory damages. This sum includes an award of costs, attorneys' fees and interest.
2. Respondent SunAmerica Securities, Inc. shall be and hereby is liable for, as a result of the acts of its agent Michael Spencer, and shall pay to Claimant David A. Vore the sum of \$40,000.00 (**Forty Thousand Dollars**) as compensatory damages. This sum includes an award of costs, attorneys' fees and interest.
3. Respondent SunAmerica Securities, Inc. shall be and hereby is liable for, as a result of the acts of its agent Donald White, and shall pay to Claimant Rosalie D'Amico the sum of

\$20,000.00 (**Twenty Thousand Dollars**) as compensatory damages. This sum includes an award of costs, attorneys' fees and interest.

4. Respondent SunAmerica Securities, Inc. shall be and hereby is liable for, as a result of the acts of its agent Michael Spencer, and shall pay to Claimants Maurice C. Latimer and Larcia A. Latimer the sum of \$15,000.00 (**Fifteen Thousand Dollars**) as compensatory damages. This sum includes an award of costs, attorneys' fees and interest.
5. The request for an award of punitive damages is denied.
6. Third Party Respondent shall be and hereby is liable for and shall pay to Third Party Claimant SunAmerica Securities, Inc. the sum of \$120,000.00 (**One Hundred Twenty Thousand Dollars**).

#### **FORUM FEES**

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There were two (2) sessions x \$300 and twenty nine (29) sessions x \$750.00 = \$22,350.00 in forum fees. Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$200.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD on behalf of the Claimants Leonard A. Calderone, Pamela K. Calderone, David A. Vore, Rosalie D'Amico, Maurice C. Latimer, and Larcia A. Latimer. Pursuant to Rule 10332(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$250.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$600.00 previously deposited with the NASD on behalf of Third party Claimant SunAmerica.

Pursuant to Rule 10332(c) of the Code, Claimants Leonard A. Calderone and Pamela K. Calderone shall be and hereby are liable for and shall pay to the NASD the sum of \$3,475.00 as forum fees. Pursuant to Rule 10332(c) of the Code, Claimant David A. Vore shall be and hereby is liable for and shall pay to the NASD the sum of \$3,475.00 as forum fees. Pursuant to Rule 10332(c) of the Code, Claimants Maurice C. Latimer and Larcia A. Latimer shall be and hereby are liable for and shall pay to the NASD the sum of \$3,475.00 as forum fees.

Pursuant to Rule 10332(c) of the Code, Respondent SunAmerica Securities, Inc. shall be and hereby is liable for and shall pay to the NASD the sum of \$11,175.00 as the balance due for forum fees.

Pursuant to Rule 10333 of the Code, Respondent SunAmerica Securities, Inc. has paid to the NASD the non-refundable member surcharge in the amount of \$300.00 previously invoiced.

The NASD shall retain postponement fees in the amount of \$750.00 previously deposited by Respondent SunAmerica Securities, Inc. Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

/s/ Robert J. Scafuri  
Robert J. Scafuri, Esq.  
Public Arbitrator, Presiding Chair

Dated: July 31, 1998

/s/ Howard F. Lynn  
Howard F. Lynn  
Public Arbitrator

August 1, 1998

/s/ Bruce F. Coleman  
Bruce F. Coleman  
Industry Arbitrator

July 29, 1998