

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Northeastern New York District Council Pipefitters Welfare Fund and Plumbers and Pipefitters Local 773, (Claimants) vs. Nicholas M. Calapa, Shearson Lehman Brothers, Inc., Smith Barney, Inc., Smith Barney Shearson, Inc., Gilford Securities, Inc., Stuart, Coleman & Co., Inc., Investors Associates, Inc., Jaron Equities Corp., Greenwich Equities, and Raiké Financial Group., (Respondents)

Case Number: 99-00414

Hearing Site: Albany, New York

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**REPRESENTATION OF PARTIES**

Claimants, Northeastern New York District Council Pipefitters Welfare Fund ("Welfare Fund") and Plumbers and Pipefitters Local 773 ("Local 773"), hereinafter collectively referred to as "Claimants": Richard L. Burstein, Esq., Fernandez, Burstein & Tuczinski, P.C., Albany, NY.

Respondents, Shearson Lehman Brothers, Inc., Smith Barney, Inc., and Smith Barney Shearson, Inc. (hereinafter collectively referred to as "Smith Barney") and Nicholas M. Calapa ("Calapa"), did not appear at the hearings in this matter. Previously represented by: Christopher B. O'Malley, Esq., First Vice President and Associate General Counsel, Salomon Smith Barney Inc., New York, NY.

Respondent, Gilford Securities, Inc. ("Gilford"): Norman S. Lawi, Esq., General Counsel, Gilford Securities, Inc., New York, NY.

Respondent, Stuart, Coleman & Co., Inc. ("Stuart"), did not enter an appearance in this matter.

Respondent, Investors Associates, Inc. ("Investors"), did not enter an appearance in this matter.

Respondent, Jaron Equities Corp. ("Jaron"), did not enter an appearance in this matter.

Respondent, Greenwich Equities ("Greenwich"), did not enter an appearance in this matter.

Respondent, Raiké Financial Group ("Raiké"), did not appear at the hearings in this matter. Previously represented by: Ruthann G. Niosi, Esq., Law Offices of Ruthann G. Niosi, Esq., P.C., New York, NY.

### CASE INFORMATION

Statement of Claim filed on or about: January 27, 1999.  
Corrected Statement of Claim filed on or about: March 12, 1999.  
Response to Raike's Motion for a More Particular Statement of Claim filed by Claimants on or about: June 16, 1999.  
Response to Raike's Motion to Dismiss and Motion for Sanctions filed by Claimants on or about: August 16, 1999.  
Welfare Fund signed the Uniform Submission Agreement: January 20, 1999.  
Local 773 signed the Uniform Submission Agreement: January 20, 1999.

Statement of Answer filed by Smith Barney and Calapa on or about: June 14, 1999.  
Smith Barney signed the Uniform Submission Agreement: June 14, 1999.  
Calapa signed the Uniform Submission Agreement: May 3, 1999.

Statement of Answer and Counterclaim filed by Gilford on or about: June 11, 1999.  
Gilford signed the Uniform Submission Agreement: June 16, 1999.

Stuart did not file a Statement of Answer or sign a Uniform Submission Agreement.

Investors did not file a Statement of Answer or sign a Uniform Submission Agreement.

Jaron did not file a Statement of Answer or sign a Uniform Submission Agreement.

Greenwich did not file a Statement of Answer or sign a Uniform Submission Agreement.

Statement of Answer filed by Raike on or about: July 16, 1999.  
Motion for a More Particular Statement of Claim filed by Raike on or about: June 14, 1999.  
Motion to Dismiss and Motion for Sanctions filed by Raike on or about: July 22, 1999.  
Raike signed the Uniform Submission Agreement: August 9, 1999.

### CASE SUMMARY

Claimants asserted the following causes of action: excessive trading; inappropriate and unsuitable investments; common law fraud; failure to supervise; breach of fiduciary duties; unauthorized transactions; breach of trust; violations of the Rules of Fair Practice of the NASD; violations of the Securities & Exchange Act; violations of the Employment Retirement Income Security Act of 1974 ("ERISA"); misstatements of facts; omissions; misrepresentation; concealment; breach of contract; negligence; lack of diversification; negligent hiring; failure of duty to warn; respondeat superior; and violations of federal and state statutory and common law. Claimants' claim involved a variety of stocks.

Unless specifically admitted in their Answer, Smith Barney and Calapa denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants' Statement of Claim fails to state claims upon which relief can be granted; Claimants' demand for damages is improper as a matter of law and fact and fails to state a claim upon which relief can be granted; no damages were suffered by Claimants; Smith Barney and/or Calapa did not make any misrepresentations, omissions, or misstatements with respect to the investments made in Claimants' accounts; by reason of Claimants' failure to complain promptly after receipt of written confirmation slips, monthly account statements, and other documents evidencing or setting forth the transactions in Claimants' accounts, Claimants are barred from recovery under the doctrines of ratification, estoppel, waiver, and laches; by reason of Claimants' failure to mitigate any alleged damages, Claimants are barred from recovery; and to the extent that Claimants' demand involves purchases made prior to December 1991, such claims are ineligible pursuant to Section 10304 of the NASD Code of Arbitration Procedure.

Unless specifically admitted in its Answer, Gilford denied the allegations made in the Statement of Claim and asserted the following defenses: Claimants have failed to state a claim upon which relief can be granted; Claimants' claims against Gilford are without merit in that they authorized all transactions in the accounts; Claimants' claims are barred by the applicable statutes of limitations; Claimants' claims of unauthorized trading are barred inasmuch as they ratified the transactions in the accounts; Claimants' claims are barred by the doctrines of equitable estoppel and waiver; Gilford acted reasonably and in good faith at all times and therefore Gilford is not liable; Claimants have failed to mitigate and/or minimize their losses and are therefore barred from recovery; and any damages suffered by Claimants have been caused, in whole or in part, by the primary, active, and affirmative negligence, carelessness, assumption of risk, and/or other culpable conduct of Claimants.

In its Counterclaim, Gilford asserted the following causes of action: Claimants' trustee was responsible for the accounts in question; Claimants' trustee had a fiduciary duty to Claimants higher than any supposed fiduciary duty held by Gilford; and Claimants' trustee should be held responsible for any losses in the accounts.

### **RELIEF REQUESTED**

Claimants requested an Award against Respondents jointly and severally for actual losses sustained by them in the diminution of their accounts, in addition to interest and damages based upon a well-managed portfolio, and attorneys' fees and punitive damages in an amount which the Panel deems appropriate based on all of the circumstances herein, but which shall not exceed \$5,000,000.00. Claimants also requested forum fees, arbitrator fees, fund fees, expert witness fees, and any further relief which the Panel deems just and appropriate under the circumstances.

Smith Barney and Calapa requested that Claimants' claims be dismissed in their entirety.

Gilford requested that the Statement of Claim be dismissed in its entirety and that judgement be rendered by the Panel in its favor.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

On August 25, 1999, Claimants informed NASD Dispute Resolution, Inc. that they had entered into a settlement agreement with Stuart.

Prior to the hearings in this matter, the Panel granted Raikes Motion to Dismiss.

On April 3, 2001, Claimants informed NASD Dispute Resolution, Inc. that they had entered into a settlement agreement with Smith Barney.

Greenwich was not a member of the NASD, Inc. or an associated person at the time in question and declined to voluntarily submit to this arbitration proceeding.

NASD Dispute Resolution, Inc. was unable to effect service upon Respondents Investors and Jaron, therefore said Respondents were not subject to the jurisdiction of the Panel in this matter.

Prior to the hearings in this matter, Claimants filed a Motion to Dismiss Gilford's Counterclaim. After due consideration, the Panel granted said Motion to Dismiss only to the extent that the claim was dismissed as a Counterclaim denominated as such, and determined that the claim would be considered as an affirmative defense by Gilford to the claims asserted against it by Claimants.

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Calapa has been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without Calapa present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

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.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Gilford be and hereby is solely liable for and shall pay to Welfare Fund the sum of \$53,000.00 as compensatory damages, for failure to supervise and ERISA violations.
2. Gilford be and hereby is solely liable for and shall pay to Local 773 the sum of \$28,000.00 as compensatory damages, for failure to supervise and ERISA violations.
3. Calapa be and hereby is solely liable for and shall pay to Welfare Fund the sum of \$67,000.00 as compensatory damages, for breach of contract, breach of fiduciary duty, unsuitability, lack of diversification, negligence, violation of the NASD Rules of Fair Practice, violation of the Security Act of 1933 and the Exchange act of 1934, ERISA violations, and fraud.
4. Calapa be and hereby is solely liable for and shall pay to Local 773 the sum of \$30,000.00 as compensatory damages, for breach of contract, breach of fiduciary duty, unsuitability, lack of diversification, negligence, violation of the NASD Rules of Fair Practice, violation of the Security Act of 1933 and the Exchange act of 1934, ERISA violations, and fraud.
5. Calapa be and hereby is solely liable for and shall pay to Welfare Fund the sum of \$500,000.00 as punitive damages. The Panel awards punitive damages based upon its determination that Calapa engaged in unconscionable conduct.
6. Calapa be and hereby is solely liable for and shall pay to Local 773 the sum of \$500,000.00 as punitive damages. The Panel awards punitive damages based upon its determination that Calapa engaged in unconscionable conduct.
7. Claimants' request for attorneys' fees is hereby denied.
8. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 250.00
Counterclaim filing fee	= \$ 500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. In this matter, Shearson Lehman Brothers, Inc., Smith Barney, Inc., Gilford Securities, Inc., Stuart, Coleman & Co., Inc., and Raiké Financial Group are parties.

##### **Shearson Lehman Brothers, Inc.**

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

##### **Smith Barney, Inc.**

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

##### **Gilford Securities, Inc.**

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

##### **Stuart, Coleman & Co., Inc.**

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 50.00

##### **Raiké Financial Group**

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

September 6, 7 & 8, 2000, adjournment by Gilford = \$1,000.00

### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$1,000.00 = \$1,000.00

Pre-hearing conference: February 1, 2000 1 session

Four (4) Hearing sessions x \$1,000.00 = \$4,000.00

Hearing Dates: April 4, 2001 2 sessions

April 5, 2001 1 session

April 6, 2001 1 session

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Total Forum Fees = \$5,000.00

1. The Panel has assessed \$2,500.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$2,500.00 of the forum fees against Gilford.

### **Fee Summary**

1. Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee = \$ 250.00

Forum Fees = \$ 2,500.00

Total Fees = \$ 2,750.00

Less payments = \$ 1,250.00

Balance Due NASD Dispute Resolution, Inc. = \$ 1,500.00

2. Gilford be and hereby is solely liable for:

Counterclaim Filing Fee = \$ 500.00

Member Fees = \$ 7,600.00

Adjournment Fee = \$ 1,000.00

Forum Fees = \$ 2,500.00

Total Fees = \$11,600.00

Less payments = \$ 9,700.00

Balance Due NASD Dispute Resolution, Inc. = \$ 1,900.00

3. Shearson Lehman Brothers, Inc. be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 7,600.00
<u>Total Fees</u>	= \$ 7,600.00
<u>Less payments</u>	= \$ 2,500.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 5,100.00

4. Smith Barney, Inc. be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 7,600.00
<u>Total Fees</u>	= \$ 7,600.00
<u>Less payments</u>	= \$ 3,100.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 4,500.00

5. Stuart be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 2,550.00
<u>Total Fees</u>	= \$ 2,550.00
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 2,550.00

6. Raike be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 3,100.00
<u>Total Fees</u>	= \$ 3,100.00
<u>Less payments</u>	= \$ 3,100.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

All balances are due and payable to NASD Dispute Resolution, Inc.

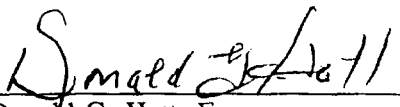


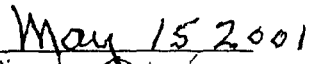
**ARBITRATION PANEL**

Donald G. Hatt, Esq.	-	Public Arbitrator, Presiding Chair
Benjamin F. Richards, Jr.	-	Public Arbitrator
Bernard J. McGuire	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
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Donald G. Hatt, Esq.  
Public Arbitrator, Presiding Chair

  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Benjamin F. Richards, Jr.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Bernard J. McGuire  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

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June 1, 2001  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

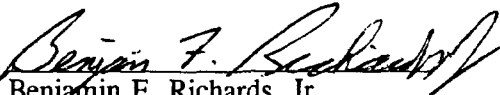
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Signature Date

  
Benjamin F. Richards, Jr.  
Public Arbitrator

6/4/2001  
Signature Date

\_\_\_\_\_  
Bernard J. McGuire  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

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Public Arbitrator, Presiding Chair

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Signature Date

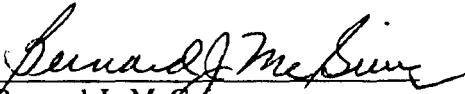
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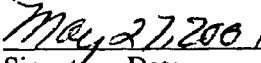
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Signature Date

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Bernard J. McGuire  
Industry Arbitrator

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Signature Date

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