

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Jorge R. Kiewek

88-00129

Name of Respondents

Shearson Lehman Brothers, Inc., f/k/a
Shearson Lehman Hutton, Inc., f/k/a Shearson
Lehman Brothers/American Express;
Joe Carabaza

REPRESENTATION

For Claimant: Jorge R. Kiewek was represented by Joel H. Pullen, Esq. of San Antonio, Texas.

For Respondents: Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express, was represented by S. Mark Murray, Esq. of Pape, Murray, McClenahan & Sparr, Inc., located in San Antonio, Texas.

CASE INFORMATION

Statement of Claim filed: January 14, 1988.

Claimant's Submission Agreement signed on: March 15, 1988.

Joint Statement of Answer filed by Respondent Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express and Joe Carabaza on: August 5, 1988.

Respondent Joe Carabaza's Submission Agreement signed on: September 12, 1990.

Respondent Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express did not file a properly executed Submission Agreement, but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: September 13, 1990 for one (1) session;
July 27, 1992 for two (2) sessions;
July 29, 1992 for three (3) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Jorge R. Kiewek ("Kiewek") alleged that Respondent Joe Carabaza ("Carabaza"), while employed by or acting as an agent for Respondent Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express ("Shearson"), misrepresented the transactions in Kiewek's commodities account, placed Kiewek into unsuitable investments and "churned" the account. Kiewek specifically alleged that:

1. Kiewek was an unsophisticated investor who had only limited investment experience in the United States' stock markets prior to 1985;
2. In 1985, Carabaza solicited Kiewek in Mexico, requesting that he be allowed to handle Kiewek's investments in the United States. Kiewek agreed and placed his trust entirely in Carabaza and Shearson, explicitly informing Carabaza that his funds were to be conservatively invested with safety. Kiewek further evidenced this trust by agreeing that it would not be necessary for Carabaza to send Kiewek account statements in Mexico;
3. Beginning in 1985 and continuing through at least 1986, Respondents engaged in excessive trading in Kiewek's account in light of his conservative investment objectives, losing virtually all of Kiewek's funds;
4. In spite of Respondents' knowledge of Kiewek's conservative investment objectives and unfamiliarity with the United States' stock markets, Respondents invested his funds in wholly unsuitable investments;
5. Respondents falsely represented to Kiewek that his funds would be invested conservatively in low risk investments; they would manage his accounts in his best interests, keeping in mind his investment objectives; Kiewek would receive high returns on his investments due to Shearson's sophisticated investment advisors; and Kiewek's accounts were making money and no improper activity was going forward; and
6. In 1986, Kiewek became aware that contrary to his wishes and instructions, funds were being lost from his account. During this time frame, Respondents strived to reassure Kiewek that there was no impropriety and fraudulently concealed their wrongs from him.

Based upon the above allegations, Kiewek asserted claims for violation of 15 U.S.C.A. Sections 77q,78j,78o and the rules and regulations promulgated thereunder; violation of the rules and regulations of the National Association of Securities Dealers and the New York Stock Exchange; common law fraud; breach of fiduciary duty; intentional infliction of emotional distress; and negligence.

Respondents Shearson and Carabaza denied the material allegations of the Statement of Claim, alleging that:

1. Kiewek's commodity account was one of several accounts he maintained at Shearson and was specifically designated by Kiewek to be the account with the highest risk reward ratio and trading volume of all his Shearson accounts;
2. Carabaza never traveled to Mexico to solicit Kiewek, but was introduced to Kiewek by Horacio Garcia, a Shearson broker who was opening several accounts for Kiewek for various other purposes. Carabaza, at the request of Kiewek and Garcia, was to handle only Kiewek's commodity account;
3. In or about June, 1985, at a meeting attended by Kiewek, Garcia and Carabaza, Garcia outlined a "pyramid" structure for Kiewek's investments, with Carabaza managing the high risk commodity accounts at the top of the pyramid and Garcia managing all others. Both Garcia and Carabaza repeatedly stressed the risks of commodities trading and Kiewek, after being made fully aware of the risks, directed that the commodity account be traded aggressively to maximize profits;
4. Kiewek requested that no communications be directed to him in Mexico and that monthly statements and confirmations not be mailed to his Mexico address. Kiewek indicated that he would obtain information about his account from Garcia, with whom he was in frequent personal and/or telephonic contact, and did not have any contact, in person or by telephone, with Carabaza after the initial meeting;
5. Shearson and Carabaza did not misrepresent the level of equity in Kiewek's account. Garcia discussed with Carabaza the positions in the commodity account on virtually a daily basis and could have provided to Kiewek such information at any time he requested it; and
6. Any losses suffered in Kiewek's commodity account were the result of market forces working against the aggressive trading strategies employed by Carabaza at Kiewek's specific direction.

RELIEF REQUESTED

Claimant Jorge R. Kiewek requested entry of an award against Respondents Shearson and Carabaza for a sum in excess of \$200,000.00 in actual damages,

punitive and exemplary damages, attorneys fees and costs.

Respondents Shearson and Carabaza requested that the Statement of Claim be dismissed and denied in its entirety, and that all costs be assessed against Kiewek.

OTHER ISSUES CONSIDERED & DECIDED

The Arbitration Panel finds that Respondent Shearson failed to file a properly executed Submission Agreement, but appeared and gave evidence at the hearing, and as a member firm, is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

On September 10, 1990, Claimant Kiewek filed a Motion for Leave to Amend the Statement of Claim. The motion was heard at the hearing scheduled on September 13, 1990. At hearing, the panel heard the parties arguments and determined that the Motion would be denied.

Prior to hearing opening arguments on September 13, 1990, Claimant Kiewek moved to adjourn the hearing until certain discovery matters could be resolved. After hearing argument on the issue, the panel determined that the motion would be granted and assessed the adjournment fee required pursuant to Section 30 of the NASD Code of Arbitration Procedure.

On September 28, 1990, Claimant Kiewek filed a Motion to Reconsider Assessment of Adjournment Fee. The Motion and all responses were forwarded to the panel for decision. On May 18, 1992, the panel determined that the Motion would be denied.

On September 28, 1990, Claimant Kiewek filed a Motion to Join and Consolidate Pending Matters. The Motion and all responses were forwarded to the panel for decision. On May 18, 1992, the panel determined that the Motion would be denied.

On September 28, 1990, Claimant Kiewek filed a Motion to Reconsider Claimant's Application to Amend Statement of Claim. The Motion and all responses were forwarded to the panel for decision. The panel determined that the Motion would be denied.

On July 27, 1992, the panel determined that the official record of hearing for that day would be kept by a court reporter supplied by A & A Court Reporters. The remaining two days of hearing were recorded by NASD tape recorders.

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.

AWARD

After considering the pleadings, the testimony and the evidence presented at

the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express, and Joe Carabaza are jointly and severally liable for and shall pay to Claimant Jorge R. Kiewek the sum of \$164,810.70 as actual damages, plus interest at the rate of 8% per annum from April 30, 1986 until said amount is paid;
2. In addition, Respondents Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express, and Joe Carabaza are jointly and severally liable for and shall pay to Claimant Jorge R. Kiewek the sum of \$50,000.00 as punitive damages. In determining to award punitive damages to Claimant, the panel considered the state and federal authorities cited in the post-hearing submissions filed by the parties and determined that authority existed for an award of punitive damages to the Claimant Jorge R. Kiewek;
3. The award of punitive damages in paragraph 2 above shall accrue interest at a rate of 8% per annum from the date the award is served on the parties until the sum is paid in full;
4. Each party shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

OTHER COSTS

Pursuant to Section 30 of the NASD Code of Arbitration Procedure, the NASD shall refund any adjournment fee paid by Claimant Jorge R. Kiewek. Any adjournment fees due and owing by any party are hereby waived by the arbitration panel.

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the costs of maintaining the record of the hearing incurred on July 27, 1992 shall be borne by Respondent Shearson. All costs of transcribing the record shall be borne by the party requesting the transcription pursuant to Section 37 of the Code of Arbitration Procedure.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Six (6) sessions x \$750.00 per session = \$4,500.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the claim filing fee of \$200.00 and refund the hearing session deposit of \$550.00 previously deposited by the Claimant Jorge R. Kiewek. Respondents Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., formerly known as Shearson Lehman Brothers/American Express and Joe

Carabaza are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$4,500.00.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Justin S. Morrill, Esq.
Justin S. Morrill, Esq.
Public Arbitrator
Chairperson

October 28, 1992

John A. Selman, Esq.
John A. Selman, Esq.
Public Arbitrator

October 23, 1992

Robert M. Birenbaum
Robert M. Birenbaum
Industry Arbitrator

October 26, 1992

Date of Service on Parties: 11-2-92