

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Sidney Marcus

88-03325

Name of Respondent(s)

E.F. Hutton, now known as  
Shearson Lehman Hutton, Inc.  
Alan M. Weiss and Charles Eldemire

CASE SUMMARY

In a Statement of Claim initially filed with the NASD on or about October 26, 1988 and amended thereafter by a first, second and third amended claim, Claimant Sidney Marcus, ("Marcus") alleged that Respondents E.F. Hutton & Co., Inc., now known as Shearson Lehman Hutton, Inc. ("Shearson"), Alan M. Weiss ("Weiss") and Charles Eldemire ("Eldemire") engaged in professional negligence, breached their fiduciary duties owed Marcus committed common law fraud, breached the implied duty of good faith and fair dealing with their client, violated the provisions of the Texas Deceptive Trade Practice Act, the NASD Rules of Fair Practice, the Rules and By-laws of the Chicago Board Options Exchange, Inc., Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b) promulgated thereunder as a consequence of trading options in and for Marcus' account maintained at Shearson. Marcus alleged that the investment strategy of selling equity put options for his account was unsuitable because the financial risks of this strategy were never fully disclosed or were misrepresented to him. Additionally, Marcus alleged that his account was improperly liquidated on or about October 20, 1987 without notice and an opportunity for Marcus to meet a margin call in his account.

In their initial answer to the claim which was filed with the NASD on or about January 11, 1989, Shearson and Weiss alleged that Marcus represented himself as a wealthy, sophisticated businessman who understood the risk involved in trading options and had prior experience trading options. Shearson and Weiss asserted that Marcus' Claim was without merit and was barred by the doctrines of waiver, estoppel and ratification.

Shearson, Weiss and Eldemire filed an answer to the third amended Statement of Claim and the second and first amended claims which were nearly identical in form and substance to the third amended Claim. Shearson, Weiss and Eldemire alleged that the customer agreement signed by Marcus provided that there was no need to advise a client prior to liquidating an account for failure to meet a margin call.

In Respondents' First Amended Answer to the Third amended Statement of Claim filed with the NASD on or about August 6, 1990, Shearson, Weiss and Eldemire reiterated the allegations contained in the answer to the Third Amended Answer. Additionally, Shearson, Weiss and Eldemire requested an award of their reasonable attorney's fees on the basis that the Chicago Board Options Exchange dismissed charges against Weiss after an investigation of the allegations contained in the claim. Shearson, Weiss and Eldemire alleged as an additional basis for an award of attorney's fees that Marcus breached the representations set forth in the option account agreement he signed when he opened his account at Shearson.

Marcus replied to the counterclaim and alleged that the claim was not frivolous. Marcus also sought attorney's fees as a discovery sanction against Shearson.

#### **RELIEF REQUESTED**

Marcus requested consequential damages of approximately \$219,000.00, treble damages as provided by the Texas Deceptive Trade Practices Act, and exemplary damages at common law, prejudgment and post-judgment interest at the highest lawful rate, attorney's fees and costs of the arbitration.

Shearson, Weiss and Eldemire requested dismissal of the claim in its entirety and an award of their reasonable attorney's fees in an amount not less than \$25,000.00. Marcus requested dismissal of the counterclaim for attorney's fees and sought \$20,000.00 as his attorney's fees as a sanction for Shearson's conduct during pre-hearing discovery.

#### **AWARD**

On Tuesday, Wednesday and Thursday, August 14, 15, & 16, 1990 in Dallas, Texas, during a hearing lasting six sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on September 30, 1988 by Claimant Sidney Marcus, and on October 5, 1988 by Joseph Hanczor on behalf of Respondent Shearson Lehman Hutton, Inc. Respondents Alan Weiss and Charles Eldemire did not execute a submission to arbitration but are required to submit to arbitration at the insistence of a public customer pursuant to Section 12 of the NASD Code. Additionally, Weiss and Eldemire answered the claim, attended the hearing and testified.

Accordingly, they will be bound by the arbitrators' decision on all issues submitted for consideration. The arbitration panel, having considered the pleadings, the testimony, the evidence presented at the hearing and the parties' legal authorities, has decided in full and final resolution of the issues submitted for determination as follows:

1. Arbitrator Robert A. Roberts respectfully dissents from the majority decision entered by the arbitration panel pursuant to Section 36 of the NASD Code;

2. The claim asserted against Shearson, Weiss and Eldemire by Marcus shall be and is hereby dismissed in its entirety;

3. The counter-claim for attorney's fees asserted against Marcus by Shearson, Weiss and Eldemire shall be and is hereby dismissed in its entirety;

4. The Claim for discovery sanctions in the form of \$20,000.00 attorney's fees asserted against Shearson, Weiss and Eldemire by Marcus shall be and is hereby dismissed in its entirety;

5. The parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter;

6. Pursuant to Section 30(b) of the NASD code the postponement fees of \$100.00 paid to the NASD by each party to obtain adjournments of previously scheduled hearing dates in the matter are retained by the NASD; and

7. Pursuant to Section 43(c) of the NASD Code, the NASD shall retain the \$750.00 deposit towards forum fees made by Marcus and Shearson is assessed and shall pay \$3750.00 as additional forum fees to the NASD.

Panel Members Concurring

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Judge Fred Harless  
Presiding Chairman

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Jay E. Sandeli

Panel Member Dissenting

Dated: 9/11/90 /S/ *Robert A. Roberts*  
Robert A. Roberts  
In dissent

Dated Served: \_\_\_\_\_

Accordingly, they will be bound by the arbitrators' decision on all issues submitted for consideration. The arbitration panel, having considered the pleadings, the testimony, the evidence presented at the hearing and the parties' legal authorities, has decided in full and final resolution of the issues submitted for determination as follows:

1. Arbitrator Robert A. Roberts respectfully dissents from the majority decision entered by the arbitration panel pursuant to Section 36 of the NASD Code;

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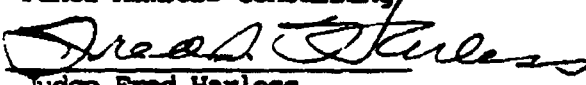
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Panel Members Concurring

Dated: September 8, 1990 /S/   
Judge Fred Harless  
Presiding Chairman

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Jay E. Sandeli

Panel Member Dissenting

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Robert A. Roberts  
In dissent

Dated Served: \_\_\_\_\_

Accordingly, they will be bound by the arbitrators' decision on all issues submitted for consideration. The arbitration panel, having considered the pleadings, the testimony, the evidence presented at the hearing and the parties' legal authorities, has decided in full and final resolution of the issues submitted for determination as follows:

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Panel Members Concurring

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Judge Fred Harless  
Presiding Chairman

Dated: Sept 12, 1990 /S/ J. E. Sandeli  
J. E. Sandeli

Panel Member Dissenting

Dated: \_\_\_\_\_ /S/ \_\_\_\_\_  
Robert A. Roberts  
In dissent

Dated Served: \_\_\_\_\_