

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Shearson Lehman Hutton, Inc.

Claimant,
Counterrespondent

v.

No. 89-01510

William D. Mays
Sharon A. Mays

Respondents,
Counterclaimants

REPRESENTATION OF PARTIES

For Claimant/Counterrespondent: John W. Shaw, Esq., of Bryan Cave, Kansas City, Missouri, and David V. Clark, Esq., of Lathrop & Norquist, Kansas City, Missouri.

For Respondents/Counterclaimant: Lawrence L. Marcucci, Esq., of Shearer, Templer, Pingel & Kaplan, P.C., West Des Moines, Iowa, and Frederick B. Anderson, Esq., of Wiggins & Anderson, West Des Moines, Iowa.

CASE INFORMATION

Statement of Claim filed on or about: May 23, 1989.

Claimant/Counterrespondent's Submission Agreement signed on: May 18, 1989.

Respondents/Counterclaimants' Statement of Answer, Defenses and Counterclaim filed on or about: August 2, 1989.

Respondents/Counterclaimants' Submission Agreement signed on: August 1, 1989.

Claimant's Reply to Respondents' Defenses and Counterclaims filed on or about: October 2, 1989.

Respondents' Amended Answer, Defenses, and Counterclaim filed on or about:

Claimant's Reply to Respondents' Amended Answer, Defenses, and Counterclaim filed on or about: May 20, 1992.

HEARING INFORMATION

Pre-hearing Conference dates:

May 12, 1992. One (1) session.	January 4, 1993. One (1) session.
November 21, 1991. One (1) session.	February 19, 1993. One (1) session.
May 8, 1992. One (1) session.	November 12, 1993. One (1) session.
August 18, 1992. One (1) session.	

Hearing dates:

June 30, 1992. Two (2) sessions.	January 8, 1993. Two (2) sessions.
July 1, 1992. Two (2) sessions.	February 24, 1993. Two (2) sessions.
July 2, 1992. Two (2) sessions.	February 25, 1993. Two (2) sessions.
August 24, 1992. Two (2) sessions.	February 26, 1993. Two (2) sessions.
August 25, 1992. Two (2) sessions.	June 1, 1993. Two (2) sessions.
August 26, 1992. Two (2) sessions.	June 2, 1993. Two (2) sessions.
August 27, 1992. Two (2) sessions.	June 3, 1993. Two (2) sessions.
August 28, 1992. Two (2) sessions.	June 4, 1993. Two (2) sessions.
November 16, 1992. Two (2) sessions.	July 26, 1993. Two (2) sessions.
November 17, 1992. Two (2) sessions.	July 27, 1993. Two (2) sessions.
November 18, 1992. Two (2) sessions.	July 28, 1993. Two (2) Sessions.
November 19, 1992. Two (2) sessions.	July 29, 1993. Two (2) sessions.
November 20, 1992. Two (2) sessions.	August 25, 1993. Two (2) sessions.
January 4, 1993. One (1) session.	August 26, 1993. Two (2) sessions.
January 5, 1993. Two (2) sessions.	January 10, 1994. Two (2) sessions.
January 6, 1993. Two (2) sessions.	January 11, 1994. Two (2) sessions.
January 7, 1993. Two (2) sessions.	

Hearing Location: Kansas City, Missouri.

CASE SUMMARY

Claimant/Counterrespondent, Shearson Lehman Hutton, Inc. a/k/a Shearson Lehman Brothers, Inc. ("SLH") stated that Respondents/Counterclaimants, William D. Mays' and Sharon A. Mays' (the "Mays") entered into a "Client Agreement" with SLH for their joint account, #183-09043, which set forth all of the rights and obligations in respect to any and all accounts opened by the Mays with SLH. SLH further stated that pursuant to paragraph 4 of the Client Agreement, SLH is entitled to charge interest on debit balances which exist on the Mays' account with SLH. SLH alleged that the Mays' joint account reflected a deficit for trading losses in an amount of not less than \$34,768.00 as of April 1989, including interest accrued to date of filing. SLH further alleged that it had made a demand for payment of the debit balance and margin interest due on the Mays' joint account, and that the Mays have failed and refused to pay the debit balance, and continue

to fail and refuse to pay said amount.

The Mays, unless specifically admitted in their Statement of Answer, Defenses, and Counterclaim, denied the allegations contained in the Statement of Claim. In addition, the Mays' asserted the following defenses and Counterclaims against SLH: Breach of contract; fraud; negligent misrepresentation; bad faith; breach of fiduciary duty; conversion; violation of state security laws; violation of Section 10B of the Securities Exchange Act of 1934 and Rule 10B (5); no jurisdiction to arbitrate; violation of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1962; unauthorized trades; negligence; intentional wrongful conduct; inadequate supervision; and violation of Section 407.020 of R.S.Mo. The defenses and counterclaims arose out of transactions in the following securities as set forth in their statement of Answer, Defenses and Counterclaims: Van Kampen Merritt U.S. Government Bond Fund; Alliance Bond Fund High Yield Portfolio; Colonial Government SEC Plus Bond Fund; Pepsi options and shares; Marion Labs shares; King World Productions shares; Liz Claiborne; Hershey stocks; HORL shares; 3M shares; Genetech and Apple puts; McGraw Hill shares; and RTA shares.

Unless otherwise admitted in its Reply to the Mays' Defenses and Counterclaims, SLH denied each and every allegation contained therein. In addition, SLH asserted the following affirmative defenses:

1. The Mays' Counterclaim, and all counts thereof, fail to state a claim upon which relief may be granted.
2. The Mays' Counterclaims are barred by waiver.
3. The Mays' Counterclaims are barred by estoppel.
4. The Mays' Counterclaims are barred by ratification.
5. The Mays' Counterclaims are barred by laches.
6. The Mays' Counterclaims are barred in whole or in part by the applicable statute or statutes of limitations.
7. The Mays' counterclaims are barred because of SLH's good faith and due diligence in the conduct of its affairs with the Mays'.
8. The Mays' failed to mitigate their damages.
9. The Mays' Counterclaim fails to state with particularity the circumstances of any fraud allegedly committed by Claimant.
10. The Mays' substantial contributory negligence was the proximate and superceding cause of any damages which the Mays sustained.
11. SLH stated that if it is adjudged to be at fault under any of the Mays' allegations, which SLH specifically denied, their loss or damage was caused or contributed to by the fault, carelessness, neglect, and negligence of the Mays, and their negligence must be compared to that of SLH, and the Mays' recovery, if any, reduced in accordance with the percentage of fault attributable to the Mays.
12. SLH's conduct was not the proximate cause of any loss or damages to the

Mays.

13. Any and all alleged oral agreements between the Mays and SLH, or any of SLH's employees or representatives, are unenforceable under the applicable statute of frauds.

14. Any and all alleged oral agreements between the Mays and SLH, or any of SLH's employees or representatives, are unenforceable under the parole evidence rule.

15. The Mays' claims are barred in whole or in part by the defense of payment.

16. The Mays' claims are barred in whole or in part by accord and satisfaction.

17. The Mays failed to plead a valid claim under the Missouri Merchandising Practices Act which, at any rate, is expressly limited to transactions involving "goods or services primarily for personal, family or household purposes," purchases or leases of consumer goods and services, and does not apply to securities transactions which are specifically regulated by Missouri's Securities Laws.

18. As a result of the Mays' failure to object or notify SLH of the acts and omissions of which they complain within 10 days of receipt of written confirmations, account statements and other documents evidencing or setting forth transactions in the Mays' accounts, the Mays are barred from recovering from SLH under Section 8-319 of the Uniform Commercial Code.

19. The Mays authorized the alleged conduct of SLH about which they now complain.

20. The Mays have failed to state a claim under 18 U.S.C. Section 1961, *et seq.*, because they have failed to set forth particular facts sufficient to specify the requisite predicate acts, to establish a pattern of racketeering activity, or to establish that SLH is guilty of any of the acts prohibited under Section 1962 (a)-(d), and, finally, because they have failed to set forth the existence of an "enterprise" as required under the statute or to allege the "threat of continuing activity."

21. The Mays' RICO claim fails to state a claim against SLH because there is no vicarious liability under RICO.

22. The Mays are not entitled to punitive damages or an award of attorneys' fees as a matter of law, and any award of punitive damages would constitute a denial of Due Process and Equal Protection under both the Federal and State Constitutions. In addition, an award of punitive damages would be contrary to the law of the State of New York, under which the parties agreed to be bound, inasmuch as New York law prohibits arbitrators from awarding punitive damages.

23. Any recovery by the Mays against SLH under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. Section 1961, *et seq.* would constitute a denial of Due Process and Equal Protection under both the Federal and State Constitutions.

24. The Mays were aware from the outset of the risks of profit and loss associated with investing in securities, and voluntarily assumed such risk. The Mays' knowing and voluntary assumption of such risk was the sole and proximate cause of their alleged damages, and their claims are barred in whole or in part because they assumed the risks of the investments they made.

RELIEF REQUESTED

SLH, in its Statement of Claim, requested the following award:

- (a) \$34,768.00 unsecured debit balance with interest on the Mays' Account #183-09403 plus margin interest; and
- (b) Costs and such other and further relief as the Arbitrators deemed proper in the premises.

The Mays requested, in their Statement of Answer, Defenses, and Counterclaim, that the arbitration panel deny the relief requested in the Statement of Claim in all respects, and asserted a Counterclaim, which requested the following award against SLH:

- (a) \$213,500 for failure to use stops and other trades not properly executed;
- (b) \$85,000.00 for loss on excess commissions;
- (c) \$181,000.00 for loss on stock sold without authority due to alleged marginability problem;
- (d) \$30,000.00 for loss on sale of bonds to cover the purported margin calls;
- (e) \$150,000.00 for loss on unsuitable options trading;
- (f) \$56,250.00 for loss due to failure to protect assets and accounts;
- (g) \$8,000.00 for loss due to unauthorized transfer between family accounts;
- (h) \$11,375.00 for loss due to unauthorized trading;
- (i) \$900,000.00 for loss due to lost opportunities;
- (j) \$120,000,000.00 for loss due to commissions on illegal transactions;
- (k) \$500,000.00 for intentional infliction of emotional distress;
- (l) \$3,000,000.00 for punitive damages;
- (m) treble damages;
- (n) attorneys' fees, costs and such other further relief as the Arbitrators deemed proper in the premises.

SLH requested that the Mays' Counterclaim be denied.

OTHER ISSUES CONSIDERED & DECIDED

On August 2, 1989, the Mays filed, with their Statement of Answer, Defenses and Counterclaim, a Motion to Dismiss Pursuant to Section 12(b) of the NASD Code of Arbitration Procedure (the "Code") for lack of jurisdiction. After review of the motion, SLH's Response, and deliberation, the Director of Arbitration denied the Motion to Dismiss with leave given to the parties to re-raise the issue with the arbitrators.

On May 4, 1992, SLH filed a Motion to Dismiss certain of the Mays' Counterclaims. Further, on June 22, 1992, SLH filed a Motion to Dismiss and/or Strike the Mays' Prayer for Punitive Damages. After hearing argument, and review of the relevant documentation, the undersigned arbitrators took the motions under advisement.

The Mays re-raised the arbitrability issue with the panel, asking for a ruling that this matter should not be in arbitration. After consideration of the parties' arguments made at the hearing, and deliberation, the panel reserved ruling on this motion, ordered the parties to provide additional information concerning the arbitrability of this matter, and ordered the hearing to proceed. After the close of the case, the panel has determined that the case is arbitrable and has been properly presented to this panel for arbitration.

On August 11, 1992, the Mays filed a Motion to Disqualify John W. Shaw, Esq. and David V. Clark, Esq. as SLH's Counsel. After review of the motion and Response, and hearing argument concerning this issue on August 24, 1992, the panel stated that they did not have the power to decide on the issue of disqualification, and therefore denied the Mays' motion.

On June 1, 1993, at the continued hearing of this matter, SLH made a Motion to Disqualify/Recuse arbitrator Patrick Hartigan based on a disclosure that arbitrator Hartigan made that morning. The Mays did not join in the motion. Since all parties did not join in the motion, arbitrator Hartigan considered the arguments made by the parties, and also reviewed and considered Canon II of the Code of Ethics for Arbitrators in Commercial Disputes. Arbitrator Hartigan, based on Canon II, Paragraph E (2), declined to recuse himself.

The parties have agreed that the Award in this matter may be executed by 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.

The record of this arbitration was closed on January 28, 1994.

AWARD

After considering the pleadings, the testimony, the briefing, 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. After review of all of the testimony and hearing arguments by Counsel, we find that this case is arbitrable and has been properly presented to this panel for arbitration. Respondent/Counterclaimants, William D. Mays' and Sharon A. Mays' Motion to Dismiss for Lack of Jurisdiction is denied.
2. Respondents/Counterclaimants, William D. Mays and Sharon A. Mays are liable for and shall pay to Claimant/Counterrespondent, Shearson Lehman Hutton, Inc. a/k/a Shearson Lehman Brothers, Inc. ("SLH") the sum of \$34,768.00 plus interest in the amount of \$16,225.00 as satisfaction of its claims herein.

3. In accordance with the applicable law and facts, SLH is liable for, and shall pay to Respondent/Counterclaimant, William D. Mays the sum of \$335,587.00, plus interest in the amount of \$156,607.00 for claims set forth in his Statement of Answer, Defenses, and Counterclaim as more particularly detailed in paragraph 109.
4. Respondent/Counterclaimant, William D. Mays is Awarded a credit for charges against him of margin interest for a six month period of time in accordance with an agreement between the parties.
5. In accordance with the applicable law and facts, SLH is liable for, and shall pay to Respondent/Counterclaimant, Sharon A. Mays the sum of \$6,012.00 plus interest of \$2,806.00 as actual damages and interest for claims specified in the Statement of Answer, Defenses, and Counterclaim.
6. Based on applicable law and facts, Respondents/Counterclaimants, William D. Mays' and Sharon A. Mays' claims for emotional distress, punitive damages, expenses, and RICO claims are denied and dismissed with prejudice.

OTHER COSTS

Under the applicable law and facts, each party shall bear its own costs and expenses associated with this arbitration, including attorneys' fees, except as set forth more fully below.

All costs and fees of this arbitration shall be divided equally between the parties.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

7 pre-hearing conference sessions x \$300.00 =	\$ 2,100.00
65 hearing sessions x \$600.00 =	<u>39,000.00</u>
Total Forum Fees to be assessed	\$41,000.00
Less:	

Hearing Session deposit paid by SLH	400.00
Interim Forum Fees paid by SLH	15,450.00
Interim Forum Fees paid by the Mays	<u>15,450.00</u>
Balance of Forum Fees to be assessed	<u>\$ 9,700.00</u>

Pursuant to Section 43(c) of the Code, the NASD shall ~~retain~~ the nonrefundable filing fee in the amount of \$500.00, and shall RETAIN the hearing session deposit in the amount of \$400.00 previously paid to the NASD by SLH.

Pursuant to Section 43 Paragraphs (a) and (c), the Mays shall pay to the NASD the sum of \$300.00 for their nonrefundable Counterclaim filing fee.

Pursuant to Sections 30(b) and 43(c) the NASD shall retain the postponement fee in the amount of \$500.00 previously paid to the NASD by SLH.

Pursuant to Section 43(c), additional Forum Fees in the amount of \$4,450.00 (4,850.00 less the \$400.00 paid towards hearing session deposit) are assessed against SLH.

Pursuant to Section 43(c), additional Forum Fees in the amount of \$5,250.00 are assessed jointly and severally against the Respondents.

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

CONCURRING ARBITRATORS

Dated:

Name:

February 16, 1994

John H. Lungren/s/
John H. Lungren
Presiding Chair
Public Arbitrator

February 12, 1994

Richard D. Sewell/s/
Richard D. Sewell
Public Arbitrator

February 14, 1994

Patrick E. Hartigan/s/
Patrick E. Hartigan
Industry Arbitrator

Date of Service by the NASD: 3-2-94