

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

James V. McAnally

90-01987

Name of Respondent(s)

Shearson Lehman Hutton, Inc.  
Kenneth Jobes  
Douglas Young

REPRESENTATION

For Claimant: James V. McAnally was represented by Raymond L. Britton, Jr., Esq. of Cage, Hill & Nislaus, Houston, Texas.

For Respondents: Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., Kenneth Jobes and Douglas Young were represented by C. W. Flynn, Esq. and Bradley W. Foster, Esq. of Locke Purnell Rain & Harrell, P.C., Dallas, Texas.

CASE INFORMATION

Statement of Claim filed: July 18, 1990

Claimant's Submission Agreement signed on: July 10, 1990

Joint Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc., Kenneth Jobes and Douglas Young on: November 2, 1990

Respondent Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: September 25, 1990 by William A. Hobauser, Vice President.

Respondent Kenneth Jobes' Submission Agreement signed on: October 7, 1991

Respondent Douglas Young's Submission Agreement signed on: October 8, 1991

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: October 18, 1991 for two (2) sessions

Hearing Location: Houston, Texas

CASE SUMMARY

Claimant James V. McAnally ("McAnally") alleged that in July of 1985, Respondents Kenneth Jobes ("Jobes") and Douglas Young ("Young"), while

employed by or acting as an agent for Respondent Shearson Lehman Brothers, Inc. ("Shearson"), formally doing business as Shearson Lehman Hutton, Inc. and E. F. Hutton, Inc., made misleading misrepresentations which placed McAnally's money from an IRA Rollover into an unsuitable and high risk speculative real estate limited partnership known as the Hutton, GSH Commercial Properties Four. As further alleged, Respondent engaged in the following conduct:

1. Placed the Claimant in an investment which was unsuitable given McAnally's investment objectives of safety of principal, compounding income, growth and predictability;
2. Made misrepresentations and lulling statements calculated to mislead McAnally regarding the condition of his account and the effects on his account as result of trading;
3. Negligently supervised the account; and
4. Breached the fiduciary duty that exists between a broker and a customer.

Based upon the above allegations, McAnally asserted claims for violation of the federal and state securities laws; violation of the rules of the National Association of Securities Dealers, Inc.; violation of the Texas Deceptive Practices Act; and common law fraud.

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

1. As part of their recommendation of a conservative, income-oriented portfolio, Young and Jobs also recommended the investment in the Commercial Properties 4 real estate limited partnership, which represented only 13% of the total assets in McAnally's portfolio;
2. Commercial Properties 4 was recommended by Shearson's research department, was managed by general partners with a solid track record in investing in this type of commercial property investment, and, from the vantage of 1985 before the onset of the real estate recession, appeared to be able to provide its limited partners with a reasonable rate of return in terms of both income and long-term appreciation;
3. The investment was fully explained to McAnally, orally and in writing, prior to his purchasing the limited partnership, including that it did not provide a guaranteed return of principal through income distributions, and he was given a copy of the prospectus on Commercial Properties 4; and
4. While Commercial Properties 4 has performed below expectations, Respondents have not misled McAnally about the status of the investment and have consistently advised McAnally that a real estate limited partnership is a long-term investment, the ultimate results of which cannot be known until the properties are sold.

In addition, Respondents asserted the following affirmative defenses:

1. The claims are barred under the applicable statutes of limitation and the doctrines of ratification, estoppel and waiver;
2. The claimant's own negligence is the cause of any damages which he has sustained;
3. The rules of the National Association of Securities Dealers, Inc. and the Texas Deceptive Trade Practices Act do not afford claimant a cause of action by which to recover damages from a securities broker-dealer for alleged fraud.

#### RELIEF REQUESTED

Claimant McAnally requested that an award be entered against the Respondents in the amount of \$45,000.00 and/or rescinding the real estate limited partnership investment, reasonable attorneys' fees, and any and all such other relief to which the arbitration panel determined claimant to be justly entitled.

Respondents Shearson, Jobes and Young requested that claimant's claim be denied in its entirety and that respondents be awarded their reasonable attorneys' fees and costs in this proceeding.

#### OTHER ISSUES CONSIDERED & DECIDED

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

1. The rescission of the purchase of the Hutton, GSH Commercial Properties Four real estate limited partnership is hereby granted to Claimant. Accordingly, Respondent Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc. and E.F. Hutton, Inc., is liable for and shall pay to the Claimant James V. McAnally the sum of \$45,000.00;
2. Upon receipt of payment of the sums enumerated in paragraph one (1) above, the Claimant shall immediately cause his interest in the Hutton, GSH Commercial Properties Four real estate limited partnership to be transferred to Shearson Lehman Brothers, Inc.;
3. In addition, Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to Claimant James V. McAnally the sum of \$5,541.00 as attorneys' fees and costs. In making this award of attorneys' fees and costs, the panel considered arguments and the

authorities presented by the parties, as well as the provisions of the Texas Securities Act, and determined that authority existed for an award of attorneys' fees in favor of Claimant James V. McNally;

4. The claims against Respondents Kenneth Jobes and Douglas Young are hereby dismissed and denied in the entirety.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee and the \$400.00 hearing session deposit previously deposited by the Claimant James V. McNally. Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$400.00.

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

BY THE ARBITRATION PANEL

Dated:

Gerald S. Siegmeyer  
Gerald S. Siegmeyer, Esq.  
Public Arbitrator  
Chairperson

December 3, 1991

Frank M. Romano  
Frank M. Romano  
Public Arbitrator

November 30, 1991

Thomas A. Thornhill, Jr.  
Thomas A. Thornhill, Jr.  
Industry Arbitrator

December 4, 1991

Date Served: \_\_\_\_\_