

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

David M. Crouch and Danee M. Crouch;  
Jewel G. Crouch;  
David M. Crouch, M.D.P.A. Employees'  
Profit Sharing #2, DTD 1-1-76; and  
Dr. David M. Crouch, P.A., Employees'  
Profit Sharing Trust, DTD 1-1-76.

90-02695

Name of Respondents

Shearson Lehman Brothers, Inc., f/k/a  
Shearson Lehman Hutton, Inc.;  
Mark E. Doon;  
James E. Lane;  
Sue Jackson

Name of Third-Party Respondent

Bill Mayo

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REPRESENTATION

For Claimants: David M. Crouch and Danee M. Crouch; Jewel G. Crouch, David M. Crouch, M.D.P.A. Employees' Profit Sharing #2, DTD 1-1-76; and Dr. David M. Crouch, P.A., Employees' Profit Sharing Trust, DTD 1-1-76 were represented by Richard M. Byrd, Esq. of Kennedy & Baris, L.L.P., located in San Antonio, Texas.

For Respondents/Third-Party Claimants: Shearson Lehman Brothers, Inc., f/k/a Shearson Lehman Hutton, Inc., Mark E. Doon, James E. Lane and Sue Jackson were represented by Lisa Cerasia, Esq., of Shearson Lehman Brothers, Inc., New York, New York and Jack D. Ballard, Esq. of Hutcheson & Grundy, L.L.P., located in Houston, Texas.

For Third-Party Respondent: William N. ("Bill") Mayo was represented by

Charles Gorham, Esq., San Antonio, Texas.

CASE INFORMATION

Statement of Claim filed: September 28, 1990.

Claimants' Submission Agreements signed on: July 24, 1990.

Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., and Mark E. Doon on: March 6, 1991.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: March 6, 1991 by Lisa Columbo, Shearson Lehman Brothers, Inc.

Respondent Mark Doon's Submission Agreement signed on: March 8, 1991.

First Amended Statement of Claim filed: April 23, 1991.

Amended Answer and Third-Party Statement of Claim of Respondents/Third-Party Claimants Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., and Mark E. Doon filed: April 30, 1991.

Answer to the First Amended Statement of Claim and Third-Party Statement of Claim of Respondents/Third-Party Claimants Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., Mark E. Doon, Sue Jackson and James E. Lane filed: June 27, 1991.

Respondent/Third-Party Claimant James E. Lane's Submission Agreement signed on: June 27, 1991.

Respondent/Third-Party Claimant Sue Jackson's Submission Agreement signed on: June 17, 1991.

Third-Party Respondent William N. Mayo's Statement of Answer filed: May 30, 1991.

Claimants' Motion to Dismiss Respondents/Third-Party Claimants' Third-Party Claim against William N. Mayo or in the Alternative to Sever Respondents/Third-Party Claimants' Third-Party Claim against William N. Mayo from this Arbitration filed on: April 18, 1991.

Respondents/Third-Party Claimants' Opposition to Claimants' Motion to Dismiss the Third-Party Claim against William N. Mayo or in the Alternative to Sever Respondents/Third-Party Claimants' Third-Party Claim against William N. Mayo from this Arbitration filed on: June 3, 1992.

Respondents/Third-Party Claimants' 25(b)(2)(iii) Motion to Bar Third-Party Respondent William N. Mayo from presenting any matter, arguments, or defenses at the hearing Filed: June 26, 1991.

Third-Party Respondent William N. Mayo's Response to Respondents/Third-Party Claimants' 25(b)(2)(iii) Motion filed: June 27, 1991.

Respondents/Third-Party Claimants' Second 25(b)(2)(iii) Motion to Bar Third-Party Respondent William N. Mayo from presenting any matters, arguments or

defenses at hearing filed: August 22, 1991.

Respondents/Third-Party Claimants' Pre-Arbitration Motion to Dismiss and Supporting Memorandum of Law filed on: July 22, 1992.

Claimants' Response to Respondents' Pre-Arbitration Motion to Dismiss and Pre-Hearing Memorandum filed on: July 28, 1992.

#### HEARING INFORMATION

Hearing Dates/Sessions: July 28, 1992 for two (2) sessions.  
July 29, 1992 for two (2) sessions.  
July 30, 1992 for two (2) sessions.

Hearing location: Houston, Texas.

#### CASE SUMMARY

Claimants David M. Crouch, Danee M. Crouch, Jewel G. Crouch, David M. Crouch, M.D., P.A., Employees' Profit Sharing No. 2 and Dr. David M. Crouch, P.A., Employees' Profit Sharing Trust ("Crouch"), alleged that Respondents/Third-Party Claimants Mark E. Doom ("Doom"), James E. Lane ("Lane"), and Sue Jackson ("Jackson"), while employed by or acting as agents for Respondent/Third-Party Claimant Shearson Lehman Brothers, Inc. formerly known as Shearson Lehman Hutton, Inc. ("Shearson"), breach their fiduciary duties to Crouch and the duty of good faith and fair dealing, violated the NASD Rules of Fair Practice, and engaged in unconscionable actions and breach of contract. Specifically, Crouch alleged that:

1. In April of 1989, while Third-Party Respondent Bill Mayo ("Mayo") was employed by Shearson and acted as Crouch's securities broker, Crouch wrote covered call option contracts for 136 units on Exxon Corp. Common Stock at an exercise price of \$45.00 per share, expiring on October 21, 1989;
2. Pursuant to an express agreement and clear understanding Crouch had with Mayo, whenever Crouch wrote covered calls on Exxon common using their own shares of Exxon held in "street Name" by Shearson, the shares were never to be sold pursuant to an assignment of exercise, but they would be "covered" whenever such written covered call options on Exxon stock became at or near the money. The reason for the agreement was because of Crouch's personal affinity for Exxon Corp. Common Stock and the fact that Crouch had a very low federal income tax basis in the shares of Exxon stock in their portfolio;
3. During September of 1989, Lane fired Mayo after becoming branch manager, allegedly in retaliation for Mayo having registered a complaint against Lane for misconduct and unethical activities;

4. On or about October 18, 1989, Doom, having been assigned to replace Mayo, personally visited Crouch to solicit Crouch's participation in Shearson's "Select Managers" investment portfolio. At this meeting, Doom indicated that the Exxon stock might have some exposure on the covered calls written by Crouch in April of 1989. Crouch informed Doom that he thought the covered calls had already expired and to determine whether the covered call options had already expired or needed to be covered;

5. Doom agreed to check on the status of the covered calls so that Crouch would be able to effect closing transactions to protect his shares of Exxon stock, but failed to do so or to effect closing transactions with respect to the Crouch's covered call options on Exxon stock when said options came at or near the money in mid-October 1989;

6. On or about October 20, 1989, Shearson sold 13,600 shares of Exxon stock pursuant to the exercise of the covered call options written by Crouch on April 13, 1989, with the settlement date of October 27, 1989, resulting in aggregate proceeds (before commissions and fees) of \$612,000.00;

7. When Crouch received the confirmation of the sale on October 26, 1989, Crouch attempted to reach Doom, who was unavailable, but spoke with Jackson, the operations manager, and informed her that he wanted to cover the transaction and was "facing" a letter to that effect;

8. Crouch never received a reply to his letter of October 26, 1989 from Lane or Johnson and the sale of 13,600 shares of Crouch's Exxon stock was consummated by Shearson on October 27, 1989, without Crouch being able to reverse the transaction and "cover" the sale; and

9. As a result of the sale, Crouch sustained damages for the sale of the stock, the federal income tax liability sustained as a result of gain realized on the sale of the shares, commissions and fees paid to Respondents, the loss of dividends paid on shares of Exxon stock from October 27, 1989 to date, and loss of appreciation in market value of the Exxon Corp. Common Stock.

Based upon the above allegations, Crouch asserted claims for violation of Sections 1 and 2 of the NASD Rules of Fair Practice; Sections 17.46 (b) (23), 17.46 (b) (5) and 17.50 (a) (3) of the Texas Deceptive Trade Practices-Consumer Protection Act; for breach of implied and express warranties in violation of Section 17.50 (a) (2) of the Texas Deceptive Trade Practices-Consumer Protection Act; violation of Sections 10 (b) and 20 (a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. Section 78j (b) and Rule 10b-5 of the Rules and Regulations of the Securities and Exchange Commission; and for breach of contract.

In addition, Crouch named Jackson and Lane in their capacity as Operations Manager and Resident Manager of Shearson's San Antonio, Texas Branch Office, alleging Jackson and Lane failed to observe high standards of commercial

Trade Practices Act.

Respondents/Third-Party Claimants Shearson, Dorn, Jackson and Lane further alleged that if Third-Party Respondent Mayo entered into an express agreement with Claimants, as alleged in their Statement of Claim, such agreement or misrepresentation was outside the scope of his employment. Respondents/Third-Party Claimants asserted that if they are found liable to Claimants, such liability would be due to the acts of Mayo which were outside the scope of his employment.

In response, Third-Party Respondent Mayo alleged that the express verbal agreement claimed by Crouch was incorrect. He further alleged that the Third-Party Claim was unwarranted because his performance had no bearing on Crouch's complaints and he was not an employee of Shearson at the time of the alleged incident.

In their Motion to Dismiss Respondents' Third-Party Claim against Bill Mayo or in the Alternative to Sever Respondents' Third-Party Claim against Bill Mayo from this Arbitration, Claimants alleged that the Third-Party Claim against Mayo, a known witness in this controversy, was filed in bad faith, for the purpose of intimidating Mayo to change his testimony. In addition, Claimants alleged the Third-Party Claim was time barred and wholly deficient under Section 25(a) of the NASD Code of Arbitration Procedure. Claimants further asserted that the inclusion of the dispute between Respondents/Third-Party Claimants Shearson, Jackson, Lane and Dorn and Third-Party Respondent Mayo was prejudicial to Claimants and as a matter of law, Respondents were not entitled to indemnification for any liability they may have to Claimants under the federal securities laws. Also, Claimants alleged the Respondents/Third-Party Claimants Shearson, Lane, Dorn and Jackson failed to make the requisite filing fee and advance hearing deposit required by Section 44 of the NASD Code of Arbitration Procedure; thus, the submission of the Third-Party Claim against Mayo is defective. Lastly, Claimants asserted that counsel for Respondents/Third-Party Claimants had a conflict of interest in any Third-Party Claim of the Respondents against Mayo and should therefore be disqualified.

In their Opposition to Claimants' Motion to Dismiss the Third-Party Claim against Bill Mayo or in the Alternative to Sever Respondents' Third-Party Claim against Bill Mayo from this Arbitration, Respondents/Third-Party Claimants Shearson, Lane, Dorn and Jackson denied the allegations contained in Claimants' Motion. Specifically, Respondents alleged the Crouch's attorney does not represent Mayo, so they do not have standing to argue that the Third-Party Claim against Mayo should be dismissed. In addition, Respondents alleged the NASD does not have the power to disqualify an attorney.

In their Pre-Arbitration Motion to Dismiss the Amended Statement of Claim, Respondents/Third-Party Claimants denied the Claimants' allegations and requested dismissal on the following grounds: 1) Crouch failed to diligently manage their accounts; 2) Crouch's accounts were non-discretionary; 3) Respondents/Third-Party Claimants were not liable for Crouch's tax liabilities; 4) Respondent/Third-Party Claimant's only duty was to follow Crouch's instructions, which they did, so no duties were breached; 5) Crouch breached his duty to mitigate damages and 6) the Texas Deceptive Trade

honor and just and equitable principals of trade in the conduct of their business. Specifically, Crouch alleged that Lane grossly mismanaged Shearson's San Antonio, Texas Branch Office, failed to adequately discharge his supervisory responsibilities with respect to the October 1989 trades in Crouch's accounts, failed to inquire into matters relating to Crouch's accounts out of malice, ill will and spite towards Mayo, and failed to take remedial action to correct Doom's wrongful conduct with respect to Crouch's accounts on account of his malice, ill will and spite towards Mayo.

Respondents/Third-Party Claimants Shearson, Doom, Lane and Jackson denied the material allegations of Crouch's Claim, alleging that:

1. Doom did not make any promises or express guarantees that he would further contact Crouch pertaining to his covered calls, but informed Crouch he had to make a decision regarding covered calls and that Crouch should inform Doom of his decision;
2. Crouch never contacted Doom about the covered calls so Crouch did not enter an order pertaining to the covered calls and because Crouch's account was non-discretionary, Doom could not have acted without an express order from Crouch;
3. No express verbal agreement existed between Mayo and the Claimants;
4. Crouch was aware of the contractual and risk factors relating to options accounts and certified that they were aware that Shearson did not provide tax advice and was not responsible for the tax consequences of transactions in the account;
5. Crouch's letter of October 26, 1989 requested that the transaction be reversed and that his Exxon stock be placed back in his account, not purchased in the market. Shearson was unable to take any actions with the account because Crouch had requested transfer of the account to Mayo at Knibbe Financial on October 12, 1989 and the Shearson ACATS department delivered wires instructing the branch to take no further action in the account, and by October 26, 1989, it was too late to purchase Exxon stock in the market to deliver pursuant to the exercise; and
6. Neither Jackson or Lane had the authority to "reverse" the transaction pursuant to Shearson policy.

Respondents/Third-Party Claimants Shearson, Doom, Jackson and Lane asserted the following affirmative defenses: 1) The Statement of Claim fails to state a cause of action upon which relief can be granted; 2) Respondents acted in compliance with all applicable rules and regulations and did not induce the alleged act or acts which constituted the alleged violations of law; 3) Claimants failed to mitigate damages; 4) The damages allegedly suffered have no causal relationship with any act committed by Respondents; 5) Claimants, through action and deed, waived their right to maintain their action against Respondents; 6) Claimants' claims are time barred; 7) New York law applies to this proceeding and the Texas Deceptive Trade Practices Act is inapplicable; and 8) securities are not "goods" within the Texas Deceptive

Practice Act is inapplicable.

In their Response to Respondents' Pre-Arbitration Motion to Dismiss, Claimants denied the allegations contained in the Respondents' Pre-Arbitration Motion to Dismiss.

#### RELIEF REQUESTED

Claimants requested an Award against Respondents in the amount of \$257,207.68 in compensatory damages for the federal income tax liability, commissions and fees, lost dividends and lost appreciation; \$1,500,00.00 in exemplary or punitive damages for breach of fiduciary duty; \$849,640.05 in additional damages pursuant to Section 17.50(b)(1) of the Texas Deceptive Trade Practices-Consumer Protection Act, based upon dividends paid on Exxon Corp. Common Stock and the Market value of the stock; reasonable attorneys' fees; Interest on the award at the then current legal rate of interest on judgments per annum from the date of award until paid; costs and expenses in this matter; and any such further relief, general or special, at law or at equity, to which Claimants may be entitled.

Respondents/Third-Party Claimants Shearson, Dorn, Lane and Jackson requested that the panel of arbitrators dismiss Crouch's Claim in all respects and that the panel impose liability on Third-Party Respondent Mayo in an amount equal to any liability imposed upon Respondents/Third-Party Claimants Shearson, Dorn, Lane and Jackson for Third-Party Respondent Mayo's actions regarding the handling of Crouch's accounts, and further, that the costs of any and all Arbitration hearings be assessed against Claimants and Mayo.

Third-Party Respondent Mayo requested that the Third-Party Claim be dismissed and denied in its entirety.

#### OTHER ISSUES CONSIDERED & DECIDED

Third-Party Respondent William N. ("Bill") Mayo failed to file an executed submission agreement, but appeared and testified at the hearing. Pursuant to Section 12 of the NASD Code of Arbitration Procedure, the panel specifically finds that Third-Party Respondent Mayo is required to submit to arbitration as an associated person.

On June 23, 1992, Claimants' Motion to Dismiss Respondents' Third-Party Claim or in the Alternative to Sever Respondents' Third-Party Claim and all responses were forwarded to the panel for review. On June 29, 1992, the panel determined that the Motion would be denied.

At hearing on July 28, 1992, Respondents/Third-Party Claimants Shearson, Dorn, Lane and Jackson presented the Motion to Bar Third-Party Respondent Mayo from presenting any matters, arguments or defenses pursuant to Section 25(b)(2)(iii) of the NASD Code of Arbitration Procedure. Upon review of the pleadings and arguments of the parties, the panel determined that the Motion would be denied.

In addition, Respondents Shearson, Dorn, Lane and Jackson presented their Motion to Dismiss at hearing on July 28, 1992. Upon review, the panel took the motion under advisement.

At the close of Claimants' case, Respondents/Third-Party Claimants Shearson, Dorn, Lane and Jackson reargued the Motion to Dismiss. The panel again took the matter under advisement. The panel has since reviewed all the evidence presented by Claimant and the arguments of the parties and has determined that the Motion shall be granted.

#### 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 Motion to Dismiss presented by Respondents/Third-Party Claimants Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., Mark Dorn, James Lane and Susan Jackson is hereby granted. The claim filed by Claimants David M. Crouch, Doree M. Crouch, Jewel G. Crouch, the David M. Crouch, M.D.P.A. Employees' Profit Sharing #2 and the Dr. David M. Crouch, P.A., Employees' Profit Sharing Trust is hereby dismissed and denied in its entirety;
2. The Third-Party Claim filed by Respondents/Third-Party Claimants Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., Mark E. Dorn, James Lane and Sue Jackson is hereby dismissed and denied in its entirety;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

#### OTHER COSTS

The costs of the stenographic reporter shall be borne by the party who supplied the reporter. All other costs associated with the reporter shall be determined pursuant to Section 37 of the NASD 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) hearing sessions x \$1,000.00 per session = \$6,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00

claim filing fee and the \$1,000.00 hearing session deposit previously filed by the Claimants. Claimants David M. Crouch and Danee M. Crouch; Jewel G. Crouch; David M. Crouch, M.D.P.A. Employees' Profit Sharing #2,, DTD 1-1-76; and Dr. David M. Crouch, P.A., Employees' Profit Sharing Trust, DTD 1-1-76 are jointly and severally liable for and shall pay to the NASD additional forum fees in the sum of \$1,000.00. In addition, the NASD shall retain the \$500.00 claim filing fee and the \$750.00 hearing session deposit previously filed by the Respondent/Third-Party Claimant Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc. Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$1,000.00. Third-Party Respondent William N. ("Bill") Mayo is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Michael E. McGowan  
Michael E. McGowan, Esq.  
Public Arbitrator  
Chairperson

29 December 1992

Douglas F. Pierce  
Douglas F. Pierce  
Public Arbitrator

December 31, 1992

Edward Grey  
Edward Grey  
Industry Arbitrator

January 28, 1993

Date of Service on Parties: 2-2-93