

PUBLIC

**NASD**

Arbitration

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of  
Securities Dealers, Inc.  
NASD Financial Center  
33 Whitehall Street  
New York, N.Y. 10004  
FAX (212) 858-4389

In the Matter of the Arbitration Between

Name of Claimant

Henry J. Flanagan

91-00737

Name of Respondents

Shearson Lehman Brothers, Inc.  
Edgar A. Ray

REPRESENTATION

For Claimant: Lawrence R. Gelber, Esq. of the law firm of Beigel & Sandler, Ltd.

For Respondent: Brian F. McDonough, Esq., of the law firm of Shanley & Fisher, P.C.

CASE INFORMATION

Statement of Claim filed: March 8, 1991.

Claimant's Submission Agreement signed on: March 4, 1991.

Statement of Answer filed by Respondents Shearson Lehman Hutton, Inc. and Edgar A. Ray on May 24, 1991.

Respondent Shearson Lehman Hutton, Inc.'s Submission Agreement signed on April 1, 1991, and Respondent Edgar A. Ray's Submission Agreement signed on May 23, 1991.

HEARING INFORMATION

Hearing Dates/Sessions: March 3, 1992, 2 sessions  
March 4, 1992, 2 sessions  
March 31, 1992, 2 sessions  
June 9, 1992, 2 sessions

Hearing Location: NASD offices located in New York, New York.

CASE SUMMARY

Claimant alleged that he wished to rollover his retirement fund into his IRA which he already maintained with Respondent Shearson Lehman Hutton, Inc. ("Shearson"), and that Claimant informed Respondent Edgar A. Ray ("Ray") that the purpose of the rollover was to provide benefits to his wife and four children in the event of his death, thus requiring preservation of capital and avoidance of risk and Respondent Ray acknowledged his risk aversion both orally and in writing. Claimant further alleged that within a few days after the initial public offering ("IPO") of a stock, L.F. Rothschild Unterberg Towbin Holdings, Inc. ("Rothschild"), underwritten by a predecessor of Respondent Shearson, priced at \$20.50 per share, and still during the support period, Respondent Ray telephoned Claimant and recommended the purchase of Rothschild shares in the after-market, further stating that Rothschild was a leader in the IPO field, that the brokerage industry as a whole was strong, that Rothschild was a leader in this industry, and that such an investment was safe, secure and suitable for the stated objectives of safe income and capital preservation for Claimant's IRA. Claimant further maintained that Respondent Ray failed to tell him that Rothschild was having serious internal management problems and that it was engaged in speculation for its own account. Resulting from the trust he had in Respondents, Claimant maintained that he purchased 1,000 shares of Rothschild at \$23.875 per share plus commission, and that the trade confirmation wrongly indicates that the transaction was unsolicited by the broker, since it was solicited by Respondent Ray. Claimant further alleged that two months later, Respondent Ray telephoned Claimant to recommend Rothschild convertible bonds, also underwritten by Respondent Shearson, for the IRA, and that Claimant, still trusting Respondent Ray, purchased thirty bonds for \$30,000, with no commission. Claimant further maintained that Respondents failed to provide a prospectus to Claimant for the stock, and may have failed to do so for the bond, upon written request of Claimant. Claimant further maintained that or about June 30, 1989, Rothschild filed for protection under the bankruptcy laws and Claimant maintained Respondents knew or should have known that Rothschild was having management difficulties as Shearson was obligated to perform due diligence on Rothschild. Claimant further alleged Respondents failed to disclose material facts; entered Claimant into investments that were unsuitable for him given his investment objectives; breached the fiduciary duties owed to Claimant; acted negligently; ignored the rules and regulations of the securities industry; breached the contract between Claimant and Respondents; and violated the RICO statute, thus, entitling Claimant to treble damages.

Respondents maintained that since the time Claimant opened his account in 1975, he was an investor who made his own decisions in handling his portfolio, at times aggressively trading stocks, commodities, and options often on margin. Respondents further maintained that Claimant rarely acted immediately upon any idea, instead considering ideas or materials that he took with him for further reflection before making his decision, and that the amount of any purchase and in which of his accounts it went were totally

Claimant's decision. Respondents denied that Claimant stated that he had only conservative investment goals, and alleged that an examination of Claimant's holdings and trading history dispels such a notion. Respondents further denied that Ray represented that an investment in Rothschild securities was "safe, secure and suitable," and alleged that Claimant took home a preliminary Rothschild prospectus, which set forth all material facts and reasonable potential risks that Rothschild could experience, and Claimant bought 1,000 shares six days after its offering. Respondents further maintained that two months after purchasing Rothschild's common shares, Claimant purchased Rothschild's convertible debentures and undoubtedly received the prospectus in the mail and must, therefore, be estopped to deny knowledge of its contents. Respondent further maintained that Claimant's argument that the prospectus was not part of his decision-making process is void of merit, and he cannot deny being on notice of the prospectus' contents and the risks involved at a time when he could have sold the debentures without any loss. Respondents further maintained that Ray did not have knowledge of non-public negative facts concerning Rothschild's future prospects, as evidenced by the fact that Ray bought shares for himself and held them. Respondents further maintained that Claimant's claims are barred by the doctrines of waiver, ratification, laches, and estoppel and Claimant's claims are time barred and manifest injustice would result in allowing the claims to proceed. Respondent further maintained Claimant's claims should be barred pursuant to the "entire controversy doctrine."

RELIEF REQUESTED

Claimant requested:

- a. compensatory damages in the sum of \$54,000, trebled under RICO;
- b. interest at the rate of 9%, from March, 1986 to the date of the decision in this matter, trebled under RICO;
- c. attorney's fees in the sum of \$11,250;
- d. costs, fees, and expenses of this action;
- e. punitive damages in an amount to be determined by the panel;  
and
- f. such other and further relief the Panel deems just and proper.

Respondents requested that the claim be dismissed with costs assessed against Claimant.

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. All claims against the Respondents are dismissed in their entirety.
2. The Claimant's request for punitive damages is denied.
3. The Claimant's claim for damages under RICO is denied.
4. Each party shall bear their respective costs, including attorney's fees.

FORUM FEES

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

8 sessions x \$500 = \$4,000 less hearing session deposit of \$600 = \$3,400 due

The Claimant be and hereby is liable and shall pay to the N.A.S.D. the sum of \$1,700 to represent forum fees.

The Respondents be and hereby are liable jointly and severally and shall pay to the N.A.S.D. the sum of \$1,700 to represent forum fees.

The N.A.S.D. shall retain the \$250 claim filing fee previously paid by Claimant.

All checks should be made payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Public/Industry

Murray T. Schner, Esq.

Public

Arthur S. Joseph, Esq.

Public

Norman J. Primack

Industry

Date of Decision: June 30, 1992

STATE OF: New York  
COUNTY OF: New York

S.S.:

On this 23<sup>rd</sup> day of June, 1992, before me personally appeared **Murray I. Sommer, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

**KEVIN L. COOK**  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 002436105  
QUALIFIED IN WESTCHESTER COUNTY  
MY COMMISSION EXPIRES NOV. 30, 1993

STATE OF: New York  
COUNTY OF: New York

S.S.:

On this 24<sup>th</sup> day of JUNE, 1992, before me personally appeared **Arthur S. Joseph, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

**GEORGETTE A. CONNELL**  
NOTARY PUBLIC, State of New York  
NO. 004897347, Kings County  
Commission Expires April 30, 1998

STATE OF: New York  
COUNTY OF: New York

S.S.:

On this 29 day of June, 1992, before me personally appeared **Norman J. Primack** known and known to to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

**GEORGETTE A. CONNELL**  
Notary Public, State of New York  
No. 004897347  
Qualified in Kings County  
Commission Expires Aug. 15, 1992