

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Audrey Atkins

91-01156

Name of Respondent

Shearson Lehman Hutton, Inc.

REPRESENTATION

Claimant, Audrey Atkins was represented by Victoria Gruver, Esq. of North & Barron, Phoenix, Arizona.

Respondent, Shearson Lehman Hutton, Inc. n/k/a Shearson Lehman Brothers, Inc. was represented by Deborah M. Fine, Esq. of Lewis and Roca, Phoenix, Arizona.

CASE INFORMATION

The Statement of Claim was filed with the NASD on April 11, 1991.

Claimant, Audrey Atkins' Submission Agreement was signed on April 3, 1991.

The Statement of Answer was filed by Respondent, Shearson Lehman Hutton, Inc. n/k/a Shearson Lehman Brothers, Inc. on or about July 16, 1991.

Respondent, Shearson Lehman Brothers, Inc.'s. Submission Agreement was signed on July 15, 1991 by William Hobauser, Esq., Vice President.

HEARING INFORMATION

The hearing dates and number of hearing sessions were May 18, 1992 for two hearing sessions and May 19, 1992 for two hearing sessions.

The hearing location was Scottsdale, Arizona.

CASE SUMMARY

Claimant, Audrey Atkins ("Atkins") alleged that she opened an account at Shearson Lehman Brothers, Inc. ("Shearson") in late 1984 or early 1985 in Sun City, Arizona. Atkins alleged that she told her account representative, Don

Aubuchon, that the money she was investing was her retirement money and represented her savings. Atkins alleged that she told Aubuchon that she needed income to supplement her social security payments. Atkins allegedly told Aubuchon that she did not wish to invade the principal of her investment. Atkins alleged that she told Aubuchon that she would be relying totally on his expertise as she was unfamiliar with the stock market. Aubuchon allegedly told Atkins that he could generate \$193.00 per month for Atkins and that he would be conservative about generating the income to provide her the money she needed on a monthly basis without invading the principal. In February of 1989, Atkins inquired of Aubuchon whether the amount of money generated from the account could be increased to \$356.00 per month to enable her to buy a new car. Aubuchon assured Atkins that the withdrawals could be covered by trading profits. Atkins alleged that contrary to Aubuchon's assurances, the withdrawals were not covered by trading profits and that Aubuchon was systematically selling off assets of her account to generate the modest income she required.

Atkins alleged that the trading in her account was completely unsuitable. Aubuchon allegedly purchased speculative stocks, including stocks in a mining and exploration company. In addition, several of the stocks purchased for her account were NASDAQ stocks, including Mentor Corporation, Fingermatrix, Inc. and Conner Peripherals, Inc. Atkins alleged that Aubuchon engaged in a tremendous amount of trading in her account and that Aubuchon made material misrepresentations and omissions in connection with the purchases of securities in her accounts. The factual allegations were alleged to sustain legal claims for violations of A.R.S. Section 44-1991, Arizona Racketeering Statute, A.R.S. Section 13-2301, et seq., breach of fiduciary duty, fraud, negligence, negligent infliction of emotional distress and breach of contract. In addition Atkins asserted that the facts supported a claim for punitive damages.

Shearson asserted that Aubuchon was in frequent contact with Atkins and that she received confirmations of her trading and monthly statements. In addition, she also received the advice of her certified public accountant who conducted a review of her annual gains and losses in her account. Shearson alleged that Atkins fully understood and assumed the risks she chose to undertake and that she was advised that she was invading principal in her account in order to obtain the monthly income she wished. Shearson asserted that Atkins directed and ratified each trade. Additionally, Shearson asserted affirmative defenses of waiver and estoppel.

RELIEF REQUESTED

Atkins requested \$29,800.17 plus treble damages under A.R.S. Section 13-2314, punitive damages, interest, costs and attorney's fees.

Shearson requested dismissal of the claim, that Atkins be required to pay all forum fees and requested an award of its attorney's fees.

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.

Atkins dismissed her claim against Shearson for churning at the hearing.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing and the briefs of the parties which were submitted at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Shearson is liable for and shall pay to Atkins, the sum of Fifteen thousand two hundred eighteen dollars and no cents (\$15,218.00);
2. Simple interest at the rate of 10% per annum is awarded on the above stated sum from and inclusive of January 1, 1990 to and inclusive of the date the award is paid;
3. Shearson is also liable and shall pay to Atkins the sum of Seven thousand five hundred forty nine dollars (\$7549.00) as her expenses and attorney's fees incurred in this proceeding. The award of attorney's fees was made based upon A.R.S. Section 12-341.01;
4. Atkins' claims for punitive and/or treble damages shall be and are specifically denied and dismissed; and,
5. The parties are to bear their own costs and expenses not otherwise specified in this award.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the \$150.00 non-refundable claim filing fee and the \$500.00 hearing session deposit made with the NASD by Atkins. Shearson is to directly reimburse Atkins for this \$650.00 sum. Shearson is assessed additional Forum Fees in the amount of \$1500.00.

Forum Fees were calculated on the basis of 4 sessions X \$500 = \$2,000 minus the hearing session deposit of \$500 retained by the NASD for a net of \$1,500 due to the NASD from Shearson. Additional Forum Fees assessed to Shearson are payable to the National Association of Securities Dealers, Inc.

Lastly, the NASD is directed to refund the \$500.00 postponement fee charged to Atkins.

Concurring Arbitrators' Signatures

Name

/S/ Irving Lowe
Irving Lowe, Esq.
Presiding Chairman
Public Arbitrator

May 22, 1992
Dated

/S/ Douglas Smith
Douglas Smith
Panelist/Public Arbitrator

May 22, 1992
Dated

/S/ Stephen T. Yeargen
Stephen T. Yeargen
Panelist/Industry Arbitrator

May 22, 1992
Dated

Date Award served by the NASD: 6.5.92 x