

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

James D. Tufts, II

91-01340

Name of Respondent(s)

Shearson Lehman Hutton, Inc., now
known as Shearson Lehman Brothers, Inc.
Jack Roy
Walter Durchhalter

REPRESENTATION

For Claimant: James D. Tufts, II was represented by Charles A. Snyder, Esq. and Mark P. Dauer, Esq. of Milling, Benson, Woodward, Hillyer, Pierson located in New Orleans, Louisiana.

For Respondent: Shearson Lehman Hutton, Inc., now known as Shearson Lehman Brothers, Inc., Jack Roy and Walter Durchhalter were represented by David G. Russell, Esq. and G. Wayne Hillis, Jr., Esq. of Parker, Hudson, Rainer & Dobbs, located in Atlanta, Georgia and Kathryn S. Reimann of Shearson Lehman Brothers, Inc. in New York, New York.

CASE INFORMATION

Statement of Claim filed: April 29, 1991
Claimant's Submission Agreement signed on: April 2, 1991
First Amended Statement of Claim filed: August 16, 1991

Joint Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc., Jack Roy and Walter Durchhalter on: June 4, 1991
Joint Answer to First Amended Statement of Claim filed by Shearson Lehman Brothers, Inc., Jack Roy and Walter Durchhalter on: August 26, 1991

Respondents Shearson Lehman Brothers, Inc., Jack Roy and Walter Durchhalter did not file Submission Agreements, but answered, appeared and testified at the hearing, are a member or associated person and are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Pre-Hearing Conference: Held February 17, 1992 for one (1) session before Arbitrator Daniel Eugene Bivens.

Hearing Dates/Sessions: March 17, 1992 for two (2) sessions
March 18, 1992 for two (2) sessions
March 19, 1992 for two (2) sessions

Hearing Location: New Orleans, Louisiana

CASE SUMMARY

Claimant James D. Tufts II ("Tufts") alleged that Respondents Jack Roy ("Roy") and Walter Durchhalter ("Durchhalter"), while employed by or acting as an agent for Respondent Shearson Lehman Brothers, Inc. ("Shearson"), misrepresented or omitted material information regarding Tufts' investment in ordinary shares of Polly Peck International PLC. As stated in the Claim, Roy and Durchhalter strongly recommended Polly Peck to Tufts, who purchased a large position in company. In approximately August of 1990, Tufts expressed misgivings about holding such a large (40,000 share) position in Polly Peck, but was dissuaded from selling by the two brokers who told Tufts that the stock carried Shearson's highest recommendation. However, on September 20, 1990, trading of Polly Peck was suspended after the share price plummeted and remains suspended following reports in the press of an investigation by Britain's Serious Fraud Office, inability of the company to secure financing and the company's having sought protection of its creditors in the British courts. Prior to the collapse, Respondents failed to provide Tufts with any written information respecting Polly Peck, even though there were many reports in the British press in August and September of 1990 indicating problems with the company and its chairman. Tufts alleged that Shearson was aware of the suspected problems prior to the suspension of trading because:

1. Roy had material dated September 4, 1990 which indicated doubts about the company and which was provided to Tufts after the suspension of trading;
2. Shearson was a market maker in the security and would closely follow press reports concerning the company;
3. Shearson's European affiliate, Lehman Brothers Securities, is one of Polly Peck's two "Corporate Brokers" on the London Stock Exchange;
4. Shearson at times provided corporate services to Polly Peck; and
5. Lehman Brothers has sued Polly Peck's chairman for his failure to pay for 6.3 million shares of Polly Peck purchased from Lehman Brothers of September 4 through September 6, 1990.

Tufts further alleged that as institutional investors felt that there was too little information available to hold a serious position in Polly Peck, it was obvious that it was unsuitable for an individual investor to hold a position

worth \$300,000.00.

Based upon the above allegations, Tufts asserted violation of 10(b) of the Exchange Act, 15 U.S.C. 78j(b) and SEC Rule 10b-5, 17 C.F.R. 240.10b-5; violation of the NASD Rules of Fair Practice, Art. III, Par. 2; and violation of the registration provisions of the Louisiana Securities Laws (La. R.S. 51:705 et seq.).

Respondent Shearson, Roy and Durchhalter denied the material allegations of the Statement of Claim, alleging that:

1. Shearson had recommended the purchase of shares of Polly Peck for years, issued research reports, was one of many other respected securities firms who studied the company and predicted a rise in the price of the shares and, in "good faith, shared with its customers its positive opinion of the company and its prediction that the stock would rise;
2. Tufts was a sophisticated investor who was not risk-adverse and liked to take chances at quick profits;
3. Shearson weighed the unsubstantiated press reports published in August of 1990 against what appeared to be a solid company with undervalued stock and reasonably concluded that it would maintain its "buy" recommendation;
4. The London press reports concerning Polly Peck were publicly available information and Tufts had a duty to keep himself informed about current events that might effect the price of his Polly Peck stock;
5. The events which created the suspension of trading in September 20, 1990 were unforeseeable and contrary to the opinions expressed by most securities firms;
6. Possible undetectable misconduct and misrepresentation on the part of Polly Peck personnel may have played a role in the unexpected problems of the company;
7. Under Section 15(f) of the Securities Exchange Act, Shearson had an affirmative obligation not to reveal any information received about Polly Peck through corporate confidences; and
8. The sale of Polly Peck stock was exempt from registration in Louisiana because the sale was a transaction in securities not involving the issuer of the securities or an underwriter of the securities.

Respondents presented fourteen affirmative defenses, including, but not limited to, that Tufts failed to state a claim upon which relief may be granted; recovery is barred by the doctrines of ratification, estoppel, waiver and assumption of risk; Respondents in no way misrepresented the investments made in Tufts' account; The diminished value of Tufts' account is the result of unforeseeable market fluctuations; the damages claimed were

not caused by Respondents, but by third parties over whom Shearson had no control; the damages are speculative; and the maxim caveat emptor bars any recovery by Claimant.

RELIEF REQUESTED

Claimant requested entry of an award against Shearson and Durchhalter, jointly and severally, for the full principal sum of \$208,805.25 plus legal interest from the date of purchase until paid; against Shearson and Roy, jointly and severally, for the full principal sum of \$123,315.15 plus legal interest from the date of purchase until paid; and against Shearson, Durchhalter and Roy for all costs of the proceeding. In addition, by Amendment to the Statement of Claim, Tufts requested that Shearson, Durchhalter and Roy pay reasonable attorneys' fees in accordance with La. R. S. 51:714 or any other applicable provision of law.

Respondents requested that the Statement of Claim and the Amendment to the Statement of Claim be dismissed and denied in their entirety.

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.

By joint stipulation filed at hearing, the parties stipulated to the following matters:

1. Tufts' claims against Durchhalter and Roy, individually, were dismissed, but Shearson assumed liability, if any, for any acts or omissions of Durchhalter or Roy in connection with the matter;
2. Roy was designated as Shearson's corporate representative and could be present during the entire hearing, as could Tufts. Other witnesses, including Durchhalter, would be present only during their own testimony; and
3. Tufts withdrew his claim that Durchhalter was not registered or qualified to sell securities in Louisiana.

At the close of Claimant's case, Respondents moved for summary judgment. After hearing argument, the panel determined that the motion would be denied.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, if any, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim and Amendment to the Statement of Claim are hereby dismissed and denied in their entirety;
2. The parties shall pay their own costs of arbitration, including attorneys' fees, except for those specifically enumerated.

FORUM FEES

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

One Pre-Hearing Session x \$300.00	=	\$300.00
Six (6) Hearing Sessions x \$750.00	=	<u>\$4,500.00</u>
Total Fees	=	<u>\$4,800.00</u>

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and the hearing session deposit of \$750.00 previously deposited by the Claimant James D. Tufts II. Claimants James D. Tufts II is liable for and shall pay to the NASD additional forum fees in the sum of \$1,650.00. Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$2,400.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Date:

Daniel Eugene Bivens, III
Daniel Eugene Bivens, III
Public Arbitrator
Chairperson

May 4, 1992

Richard J. Meunier
Richard J. Meunier, Esq.
Public Arbitrator

May 8, 1992

Charles A. Schildbauer
Charles A. Schildbauer
Industry Arbitrator

May 11, 1992

Date of Service: _____