

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Adolph Buerckel and
Lucille Kellett

91-02322

Name of Respondents

Shearson Lehman Hutton, Inc. and
Richard R. McKinley

REPRESENTATION

Claimants, Adolph Buerckel and Lucille Kellett were represented by Paul Kloberdanz, Esq. of Phoenix, Arizona.

Respondent, Shearson Lehman Brothers, Inc. was represented by Tom Galbraith, Esq. of Lewis and Roca, Phoenix, Arizona.

Respondent, Richard McKinley did not file an entry of appearance.

CASE INFORMATION

The Statement of Claim was filed with the NASD on July 31, 1991.

Claimant's Submission Agreements were signed on July 8, 1991 by Adolph Buerckel and Lucille Kellett.

The Statement of Answer was filed by Respondent, Shearson Lehman Brothers, Inc. on September 26, 1991.

Respondent, Shearson Lehman Brothers did not file a Submission Agreement with the NASD.

Respondent, Richard McKinley did not file either an Answer or a Submission Agreement with the NASD.

HEARING INFORMATION

The hearing occurred on January 16, 1992 and lasted two (2) sessions.

The hearing location was Scottsdale, Arizona.

CASE SUMMARY

Claimants, Adolph Buerckel and Lucille Kallett ("Buerckel" and "Kallett") alleged causes of action sounding in breach of fiduciary duty, violation of NASD Rules, violations of federal securities laws, negligent supervision, common law fraud, intentional misrepresentation, negligent misrepresentation, violations of the Arizona securities law, the Arizona racketeering statute and the federal Rico statute against Respondents, Shearson Lehman Brothers, Inc. ("Shearson") and Richard McKinley ("McKinley"). The foregoing causes of action were alleged against Shearson and McKinley in connection with unsuitable investments in illiquid limited partnerships. Buerckel and Kallett alleged that McKinley took advantage of Buerckel and Kallett by virtue of the relationship between the parties. Buerckel and Kallett alleged that Shearson failed to adequately supervise McKinley and that McKinley repeatedly made misrepresentations of material fact to Buerckel to induce him to purchase securities.

Shearson denied the allegations of the Statement of Claim and asserted that under New York law, punitive damages were not recoverable. Additionally, Shearson asserted that Claimants received confirmations on all trades and were fully informed of the investment activity which McKinley carried out on their behalf. Under the law, Shearson asserted that the claimants had ratified the trades not specifically objected to within the parameters of their customer agreements and the terms of the confirmations of the trades for their accounts.

McKinley did not answer the allegations against him.

RELIEF REQUESTED

Claimant, Buerckel requested compensatory damages of \$167,304.61, treble damages of \$501,913.83 under the federal and/or Arizona racketeering statutes, punitive damages of \$1,000,000.00, attorney's fees and costs.

Claimant, Kallett requested compensatory damages of \$40,062.63, treble damages of \$120,187.89 under the federal and/or Arizona racketeering statutes, punitive damages of \$250,000.00, reasonable attorney's fees and costs.

Respondent, Shearson requested that the claims be dismissed in their entirety with prejudice.

Respondent, McKinley did not file an Answer with an affirmative relief request for the panel to consider.

OTHER ISSUES CONSIDERED & DECIDED

The parties present at the arbitration hearing 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 present at the hearing have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

The arbitration panel found that even though Shearson failed to file an executed submission agreement with the NASD, it was obligated to arbitrate this dispute pursuant to Section 12 of the NASD Code of Arbitration Procedure. Additionally, since Shearson filed an Answer, appeared at the hearing and provided testimony through witnesses, Shearson is bound by the panel's determination on all issues submitted.

The panel also finds that McKinley was obligated to arbitrate this dispute pursuant to Section 12 of the NASD Code of Arbitration Procedure. The panel also found that McKinley had notice of the Claim and the hearing date in accordance with Section 25 and Section 26 of the NASD Code of Arbitration Procedure. Therefore, even though McKinley failed to appear at the hearing on January 1, 1992, the panel determined to proceed in his absence pursuant to Section 29 of the NASD Code of Arbitration Procedure and McKinley is also bound by the panel's determination on all issues submitted.

AWARD

After considering the pleadings, the testimony, the evidence presented at the hearing and the parties' post-hearing submissions on the issue of attorney's fees, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Shearson and McKinley are jointly and severally liable for and shall pay to Claimant, Kellett, compensatory damages in the amount of Fourteen thousand two hundred fifty two dollars and no cents (\$14, 252.00);
2. Interest at the rate of 10% will accrue to Claimant, Kellett on the above sum from and inclusive of the date the award is served on the parties to and inclusive of the date the award is satisfied;
3. Claimant, Buerckel is awarded the right of rescission with respect to the limited partnership interests purchased through Respondent Shearson as follows:

PARTNERSHIP

PURCHASE PRICE

a) Capital Source L.P.	\$17,000.00
b) American First L.P.	\$10,000.00
c) Participating Income L.P.	\$30,000.00
d) Shearson Radisson L.P.	\$15,000.00
e) Lepercy L.P.	\$15,000.00

4. Accordingly, Claimant, Buerckel shall upon receipt of this award, assign all right and interest he retains in the above listed limited partnerships to Shearson. Upon receipt of the assignment from Claimant, Buerckel, Shearson is liable for and shall pay to Claimant, Buerckel, rescissory damages in the total sum of Eighty seven thousand dollars and no cents (\$87,000.00);

5. Interest at the rate of 10% will accrue to Claimant, Buerckel on the above sum from and inclusive of the date the award is served on the parties to and inclusive of the date the award is satisfied;

6. Claimant's claims for punitive damages and treble damages under federal and Arizona law are hereby specifically denied; and,

7. Claimants, Buerckel and Kallett are awarded reasonable attorney's fees in the amount of Eight thousand five hundred fourteen dollars and no cents (\$8514.00) and costs in the amount of One thousand two hundred fifty dollars and no cents (\$1250.00). This award of attorney's fees and costs is made pursuant to A.R.S. Section 12-331-32. To the extent the claimants entered into a contingent attorney's fee arrangement with their attorney, the total amount of attorney's fees payable to Claimant's attorney out of this award shall not exceed the amount of Eight thousand five hundred fourteen dollars and no cents (\$8514.00).

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the \$250.00 non-refundable claim filing fee and the \$1000.00 hearing session deposit. Shearson is directed to reimburse the Claimants in the amount of \$1250.00. Shearson is also assessed and shall pay to the NASD additional Forum Fees in the amount of \$1000.00.

Forum Fees were assessed on the basis of \$1000.00 per hearing session for two hearing sessions for a total amount of \$2000.00 and the additional Forum Fees assessed to Shearson are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Warren C. Kotzmann, Esq.
Presiding Chairman/Public Arbitrator

Dated

Sidney W. Mandel
Sidney W. Mandel, Esq.
Panelist/Public Arbitrator

4-7-1992
Dated

Marvin J. Klein
Panelist/Industry Arbitrator

Dated

Date Award served by the NASD: _____

Forum Fees were assessed on the basis of \$1000.00 per hearing session for two hearing sessions for a total amount of \$2000.00 and the additional Forum Fees assessed to Shearson are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name

Warren C. Kotzmann, Esq.
Presiding Chairman/Public Arbitrator

Dated

Sidney W. Mandel, Esq.
Panelist/Public Arbitrator

Dated

Marvin J. Klein
Marvin J. Klein
Panelist/Industry Arbitrator

4.8.92
Dated

Date Award served by the NASD: _____

Forum Fees were assessed on the basis of \$1000.00 per hearing session for two hearing sessions for a total amount of \$2000.00 and the additional Forum Fees assessed to Shearson are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name


Warren C. Rotzmann, Esq.
Presiding Chairman/Public Arbitrator

4/8/92
Dated

Sidney W. Mandel, Esq.
Panelist/Public Arbitrator

Dated

Marvin J. Klein
Panelist/Industry Arbitrator

Dated

Date Award served by the NASD: _____