

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

The Estate of Ossie L. Sandefur
by Richard P. Scaletty,
the Personal Representative

No. 91-03553

Name of Respondents

Shearson Lehman Brothers, Inc.
Mark S. Greenway

REPRESENTATION OF PARTIES

For Claimant: Richard P. Scaletty, Esq., Independence, Missouri.

For Respondent Mark S. Greenway: Ray E. Sousley, Esq. of Vleisides, Donnelly, O'Leary & Sousley, Kansas City, Missouri.

For Respondent Shearson Lehman Brothers, Inc.: John W. Shaw, Esq. of Bryan Cave, Kansas City, Missouri.

CASE INFORMATION

Statement of Claim filed: November 8, 1991.

Claimants' Submission Agreement signed on: November 8, 1991.

Statement of Answer filed by Respondent Shearson Lehman Brothers, Inc. on: January 30, 1992.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: December 11, 1991.

Claimant's Motion to Bar Defenses by Respondent Mark S. Greenway filed: January 30, 1992.

Statement of Answer filed by Respondent, Mark S. Greenway on: September 11, 1992.

The NASD does not have a record of Respondent Mark S. Greenway having filed a Submission to Arbitration.

Claimant's First Amended Statement of Claim filed: May 4, 1992.

Respondent Shearson Lehman Brothers, Inc.'s Answer to First Amended Statement of Claim filed: May 18, 1992.

Claimant's Dismissal With Prejudice of her case against Shearson Lehman Brothers, Inc. filed: July 31, 1992.

Request to substitute Richard P. Scaletty, the Personal Representative of the Estate of Ossie L. Sandefur as the real party in interest, Letters Testamentary, Clerk's Certificate, and Submission Agreement filed: November 20, 1992.

HEARING INFORMATION

Pre-Hearing conference date: June 29, 1992. One (1) session.

Hearing dates: July 29, 1992. One (1) session.
September 9, 1992. Two (2) sessions.
September 10, 1992. Two (2) sessions.

Hearing Location: Kansas City, Missouri.

Having reached a settlement with the Claimant prior to the first hearing date, Shearson Lehman Brothers, Inc. did not participate in these hearings.

CASE SUMMARY

Claimant, The Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative f/k/a Ossie L. Sandefur ("Claimant") alleged: Violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78j(b)) and Rule 10b-5 promulgated thereunder; violation of Section 20(a) of the Securities and Exchange Act of 1934 (15 U.S.C. Section 78t); violation of Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. Section 1962, *et seq.*, violations of Chapters 407 and 409 R.S.Mo.; violation of common law; breach of contract; breach of fiduciary duty; fraud; unauthorized trading; misappropriation; negligence; and personal injury by Respondent Mark S. Greenway ("Respondent"). The allegations arose out of activities involving the following securities: Kemper U.S. Government Securities Fund ("Kemper"); American Capital Government Securities ("American"); Van Kampen Merritt U.S. Gov't Fund ("VKM"); Capital Source II, L.P.; Jones Growth Partners, LTD. (a limited partnership); Silver Screen Partners IV (limited Partnership); Insured Income Properties 88, LTD (limited partnership); and VMS Mortgage Investors III (limited partnership).

Claimant stated that during the fall of 1986, she had first met Respondent and had opened an account, through Respondent, at B.C. Christopher Company. Claimant also stated that in July of 1987, Respondent went to work for E.F. Hutton Company, Inc. n/k/a Shearson Lehman Brothers, Inc., and

had persuaded her to transfer her account at B.C. Christopher Company with Respondent. Claimant alleged that at all times Respondent knew that her investment objective had been to preserve capital and generate sufficient interest and dividends to provide sufficient monthly monetary support. Claimant also alleged that Respondent never attempted to ascertain her financial condition, or her ability to sustain losses, and that Respondent had made excessive unauthorized trades in her account. Claimant further alleged that Respondent had continually assured her that "everything was fine" and "to disregard the statement". Claimant next asserted that, in the latter part of 1990, Respondent had left employment at Shearson Lehman Brothers, Inc. and had continued to deceive and misinform her of the true status of her account and also the fact that he was no longer lawfully entitled or able to handle Claimant's account because his securities license had been suspended by the State of Missouri. Claimant went on to assert that Respondent had sent money to her, leading Claimant to believe it had been money from her account when it was not. Claimant asserted that a number of forgeries had occurred in her account relating to requests to liquidate certain securities in Claimant's account whereby Respondent had allegedly forged Claimant's signature and had allegedly falsely and fraudulently warranted and guaranteed that the signature had been that of the Claimant. Claimant also alleged that a margin account had been established in her name and traded excessively causing her to incur substantial losses and debt. Lastly, Claimant alleged that at no time had Respondent obtained her consent or authorization to open a margin account, and that at no time had Respondent explained to Claimant the risks associated with such an account.

For his Answer and affirmative defenses to the First Amended Statement of Claim, Respondent stated the following:

First Defense

1. Respondent did not have knowledge or information sufficient to form a belief as to the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 19, 21, 22, 26, 34, 53, 60, 68, subpoena duces tecum was served on Respondent on July 14, 1992.
2. Respondent denied the allegations of paragraphs 17, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 69, 70, 72, 73, 74, 75, 77, 78, 80, 81, 82, 84, 85, 86, 87, 88, 90, 91, 93, 94, and 95 of Claimant's First Amended Statement of Claim.
3. Respondent incorporated by reference his answer to each and every paragraph of Claimant's First Amended Statement of Claim in response to paragraphs 12, 67, 71, 76, 79, 83, 89, and 92 of said statement.
4. Respondent admitted the allegations contained in paragraph 8 of Claimant's First Amended Statement of Claim.
5. Respondent admitted that he was acting within the scope of his employment as alleged in paragraph 11 of Claimant's First Amended Statement of Claim, but denied the remaining allegations of paragraph 11.
6. Respondent admitted that he met with Claimant in the Fall of 1986, and that Respondent had been a registered representative of B. C. Christopher Company, and that Claimant had opened an account with approximately \$150,000.00, but denied the remaining allegations of paragraph 16 of Claimant's First Amended Statement of Claim.

7. Respondent admitted that he left B. C. Christopher Company and joined E. F. Hutton, but the Respondent was without knowledge or information sufficient to have formed a belief as to the remaining allegations of paragraph 18 of Claimant's First Amended Statement of Claim.

8. Respondent admitted that he left Shearson Lehman, but denied the remaining allegations of paragraph 50 of Claimant's First Amended Statement of Claim.

Second Defense

Claimant's First Amended Statement of Claim failed to State a claim upon which relief could be granted.

Third Defense

Claimant's claims were barred by the applicable statutes of limitation.

Fourth Defense

Claimant's claims were barred by the applicable doctrine of waiver, estoppel and laches.

Fifth Defense

Claimant filed an action before the Circuit Court of Jackson County, Missouri, seeking recovery for the same alleged damages and had, therefore, impermissibly split her cause of action.

Sixth Defense

Claimant had failed to plead fraud with particularity as required.

Seventh Defense

If Respondent would be determined to be liable for any portion of Claimant's claimed damages, which had been expressly denied, then fault should be apportioned between Claimant, Shearson Lehman and other unnamed parties.

Eighth Defense

Respondent claimed entitlement to a set off for all monies which Claimant had received in settlement from other entities and individuals for her alleged damages.

Ninth Defense

Claimant's claimed damages, the existence and amount of which are expressly denied, were caused by other, unnamed parties.

Tenth Defense

Claimant's First Amended Statement of Claim failed to state a claim for punitive damages under New York law as required.

Eleventh Defense

Respondent at all times exercised good faith with respect to Claimant's account.

Twelfth Defense

Claimant failed to mitigate her damages by selling at a time when the market would have allowed Claimant to do so with no or minimal loss.

Thirteenth Defense

Respondent reserved the right to add additional affirmative defenses, at such time as said additional defenses became known and/or available to Respondent through discovery and/or any other source.

Fourteenth Defense

Claimant's claims were barred by settlement, payment, res judicata, and accord and satisfaction.

RELIEF REQUESTED

In Count I, Claimant requested an award against each of the Respondents, jointly and severally, in an amount in excess of \$200,000.00 as actual damages together with interest accruing from the date Claimant's accounts were opened, rescission of all partnership investments, and for costs, attorneys' fees, and expenses.

In Count II, Claimant requested an award against each Respondent, jointly and severally, in an amount in excess of \$200,000.00 as actual damages, together with interest accruing from the date Claimant's accounts were opened, for punitive damages in the sum of \$1,000,000.00, and for costs, attorneys' fees, and expenses.

In Count III, Claimant requested an award against each of the Respondents, jointly and severally, in an amount in excess of \$200,000.00, representing the diminution in value of Claimant's investment portfolio, fees and commissions, loss of dividends plus interest thereon, \$1,000,000.00 punitive damages, costs, attorneys' fees, and expenses incurred herein, and a full and complete accounting of her account.

In Counts IV, and V, Claimant requested an award against each of the Respondents, jointly and severally, in an amount in excess of \$200,000.00 actual damages, \$1,000,000.00 as punitive damages, plus costs, attorneys' fees, and expenses.

In Count VI, Claimant requested an award against each respondent, jointly and severally, in the sum of \$200,000.00, then trebled according to law, statutory interest, plus her costs, attorneys' fees, and expenses.

In Count VII, Claimant Requested an award against each Respondent, jointly and severally, for a fair and reasonable sum as actual damages, \$500,000.00 punitive damages, and her costs and expenses.

In Count VIII, Claimant requested an award against each Respondent, jointly and severally, for a fair and reasonable sum as actual damages, \$1,000,000.00 punitive damages, her costs, attorneys' fees, and expenses.

Respondent, Mark S. Greenway, requested judgement in his favor, that Claimant take noting by the First Amended Statement of Claim, and for his costs incurred, and for such other and further relief as the panel deemed proper.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Mark S. Greenway did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the Code and having answered the claim, appeared and testified at the hearing and therefore is bound by the determination of the arbitration panel on all issues submitted.

On July 21, 1992, the NASD received correspondence from Respondent's counsel, Ray E. Sousley, Esq. ("Sousley"), informing the NASD of his representation, and also requesting a postponement of the hearing set for July 29, 1992. The panel ruled to deny the request for postponement. The decision had been transmitted to the parties on July 27, 1992.

On July 23, 1992, Sousley, on behalf of Respondent, made a Motion to Disqualify Claimant's counsel, Richard P. Scaletty, Esq. ("Scaletty").

At the hearing held on July 29, 1992, the Motion for Continuance had been re-raised by Sousley. The panel denied the Motion. Sousley further renewed the Motion to Disqualify Scaletty. After hearing argument from the parties, and deliberation, the panel denied the Motion. Sousley then made a Motion to Dismiss Claimant's claim for punitive damages. After hearing argument from the parties, and deliberation, the panel took the Motion under advisement. Further, Sousley handed to the NASD representative a Motion for TRO, and notice for an immediate hearing on the Motion in the Circuit Court for Jackson County, Missouri. The panel adjourned the hearing. The TRO had been sustained by the Court, and a hearing date had been set in August, 1992. The TRO had been dissolved, by the Court, on or about August 16, 1992. Notice of the panel's decision was sent to the parties on August 31, 1992.

On August 12, 1992, the NASD received Respondent's Motion to File Answer and Defenses Out of Time. The NASD had been forced to wait until the TRO had been lifted before dealing with this Motion. On August 21, 1992, Claimant filed a response to the Motion with the NASD. After review of the submissions of both parties, and deliberation, the panel granted the Motion.

On August 18, 1992, a Motion for expedited hearing was made by Claimant. Sousley's response to the Motion had been received on August 24, 1992. The panel granted the Motion, and had scheduled the hearing for September 10 and 11, 1992. The decision was forwarded to the parties via facsimile on August 25, 1992. The NASD had, on January 30, 1992, received Claimant's Motion to Bar Defenses of Respondent.

On September 1, 1992, various subpoenas and an order of appearance, along with a Subpoena Duces Tecum directed to the disability insurance carrier of Respondent, were sent to the NASD, by Claimant, for the signature of the Chairman of the arbitration panel. The NASD requested a response from Respondent concerning the Subpoena Duces Tecum on September 1, 1992 by facsimile and regular mail. Respondent's response had been received by the NASD on September 4, 1992. The material concerning the Subpoena Duces Tecum was sent to the Chairman for ruling on September 4, 1992. The Chairman had granted the Subpoena Duces Tecum in part. All parties received notification of the Chairman's ruling on September 9, 1992.

At the hearing on September 10, 1992, the panel took up Respondent's September 9, 1992, Motion to Reconsider the Subpoena Duces Tecum. The panel ruled on the Motion as the first order of business, and decided to nullify the existing subpoena contingent upon the decision of the panel that punitive damages were in order. If such a finding were made by the panel, the panel would consider such information in camera. Further, Sousley gave the NASD representative an Ex Parte Application for Issuance of Protective Order, Suggestions in Support of the Application, a Motion to Shorten Time on Ex Parte Hearing, and a Protective Order from the Circuit Court of Jackson County, Missouri, quashing the Subpoena Duces Tecum and prohibiting further subpoenas. At the end of the hearing on September 11, 1992, Sousley verbally agreed to voluntarily dismiss the pending Circuit Court action without prejudice due to the mootness of the issue. On September 14, 1992, the NASD received the voluntary dismissal from Sousley.

On October 21, 1992, the panel requested that Scaletty revise his earlier Subpoena Duces Tecum relating to Respondent's Disability Insurance Policy for production of documents relating to the policy for in camera review by the panel. On October 27, 1992, the NASD received the Subpoena from Scaletty, and it had been forwarded to the Chairman on November 4, 1992, for review and signature. Upon receipt of the signed Subpoena, the NASD forwarded the same to Respondent's insurance carrier. The material pertaining to the subpoena had been received by the NASD on November 25, 1992, and had been forwarded to the Chairman.

On October 27, 1992, Respondent filed a Suggestion of Death with the NASD. The Suggestion related to the death of Claimant, Ossie L. Sandefur. On November 20, 1992, the NASD received a Request from Scaletty to substitute the real party in interest. The panel granted the request in February of 1993.

During the first part of December, 1992, the Chairman, on behalf of the panel, requested that the NASD prepare an Order of Production directed to the Respondent. The panel ordered that Respondent produce his 1991 Federal Income Tax Return. On December 8, 1992, the NASD received the signed Order from the Chairman, and on December 8, 1992, transmitted the Order to the parties by facsimile and regular

mail. The NASD received Respondent's compliance with the order on December 22, 1992. The material was sent to the Chairman on December 31, 1992.

The parties have agreed that the Award in this matter may be executed by 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.

AWARD

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

1. Respondent Mark S. Greenway is liable for, and shall pay to Claimant, The Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative, the sum of \$149,200.00 as satisfaction of Claimant's claims relating to actual damages herein;
2. Respondent Mark S. Greenway is liable for, and shall pay to Claimant, the Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative, the sum of \$150,000.00 as satisfaction of Claimant's requests for punitive damages;
3. Claimant's, the Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative, requests for damages relating to RICO are hereby denied and dismissed with prejudice;
4. The request to substitute The Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative, as the real party in interest is hereby granted;

OTHER COSTS

5. Respondent Mark S. Greenway is liable for, and shall pay to Claimant, The Estate of Ossie L. Sandefur by Richard P. Scaletty, the Personal Representative, the sum of \$1,250.00 as reimbursement for filing fees and hearing session deposit paid to the NASD by the Claimant; and
6. Each party shall bear their own costs and attorneys' fees associated with this arbitration, except as set forth more fully below.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

1 pre-hearing conference session X \$300.00 = \$300.00

5 hearing sessions X \$1,000.00 = \$5,000.00

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall retain the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant.

Additional forum fees in the amount of \$4,300.00 are assessed against Respondent Mark S. Greenway.

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

CONCURRING ARBITRATORS

Dated:

March 5, 1993

/s/ Murray S. Levin
Murray S. Levin
Presiding Chair
Public Arbitrator

March 2, 1993

/s/ J. Stanley Levitt
J. Stanley Levitt
Public Arbitrator

February 26, 1993

/s/ Lawrence D. Morriss, Jr.
Lawrence D. Morriss, Jr.
Industry Arbitrator

Date of Service by the NASD: _____