

## 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

Robert O. Balch

vs.

CASE NO.  
91-03627

Name of Respondents

Dean Witter Reynolds Inc.  
Shearson Lehman Brothers, Inc.  
Michael A. Ewanouski

REPRESENTATION

For Claimant, Robert O. Balch, Thomas H. Tucker, Esq. from the law firm of McGowan, Engel, Tucker, Garrett & Shultz

For Respondents, Shearson Lehman Brothers, Inc. ("Shearson") and Michael A. Ewanouski ("Ewanouski"), Barry Y. Weiner, Esq. and Laurie B. McGhee, Esq. from the law firm of Shapiro, Israrel & Weiner, P.C. for the period of November, 1986 through February, 1988.

For Respondents, Dean Witter Reynolds, Inc., ("Dean Witter") and Micheal A. Ewanouski, Gerald F. Rath, Esq. and R. Scott Henderson. Esq. from the law firm of Bingham, Dana & Gould, for the period of February, 1988 through June, 1989.

CASE INFORMATION

Statement of Claim was filed on November 7, 1991.

Claimant's Submission Agreement was signed on November 7, 1991.

Joint Statement of Answer filed by Shearson and Ewanouski on November 15, 1992.

Shearson's Submission Agreement was signed on January 9, 1992.

Joint Statement of Answer filed by Dean Witter and Ewanouski on February 13, 1992.

Dean Witter's Submission Agreement was signed on January 13, 1992.

Ewanouski's Submission Agreement was signed on February 13, 1992.

HEARING INFORMATION

Hearing Date/Sessions: September 09, 1992 -- Two Sessions

Hearing Location: National Association of Securities Dealers, Inc. offices located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

Claimant alleged that he was an inexperienced investor who sustained losses in his accounts as a result of unsuitable investment recommendations, a risky investment strategy and misrepresentations made by his account representative, Ewanowski, who was employed by E.F. Hutton, the predecessor to Shearson, and subsequently Dean Witter. While the accounts were at Shearson's Boston office, Claimant alleged that he informed Ewanowski of his desire to obtain only low-risk and liquid investments to meet his retirement objectives. Claimant further alleged that Ewanowski recommended several risky and illiquid investments which were inconsistent with his retirement objectives and misrepresented those investments as low-risk and liquid. In particular, Claimant alleged that Ewanowski recommended Lepery Corporate Income Fund Limited Partnership, a real estate partnership and Jetstream Limited Partnership, which Claimant alleged was affiliated with Shearson. Claimant also alleged that Respondent Ewanowski, while employed by Shearson, made investments without authorization, purchased and sold securities solely to generate commissions and arranged a high-risk margin account without discussing the risks associated with such an account. Claimant further alleged that Ewanowski transferred to Dean Witter, however before doing so, recommended an unsuitable and risky investment strategy consisting of discretionary, short term trading in common stocks such as Damon Corporation and Lyondell Petrochemical. Claimant contended that this strategy continued at Dean Witter. Claimant also alleged that while at Dean Witter, Ewanowski purchased and sold securities solely to generate commissions and made unauthorized trades which resulted in substantial losses for both accounts.

Dean Witter, Shearson and Ewanowski maintained that Claimant was and is an experienced, knowledgeable and sophisticated investor who was fully advised of and approved all transactions made in his accounts. Respondents further maintained that Claimant never complained nor expressed dissatisfaction with Ewanowski's performance. Additionally, Respondents denied charges of purchasing and selling securities in Claimant's account solely to generate commissions, that unsuitable investments were purchased for Claimant or that Balch was not consulted prior to trading activity. Dean Witter maintained that any discussions concerning short term trading was initiated by Claimant and were consistent with Claimant's expressed objectives of generating income, obtaining profits through short term trading and speculation. Dean Witter contended that Claimant's desire for short term profits was evidenced by the admitted unsolicited purchases and sales of LTX stock. Respondent Shearson additionally maintained that the limited partnership units purchased by Claimant were consistent with Claimant's desire to obtain growth without

day to day movement in the market and that Claimant was fully informed of the illiquidity of these investments as explicitly stated in the prospectuses. Respondent Shearson also maintained as affirmative defenses that Claimant's assertions are barred by the applicable statutes of limitation and that Claimant ratified all transactions and, thus effectively, waived any claims against Shearson.

#### RELIEF REQUESTED

Claimant requested an award in the amount of \$88,484.00 against Respondents. Claimant also requested that the panel award him interest, costs and attorney fees.

Respondents requested that Claimant's claims be dismissed. Respondent Dean Witter and Ewanouski requested that they be awarded such other and further relief including attorney's fees as the arbitration deem just and proper.

#### OTHER ISSUES CONSIDERED & DECIDED

On February 24, 1992, Claimant filed a Motion to Bar Shearson under Section 25(b)(2)(iii) for failure to file an answer within the time allowed. This motion was denied by the panel.

#### DISCUSSION/CONCLUSIONS & RATIONALE

Balch was a self-employed plumbing contractor with a high school education who met Ewanouski in 1984 when Ewanouski set up Balch's Individual Retirement Account with Shearson's predecessor, E.F. Hutton. After Balch's wife passed away in 1986, Balch opened a non-discretionary brokerage account with E.F. Hutton. Ewanouski was his account executive.

Balch testified that he told Ewanouski that he wanted his account to do "better than a bank," that he wanted "liquidity," and that he relied on Ewanouski for "most of" his investment decisions. Units in two limited partnerships (the "Units") were recommended by Ewanouski and purchased by Balch. Balch alleged that such recommendations were unsuitable considering his liquidity needs. He further testified that he never received prospectuses for the Units.

Ewanouski testified that Balch had not been specific regarding his liquidity needs when the account was opened, that the account was a non-discretionary account, that the Units were suitable for Balch, that prospectuses for the Units had been provided to Balch, and that Balch had approved every trade, had initiated several unsolicited trades on his own, and had not expressed any dissatisfaction with Respondents until after his account had been transferred to another broker.

Questioning by the panel elicited further testimony from Balch to the effect that he had owned at least one private aircraft during the existence of his account. The Arbitrators find that the Units were not unsuitable investments for Claimant. Furthermore, taking into consideration the non-discretionary nature of Claimant's account and the undisputed testimony that Claimant had initiated some of the trading in his account, the Arbitrators find that he failed to establish his claim of churning. Accordingly, Claimant failed to establish any of his claims, and no liability exists on the part of either Respondent.

#### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The arbitrators find that the Limited Partnerships were not unsuitable investments for Claimant. The arbitrators further find that since the Claimant's account was a non-discretionary account and Claimant admitted in his testimony that he had initiated some of the trading, he failed to establish his claim of "churning". Thus, no liability exists on the part of Respondents on Claimant's charges of unsuitability.

2. The claim for damages based on the charges of unauthorized trading is denied.

3. Each party shall bear its respective legal fees and costs.

#### FORUM FEES

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

1. The forum fees in the amount of \$1000.00 for two hearing sessions at \$500.00 per session are assessed and shall be divided equally between the Claimant and the Respondents; specifically, Claimant is liable for fifty percent (50%) and Respondents are liable for fifty percent (50%).

2. Claimant is further liable for \$150.00 non-refundable filing fee.

3. Claimant deposited \$650.00 which shall be applied to the fees assessed.

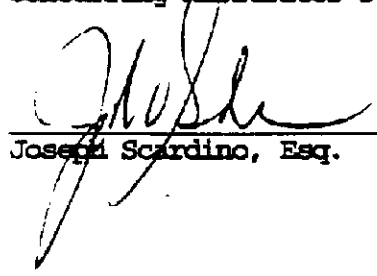
Fees are payable to the National Association of Securities Dealers, Inc.

#### ARBITRATION PANEL

S. Lawrence Gwin, Jr., Esq.	-	Chairperson-Public
Joseph Scardino, Esq.	-	Public
Robert W. Crook	-	Industry

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Concurring Arbitrator's Signature

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Joseph Scardino, Esq.

Date of decision: October 22, 1992

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Concurring Arbitrator's Signature

  
Robert W. Crook

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Concurring Arbitrator's Signature

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S. Lawrence Gwin, Jr., Esq.

Date of decision: October 22, 1992