

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Name of Claimants

Barbara Johnson  
Kurt Johnson

No. 91-03758

Name of Respondents

Shearson Lehman Brothers, Inc.  
Nick Bocella  
Mark Greenway

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REPRESENTATION OF PARTIES

For Claimants: John Miller, Esq., of Nygaard & Associates.  
Overland Park, Kansas.

For Respondents Shearson Lehman Brothers, Inc. and Nick Bocella:  
John Shaw, Esq., of Bryan Cave, Kansas City, Missouri.

Respondent Mark Greenway appeared at the hearing pro se. Mark Greenway had previously been represented by Ray E. Sousley, Esq., Kansas City, Missouri.

CASE INFORMATION

Statement of Claim filed on or about: November 15, 1991.

Claimants' Submission Agreement signed: November 5, 1991.

Joint Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc. and Nick Bocella on or about: February 10, 1992.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: December 24, 1991.

Respondent Nick Bocella's Submission Agreement signed on: December 30, 1991.

Answer and Affirmative Defenses filed by Respondent Mark Greenway on or about: August 7, 1992.

The NASD does not have a record of Respondent Mark Greenway having filed a Submission Agreement.

HEARING INFORMATION

Hearing dates: June 23, 1993. Two (2) sessions.  
June 24, 1993. Two (2) sessions.  
June 25, 1993. One (1) sessions.

Hearing Location: Kansas City, Missouri.

CASE SUMMARY

Claimants, Barbara Johnson and Kurt Johnson ("Claimants") alleged: Unauthorized trading; churning; unsuitability; negligent misrepresentation; common law fraud; breach of fiduciary duty; failure to supervise; violation of the Missouri Securities Act; violations of the Federal RICO Statute; negligence; breach of contract; violation of the Missouri Merchandising Protection Act; and violations of New York Stock Exchange and NASD Rules by Respondents Shearson Lehman Brothers, Inc. and Nick Boccella ("Respondents") and Respondent Mark Greenway ("Greenway"). The allegations arose out of transactions in the following securities during the period of 1987 through the spring of 1990: Genentech stock; Van Kampen Merritt U.S. Government Securities Fund; Polaris Ind. Ptrs. limited partnership; and Silver Screen Partners IV L.P. amongst others more fully set forth in the exhibits and testimony in this case. Claimants stated that the limited partnerships had been purchased on margin. Claimants also stated that the major focus of the trading in their account centered around shorting naked options. Claimants also alleged that in 1987, they only opened a cash account, and had not signed an option agreement, nor had they signed a margin agreement until May 2, 1988. Claimants further stated that they had never been provided with the required option risk disclosure statement.

For their Answer, Respondents denied any and all liability to Claimants which had not been specifically admitted in their Answer to the Statement of Claim, and denied each and every allegation asserted by the Claimants which had not been specifically admitted to in their Answer. In addition, Respondents asserted the following affirmative defenses:

1. Claimants' Statement of Claim, and all causes of action thereunder, fail to state a claim against Respondents upon which relief may be requested.

2. As a result of Claimants' failure to notify Respondents of

the alleged acts and omissions of which Claimants complain promptly after receipt of written confirmations, monthly statements and other documents evidencing or setting forth transactions in Claimants' account, and in any event, promptly after Claimants discovered or reasonably should have discovered the alleged acts or omissions, Claimants are barred from recovering from Respondents under the doctrines of ratification, account stated, estoppel, waiver and laches because Respondents relied upon the aforesaid silence of Claimants.

3. Claimants' claims for relief are barred in whole or in part by the applicable statute or statutes of limitations.

4. Respondents are not liable to Claimants because of Respondents' good faith and due diligence in the conduct of their affairs with Claimants.

5. Claimants failed to act promptly and with due diligence to mitigate their alleged damages after Claimant knew or should have known of the alleged acts and omissions of which Claimants now complain. To the extent Claimants' damages were sustained after such time, Claimants are barred from recovering such damages.

6. Claimants' claims fail to state with requisite particularity the circumstances of any fraud allegedly committed by Respondents.

7. By failing to exercise the degree of care over their affairs and investments which an ordinary prudent investor would exercise, Claimants caused or contributed to cause the alleged damages of which they complain, and thus, are barred by their contributory negligence from recovering any such alleged damages from Respondents.

8. Claimants' claims are barred because Respondents' conduct was not the proximate cause of any loss or damages to Claimants. The loss or damages alleged were caused, if at all, by unforeseeable market factors and conditions affecting the value of securities in Claimants' account, for which Respondents are not liable or responsible.

9. Claimants were aware from the outset of the risks of profit and loss associated with investing in securities, and voluntarily assumed such risk. The Claimants' knowing and voluntary assumption of such risk was the sole and proximate cause of their alleged damages, and their claims are barred in whole or in part because they assumed the risks of the investments they made.

10. As a result of Claimants' failure to object or notify Respondents of the acts and omissions of which Claimants complain

within ten days or receipt of written notification evidencing or setting forth transactions in Claimants' account, Claimants are barred from recovering from Respondents under Section 8-319 of the Uniform Commercial Code.

11. Claimants authorized the alleged conduct of Respondents about which Claimants now complain.

12. Claimants are not entitled to punitive damages or an award of attorneys' fees as a matter of law, and any award of punitive damages constitute a denial of Due Process and Equal Protection under both the federal and State Constitutions. In addition, any award of punitive damages would be contrary to the law of the State of New York, under which the parties agreed to be bound, inasmuch as New York law prohibits arbitrators from awarding punitive damages.

13. Any recovery by Claimants against Respondents under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. Section 1961, et seq., would constitute a denial of Due Process and Equal Protection under both the Federal and State Constitutions.

In his Answer and Affirmative Defenses to the Statement of Claim, Greenway asserted the following:

#### First Defense

1. Greenway admitted that the Claimants opened an account with him at Shearson Lehman Brothers, Inc., but that Greenway denied any wrongdoing on his part or on the part of any Respondent, and further states that any decline in the value of the Claimants' account is the direct result of the action of the Claimants and then prevailing market conditions.

2. Greenway further stated that the Statement of Claim is so devoid of particular facts upon which the claim is based, that Greenway is unable to adequately plead and/or answer the Statement of Claim.

3. Greenway denied each and every allegation of the Statement of Claim not specifically admitted in his Answer.

#### Second Defense

Claimants' Statement of Claim fails to state a claim upon which relief can be granted.

#### Third Defense

Claimants' claims are barred by the applicable statutes of

limitations.

Fourth Defense

Claimants' Claims are barred by the doctrine of waiver, estoppel and laches.

Fifth Defense

Claimants' have failed to plead fraud with particularity as required.

Sixth Defense

Should it be determined that Greenway is liable for any portion of Claimants' claimed damages, which is expressly denied, then fault should be apportioned between Claimants, Shearson Lehman, and other unnamed parties.

Seventh Defense

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

Eighth Defense

Claimants' Statement of Claim fails to state a claim for punitive damages under New York law as required.

Ninth Defense

Greenway at all times exercised good faith with respect to Claimants' account.

Tenth Defense

Claimants' failed to mitigate their damages by selling at a time when the market would have allowed them to do so with no or minimal loss.

Eleventh Defense

Greenway reserves the right to add additional affirmative defenses, at such time as said additional defenses become known and/or available to Greenway through discovery and/or any source.

Twelfth Defense

Claimants' claims are the direct result of the negligence of Claimant Kurt Johnson.

RELIEF REQUESTED

Claimants requested:

1. That their purchase of Silver Screen Partners be rescinded with interest from March 25, 1988.
2. Compensatory damages in the amount of \$154,000.00.
3. An Award of attorneys' fees, interest, and other out of pocket expenses associated with this arbitration.
4. An award of all commissions paid to Hutton/Shearson.
5. An award of punitive damages.
6. That any award be trebled in accordance with the federal RICO statute.

Respondents requested that an award in favor of Respondents be entered together with the costs associated with this proceeding.

Greenway requests judgement in his favor, that Claimants take nothing by their Statement of Claim, and for costs incurred, and for such other and further relief as the panel deemed proper.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Mark 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 panel on all issues submitted.

On or about August 7, 1992, Greenway filed a Motion to File Answer and Defenses out of time. The Motion was granted, and the Answer allowed to become a part of the pleadings in this arbitration.

On or about April 14, 1993, Respondents filed a Motion to Dismiss. On May 26, 1992, Claimants filed their response to the Motion, and the documents were forwarded to the panel. After review of the documents and deliberation, the panel denied the Motion to Dismiss.

On June 1, 1993, Respondents filed a Motion to Dismiss Claimants'

RICO and punitive damages claims. On or about June 11, 1993, Claimants file their Response, and the Documents were forwarded to the panel. After review of the documents and deliberation, the panel reserved ruling on the Motion to Dismiss until the final award.

On June 24, 1993, at the close of Claimants' case-in-chief, Respondents made an oral Motion for a Directed Verdict. After hearing argument from all parties, the panel reserved ruling on the Motion until the close of all evidence.

On June 25, 1993, at the close of all evidence, Respondents reasserted their Motion for a Directed Verdict. After hearing argument from the parties, and deliberation, the panel ruled that there was not a legal basis for the panel to grant the motion, and proceeded with the closing statements.

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 original(s) remain on file with the NASD.

#### AWARD

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

1. Respondents', Shearson Lehman Brothers, Inc.'s and Nick Boccella's Motion to Dismiss Claimants' claims for punitive and RICO damages is hereby denied.
2. Claimants, Barbara and Kurt Johnson's claims are denied and dismissed with prejudice.

#### OTHER COSTS

Each party shall bear its own costs, expenses 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 "Code"), the following forum fees are assessed:

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

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

Pursuant to Sections 43(c) and 30(b) of the Code, the NASD shall retain the postponement fee in the amount of \$1,000.00 previously paid to the NASD by Respondent Shearson Lehman Brothers, Inc.

Additional forum fees in the amount of \$5,000.00 are assessed jointly and severally against Respondents Mark Greenway, Nick Boccella, and Shearson Lehman Brothers, Inc.

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

**CONCURRING ARBITRATORS**

Dated:

Name:

June 25, 1993

/s/Robert T. Donnelly  
Robert T. Donnelly  
Presiding Chair  
Public Arbitrator

June 25, 1993

/s/Alan D. Beauchaine  
Alan D. Beauchaine  
Industry Arbitrator

June 25, 1993

/s/Alan C. Fite  
Alan C. Fite  
Public Arbitrator

Date of Service by the NASD:

June 28, 1993