

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Donald B. Egan d.b.a Donnegan R. International, Inc.

91-04043

Name of Respondents

Shearson Lehman Brothers, Inc.;  
Mark Stevenson;  
David Bromberg

REPRESENTATION

For Claimant: Donald B. Egan d/b/a Donnegan R. International Inc. appeared pro se.

For Respondents: Shearson Lehman Brothers, Inc., Mark Stevenson and David Bromberg were represented by Pete S. Michaels, Esq. of Shearson Lehman Brothers, Inc., New York, New York and Jack D. Ballard, Esq. of Hutcheson & Grundy, L.L.P., located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed on: January 14, 1992.

Claimant's Submission Agreement signed on: December 17, 1992.

Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc., Mark Stevenson and David Bromberg on: March 25, 1992.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: March 11, 1992 by Pete S. Michaels, Vice President and Associate General Counsel, Shearson Lehman Brothers, Inc.

Respondent Mark Stevenson's Submission Agreement signed on: August 10, 1992.

Respondent David Bromberg's Submission Agreement signed on: August 10, 1992.

Claimant's Section 25(b)(2) Motion to Preclude filed on: March 12, 1992.

Respondents' Response to Claimant's Motion to Preclude filed on: May 14, 1992.

Respondents' Motion to Dismiss filed on: August 20, 1992.  
Claimant's Objection to Motion to Dismiss filed on: August 25, 1992.

Respondents' Motion to Dismiss Statement of Claim for Violations of the NASD  
Code of Arbitration Procedure filed on: September 30, 1992.  
Claimant's Objection to Respondents' Motion to Dismiss filed on: October 12,  
1992.

#### HEARING INFORMATION

Pre-Hearing Conferences: August 5, 1992 before One (1) Arbitrator;  
August 26, 1992 before One (1) Arbitrator.

Hearing Dates/Sessions: September 1, 1992 for Two (2) sessions;  
September 2, 1992 for Two (2) sessions;  
October 15, 1992 for Three (3) sessions;  
October 16, 1992 for Two (2) sessions;  
February 12, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas.

#### CASE SUMMARY

Claimant Donald B. Egan, d/b/a Donnegan R. International Inc. ("Egan"), alleged that Respondent David Bromberg, ("Bromberg"), while employed or acting as an agent for Respondent Shearson Lehman Brothers, Inc. ("Shearson"), engaged in churning, unauthorized trading, unsuitable investments, and fraudulent misrepresentations and other illegal and wrongful conduct. Egan specifically alleged that:

1. After seeing each other at a social function in 1989, Bromberg telephoned Egan and persuaded Egan to invest with him, claiming that he was "linked up with a "network" of other brokers who...could successfully support and enhance stocks to increase the stocks' popularity" and that if he invested with him, Egan would be insulated against risk and would be successful in an otherwise precarious economic environment;
2. Egan advised Bromberg that given his financial and personal situation, he could only be involved in situations involving little or no downside risk and that he had no idea how to chose stable stocks providing safe, steady growth. Bromberg assured Egan there was absolutely no risk because the stocks Bromberg chose were "special situations" supported by Bromberg and his inner circle of powerful brokers;

3. When the account opened in October of 1989, trading began slowly with Bromberg buying only two stocks and executing around fifteen trades in the last three months of the year. In 1990, Bromberg, without disclosing the risks, began to aggressively trade stock on a nearly daily basis, often for little or no gain, which was inappropriate given Egan's stated goal of maintaining a secure investment with safe, gradual growth;

4. Bromberg made his trading more appealing by arranging for Egan to secretly listen in on telephone conversations between Bromberg and another member of the "network" of brokers which were intentionally false and designed by Bromberg and his cohorts to manipulate Egan into purchasing stock for the brokers' benefit;

5. Bromberg executed trades in several stocks without Egan's knowledge or authorization, often making trades in Egan's account when Egan was on vacation. Egan was unable to discover the trades because on many occasions, the Respondents failed to send confirmation slips and/or monthly statements or sent them to incorrect or defunct addresses;

6. Bromberg engaged in excessive trading in Egan's account for the primary purpose of enriching himself to the detriment of Egan, completely turning over the account nearly every month;

7. Bromberg engaged in a scheme to convert to himself and other brokers huge dividends paid on large blocks of Burnup & Sims stock, often using customers accounts to park stock; and

8. Respondents Shearson and Mark Stevenson ("Stevenson") were aware of Bromberg's illegal and wrongful propensities, but failed to exercise their responsibilities as control persons to properly supervise Bromberg.

Based upon the above allegations, Egan asserted claims for violation of the Texas Securities Act, Tex. Rev. Stat. Ann. art. 581 par. 33; violation of Section 12(2) of the Securities Act of 1933, as amended, 15 U.S.C. Par. 77a et seq., and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. par. 78 et seq., and Rule 10b-5 promulgated thereunder; breach of fiduciary duty; fraud; negligence and gross negligence.

The Respondents denied the material allegations of the Statement of Claim, alleging that:

1. Egan was a sophisticated investor who was a financial consultant with Bache Halsey Stuart Inc. in the mid-1970's and was a director/principal for at least four securities firms. In addition, Egan advised Bromberg upon opening his account that his yearly income was "\$150,000 and over", his net worth was "\$1,000,000 and over", and

that his investment objectives were "businessman's risk-- appreciation" and "trading short term;"

2. The Shearson account was not a discretionary account and Egan was solely and completely in control of the account at all times. Egan established himself as an active and informed investor who telephoned Bromberg incessantly (often ten to twenty times daily), watched the Financial News Network on cable television and would then call to confirm the quotations with Bromberg and telephoned corporate executives of companies he owned stock in to discuss its performance; and

3. In February of 1991, Egan purchased 15,00 shares of Burnup & Sims which required him to deposit funds to cover the purchase. The check for \$80,000 he deposited "bounced" because he stopped payment. At that time, Egan was informed that if \$80,000 was not deposited, the position would be sold and Egan would be responsible for any debit incurred. At that time, Egan promised that the check would clear and requested a meeting with Stevenson, for the first time expressing concerns about the account.

Respondents asserted the following affirmative defenses:

1. Egan's demand for damages is improper as a matter of law and fact and therefore his Statement of Claim fails to state a claim upon which relief can be granted;

2. Egan is barred by the principles of waiver and estoppel because he had full knowledge of all material facts concerning his investments, yet did not repudiate those investments in a timely fashion;

3. Egan was provided with regular and timely notification of all transactions in his account, either orally or by the confirmations and monthly statements, but did not repudiate any transaction in a timely fashion. Therefore, the claims are barred in whole or in part by the doctrines of ratification and affirmance;

4. Respondents acted in compliance with all applicable rules and regulations and in good faith, without malice or scienter, and did not directly or indirectly induce any of the acts alleged to constitute the wrongful conduct. Any damage resulted from Egan's own actions or the actions of parties other than Respondents;

5. Egan, a securities professional, was solely in control of his account at all times, and Respondents exercised no discretion or de facto control over the account and bear no liability for any losses;

6. Egan failed to mitigate any damages by retaining investments in

his portfolio even as they lost value;

7. The claims are barred, in whole or in part, by the doctrine of laches and the applicable statute of limitations; and

8. Egan was informed of the nature of all investments, was in a position to judge the risks and knowingly accepted those risks and based on the information he supplied, was entirely suitable for the transactions in his account.

In their Counterclaim, Respondents alleged that Egan is liable for breach of contract, fraud and misrepresentation for his failure to honor the \$80,000 check he tendered to Shearson. In addition, Respondents alleged Claimant is liable for malicious prosecution and abuse of process related to his failure to disclose to the Panel material misrepresentations within Claimant's Statement of Claim.

#### RELIEF REQUESTED

Claimant requested an entry of an award in the amount of \$210,000.00 plus costs of arbitration and pre-judgment and post-judgment interest. Claimant also requested an award of punitive damages sufficient to punish Respondents for their conduct and to deter such conduct in the future. Also, Claimant sought a declaration that he owes no money to Respondents for any losses incurred in the account as a result of the Respondents selling out of Claimant's position in February, 1991.

Respondents requested that the Statement of Claim be dismissed in its entirety and that Respondents be awarded all costs and attorney's fees that they have incurred in this matter and that they be awarded damages on their Counterclaim in an amount to be determined by the Panel.

#### OTHER ISSUES CONSIDERED & DECIDED

At hearing on September 1, 1992, the Panel heard argument on Claimant's Motion to Preclude. After review of the arguments and the pleadings filed on this issue, the panel determined that the Motion would be denied.

In addition, on September 1, 1992, the Panel heard argument of Respondents' Motion to Dismiss filed August 20, 1992. After review of the arguments and pleading filed on this issue, the Panel determined that the Motion would be denied.

At hearing on October 15, 1992, the Panel heard argument on Respondents' Motion to Dismiss Statement of Claim for Violations of the NASD Code of Arbitration

Procedure. The panel determined that the Motion would be taken under advisement. The Motion is hereby denied in its entirety.

At the close of the Claimant's case, Respondents presented a Motion for Directed Verdict. After hearing argument on the issue, the Panel determined that the Motion would be denied. The Respondents reasserted the Motion. The Panel has determined that the Motion shall again be denied.

On February 3, 1993, Egan filed a Motion for Sanctions and Disciplinary Actions and a responsive pleading was filed on February 4, 1993. The Panel has reviewed the matter and has determined that the Motion shall be denied.

The Respondents presented a Motion for a Confidentiality Order. Upon review of the arguments presented on this matter, the Panel has determined that the Motion shall be denied.

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.

AWARD

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

1. Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to Claimant Donald B. Egan d/b/a Donnegan R. International Inc. the sum of \$10,000.00;
2. Respondent David Bromberg is liable for and shall pay to Claimant Donald B. Egan d/b/a Donnegan R. International Inc. the sum of \$5,000.00;
3. Respondent Mark Stevenson is liable for and shall pay to Claimant Donald B. Egan d/b/a Donnegan R. International Inc. the sum of \$5,000.00;
4. The claims for punitive damages are dismissed and denied in their entirety;
5. In regard to the Counterclaim, Claimant Donald B. Egan d/b/a Donnegan R. International Inc. is liable for and shall pay to Respondent Shearson Lehman Brothers, Inc. the sum of \$10,606.27;

6. All other claims asserted by the parties are dismissed and denied in their entirety;

7. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

#### OTHER COSTS

The panel determined that the official record would be maintained by the court reporter retained by Respondent Shearson Lehman Brothers, Inc. Respondent Shearson Lehman Brothers, Inc. shall pay all costs of the stenographic reporter who kept the record of the proceeding. Pursuant to Section 37 of the NASD Code of Arbitration Procedure, any party electing to have the record of the proceeding transcribed shall bear the cost of the transcription and a copy of the transcript shall be provided to the arbitrators through the NASD.

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, Respondent Shearson Lehman Brothers, Inc. shall pay to the NASD the sum of \$111.75 incurred as administrative costs. In addition, Claimant Donald B. Egan d/b/a Donnegan R. International, Inc. shall pay to the NASD the sum of \$83.65 incurred as administrative costs.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Prehearing conference sessions x \$300.00 per session = \$600.00; Eleven (11) hearing sessions x \$750.00 per session = \$8,250.00. Total Forum Fees = \$8,850.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimant, Donald B. Egan d/b/a Donnegan R. International Inc. Claimant Donald B. Egan d/b/a Donnegan R. International Inc. is liable for and shall pay to the NASD additional forum fees in the sum of \$6,330.00. The NASD shall retain the \$500.00 claim filing fee and the \$300.00 hearing session deposit previously deposited by Respondent Shearson Lehman Brothers, Inc.. David Bromberg and Mark Stevenson. Respondent Shearson Lehman Brothers, Inc. is liable for and shall pay to the NASD the sum of \$1,470.00 as additional forum fees.

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

Concurring Arbitrators' Signatures

Name:

Date:

John A. Selman, Esq.  
John A. Selman, Esq.  
Public Arbitrator  
Chairperson

May 6, 1993

Thomas D. Nagle  
Thomas D. Nagle  
Public Arbitrator

May 3, 1993

James R. Augustine  
James R. Augustine  
Industry Arbitrator

May 4, 1993

Date of Service on the Parties: 5-10-93