

AWARD

NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Intercity Company Establishment

vs.

Case No.
92-00768

Name of Respondents

Shearson Lehman Brothers, Inc.
Charles Ahto
Dominic J. Mariano, Jr.

REPRESENTATION

Claimant and Counterclaim Respondent Intercity Company Establishment ("Claimant"), is represented by Elisabeth Sieroe Maurer, Esq. located in Ridgefield, Connecticut. Claimant was represented at various times by Anthony J. Hom, Esq. who is located in Philadelphia, Pennsylvania, Christopher Fountain, Esq., David Wallman, Esq., Harold Blinderman, Esq. and Stephen Ganis, Esq., all located in Connecticut. At other various times, Claimant has been represented by its authorized representative, Johannes von Mecklenberg, pro se.

Respondents and Counterclaim Claimants, Shearson Lehman Brothers, Inc. ("Shearson"), Charles Ahto ("Ahto") and Dominic Mariano ("Mariano"), (collectively "Respondents"), are represented by Pete S. Michaels, Esq. located in Boston, Massachusetts.

CASE INFORMATION

Statement of Claim was filed on March 4, 1992.

Claimant's Submission Agreement was signed on February 27, 1992.

Amended Statement of Claim was filed on April 6, 1995.

Answer to Amended Statement of Answer and Third Party Claim was filed on June 16, 1995.

Joint Statement of Answer was filed by Respondents on May 21, 1992.

Respondent Shearson signed its Submission Agreement on August 7, 1992.

Respondent Ahto signed his Submission Agreement on July 31, 1992.

Respondent Dominic signed his Submission Agreement on August 10, 1992.

Amended Statement of Answer and Third Party Claim was filed by Respondents on March 20, 1995.

HEARING INFORMATION

Pre-Hearing Conferences Dates/Sessions:

November 30, 1994	-	1 session
March 7, 1995	-	1 session
March 14, 1995	-	1 session
March 21, 1995	-	1 session
March 24, 1995	-	1 session

March 27, 1995	-	1 session
April 1, 1995	-	1 session
October 17, 1996	-	1 session.

Hearing Dates/Sessions:

April 6, 1995	-	2 sessions
June 12, 1995	-	2 sessions
August 18, 1995	-	2 sessions
October 17, 1995	-	1 session
November 2, 1995	-	2 sessions
December 6, 1995	-	2 sessions
December 8, 1995	-	2 sessions
February 6, 1996	-	1 session
February 12, 1996	-	2 sessions
March 18, 1996	-	1 session
May 6, 1997	-	2 sessions
July 28, 1997	-	1 session.

Hearing Location: NASD Regulation, Inc.'s offices ("NASD Regulation") and various other locations in New York, New York, Sheraton Hotel in Stamford, Connecticut and Best Western, in Bethel, Connecticut.

CASE SUMMARY

Claimant alleges that Respondents engaged in churning, unsuitable investments, fraud, breach of fiduciary duty, negligence, breach of contract, violation of federal securities laws and failure to supervise the firm's broker.

Claimant alleges that it opened an account with Respondents with an investment objective of a "conservative program of preservation of capital and income," through investment and tax free municipal bonds. Claimant claims that its investment portfolio at Shearson had equity of approximately \$1.3 million and a margin balance of approximately \$2.8 million. Claimant claims that in and throughout 1985, Ahto purchased approximately \$400,000.00 worth of bonds on the misrepresentation that the bonds were "high quality". Claimant also alleges that Ahto recommended the liquidation of Claimant's municipal bond portfolio. Claimant alleges that Respondents recommended the purchase of these high yield bonds pursuant to its research department and which were to be high quality bonds. Claimant alleges that the bonds were, in fact, "junk bonds" or "speculative bonds". Claimant alleges that in or around October, 1990, Mariano claimed that he wanted to recoup Claimant's lost money and told Claimant he knew of an easy way to do so. Claimant alleges that Mariano suggested the "short sale" of 10,000 shares of Security Pacific Corporation. Claimant alleges that Mariano was sure that the stock would be "hammered down" and would give Claimant a profit of \$10,000 per point. Claimant alleges he has lost approximately \$1.8 million due to Respondents' actions.

Respondents deny the allegations set forth in the Statement of Claim in their entirety. Respondents submit that they are not liable to Claimant for any damages. Respondents claim that Claimant, through Mr. von Mecklenberg, its authorized representative, made all decisions pertaining to Claimant's account. Respondents also claim that Claimant was fully informed about the risks of investing in the stock market, in general, and risks inherent in its portfolio, in particular, yet Claimant willingly chose to accept those risks. Respondents claim that Claimant closely monitored the activity in its account and was aware of

the nature and status of its investments at all times through the receipt of transactional confirmation slips and monthly account statements, among other things.

Respondents proffer the following affirmative defenses: (1) the Claimant's Statement of Claim fails to state a claim upon which relief can be granted; (2) Claimant is barred by the principles of waiver and estoppel; (3) Claimant has no private right of action for alleged violations of NYSE and NASD rules pursuant to relevant case law; (4) Claimants' claims are barred in whole or in part by the doctrine of laches, the applicable statutes of limitation, and Rule 10402 (formerly Section 15) of the NASD *Code of Arbitration Procedure* ("Code"); (5) Claimant's claims are barred in whole or in part by the doctrines of ratification and affirmance; (6) Respondents acted in compliance with all applicable rules and regulations in good faith, without scienter, and did not directly or indirectly induce any of the alleged acts constituted in the alleged wrongful conduct; (7) Claimant did not attempt to mitigate any damages; (8) Claimant, through its authorized representative, was solely in control of Claimant's account and Respondents exercised no discretion or control over the account; (9) Claimant was informed of the nature and characteristics of all investments made in its accounts; (10) Claimant was owed no fiduciary duty by Respondents under applicable law; (11) demands for punitive damages must be denied as a matter of law under New York choice of law clause because punitives may not be awarded in New York; (12) Claimant has made second investment decisions in transferring accounts from brokerage firm to brokerage firm and is therefore estopped from seeking recovery; and (13) Respondents did not violate any federal securities laws and is, therefore, not liable.

In their March 20, 1995 amended answer, Respondents assert a counterclaim against Claimant alleging that Claimant's authorized agent, Mr. von Mecklenberg, violated Connecticut General Statutes. The claim includes allegations of illegal surreptitious tape recordings, indemnification under federal securities laws, and indemnification under common law.

RELIEF REQUESTED

Claimant requests an award in the amount of \$1,826,500 in compensatory damages plus interest from the date the losses were incurred to the date of the conclusion of the arbitration hearing, punitive damages, plus attorneys' fees and costs.

Respondents request that the claims against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees. In their Counterclaim, Respondents seek damages pursuant to Connecticut statutes regarding illegal tape recordings, costs and attorneys' fees as well as indemnification against Mr. von Mecklenberg. Respondents also request that the records of Ahto and Mariano with all regulatory authorities to which any notification of this claim has been filed be expunged.

OTHER ISSUES CONSIDERED & DECIDED

The parties present at the last hearing date 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 original remains on file with the NASD Regulation.

Hearing Location

On or about January 13, 1995, Claimant made its first request for a change in location of the hearings, from New York City to Danbury, Connecticut. On or about February 23, 1995, the Panel granted, in part, Claimant's motion and changed the hearing location from New York City to Stamford, Connecticut, ruling that Claimant would bear the additional costs to the NASD of conducting the hearings in Connecticut. Between February 28, 1995 and prior to the May 6, 1997 hearing, Claimant made numerous requests that the Panel reconsider its decision and conduct the hearings in Brookfield/Danbury, Connecticut, Mr. von Mecklenberg's hometown. Claimant relied upon letters from two doctors which stated that Mr. von Mecklenberg's health would be affected if he was required to travel outside his immediate area. Based upon the submissions by both parties, the Panel ruled to continue the hearings in Stamford, Connecticut. Mr. von Mecklenberg attended some of the hearings but continued to renew Claimant's request that the Panel change the hearing location.

Pursuant to a court direction, Mr. von Mecklenberg's redirect testimony was videotaped in the Brookfield/Danbury, Connecticut area in July, 1996. Respondents objected to the Panel's viewing of such tapes because of the conditions in which the testimony was given. Respondent's attorney stated that he was not present for any of Mr. von Mecklenberg redirect testimony. Among other reasons, Respondents argued that their exclusion from the redirect examination was intentional. Moreover, the Panel ruled that the documents attached to the transcript of the video or audio tape of Mr. von Mecklenberg's redirect testimony were not to be admitted into evidence through such transcripts. Claimant had failed to produce some of those documents pursuant to discovery orders by the Panel.

Claimant renewed its request to change the hearing location to Danbury. The Panel decided to conduct the May 6, 1997 hearing in Danbury, and offered the parties the opportunity to stay in Danbury for as long as reasonably necessary, including overnight, to ensure that the witness, Mr. von Mecklenberg, had an opportunity to complete his testimony. The Panel ruled that all future hearings would be conducted in Stamford, Connecticut.

At the May 6, 1997 hearing session, Claimant was unprepared to go forward with any witnesses. But, Claimant represented that it would call Ahto, Mariano, Robert Calabrese and its expert, Howard Berg at subsequent hearings. At the hearing the Panel set future hearing dates and determined that there would be no further postponement of hearing dates, unless there was an unforeseen emergency. The Panel also determined that any additional change in party representation or open issues should be completed in sufficient time to allow the hearings to proceed as scheduled.

Motions

On March 18, 1993, Respondents' filed a motion to dismiss the claim as ineligible for arbitration pursuant to Rule 10402 formerly Section 15, of the *Code*. Claimant's Memorandum in Opposition to Respondents' motion to dismiss was filed on or about May 13, 1994. The Panel reserved decision on this motion. On several occasions, Respondents resubmitted to the Panel motions to dismiss.

On October 29, 1996, Claimant made a motion to dismiss its claims without prejudice in order to allow it to bring its claims before a new Panel. On November 8, 1996, Respondents submitted their response to Claimant's motion to dismiss.

The Panel denied Claimant's motion and reserved decision on Respondents' motion to dismiss. The Panel ultimately denied Respondents' motion to dismiss and also denied Respondents' motion to dismiss for failure to prosecute which was filed on July 28, 1997.

Only the most significant motions are set forth above.

Adjournment

After filing a Statement of Claim on Claimant's behalf on March 4, 1992, Anthony J. Hom, Esq. filed a notice of withdrawal as counsel on August 6, 1992. Mr. Hom reappeared as counsel on August 26, 1992. Later, Claimant was represented by Christopher Fountain, Esq., Harold Blinderman, Esq., David Wallman, Esq., Stephen Ganis, Esq. and, just prior to the July 28, 1997 hearing, Elisabeth Seieroe Maurer, Esq.

By letter dated July 25, 1997, Ms. Maurer requested a postponement of the hearings scheduled for July 28, 1997, August 5, 6 and 20, 1997 and September 3, 1997. Ms. Maurer wrote that she would be out of town and wanted the hearing to reconvene at the conclusion of a recently filed complaint by Mr. von Mecklenberg before the Connecticut Commission on Human Rights and Opportunities. Respondents, through their attorney, opposed the postponement of the hearing on several grounds. Among them are, that Claimant failed to comply with the Panel's discovery orders and that the Panel stated at the last hearing date, May 6 1997, at which Mr. von Mecklenberg and his attorney were present, that there would be no further postponement of the hearings and that any change in counsel should occur in sufficient time to proceed with the hearing on July 28, 1997. The Panel's rulings at the May 6, 1997 hearing were reiterated in a letter from the chairperson which was sent to both parties on July 7, 1997. The Panel denied Claimant's request for a postponement of the hearing.

Neither Mr. von Mecklenberg nor Claimant's counsel appeared at the hearing on July 28, 1997. The hearing was set to commence at 10:00 a.m. and the Panel delayed the commencement of the hearing until after 10:30 a.m. in the hopes that someone would participate on Claimant's behalf. The NASD Regulation staff outlined on the record steps taken to relay the Panel's decision denying Claimant's request to postpone the hearing and efforts to contact Claimant's counsel on July 28, 1997.

Based upon NASD Regulation's file, the Panel's previous orders, the Panel proceeded with the hearing on July 28, 1997 and concluded the matter pursuant to Rule 10318 of the *Code*.

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. All claims asserted by Claimant against Respondents are denied in their entirety as Claimant failed to meet its burden of proof. The Panel considered and decided all of Claimant's claims on the merits.
2. Respondents' motions to dismiss on various grounds are denied, except that the Panel never ruled on Respondents' motion to dismiss pursuant to Rule 10402 of the *Code*.
3. Claimant violated Connecticut General Statutes and is liable to Respondents on their counterclaim, referred to by Respondents as Third Party Claim, based upon the actions of Mr. von Mecklenberg, Claimant's authorized representative.
4. Claimant is liable to Respondents for attorneys' fees pursuant to *Neuberger & Berman v. Donalson Lufkin & Jenrette Securities Corp.* and *Kidder Peabody & Co.* (No. 91-16833 (NY Co

NY Sup Ct, April 6, 1992)). Claimant shall pay Respondents attorneys' fees in the amount of SEVENTY EIGHT THOUSAND NINE HUNDRED AND EIGHTY SIX DOLLARS AND EIGHTY TWO CENTS (\$78,986.82) as detailed in Mr. Michaels' affidavit for attorneys' fees, Exhibit No. R-24. Claimant is also liable to Respondents pursuant to Connecticut General Statutes for attorneys' fees.

5. NASD is directed to expunge the records of Ahto and Mariano with respect to this case with all regulatory authorities, including Central Registry Depository ("CRD"), that have been notified that this claim has been filed.

FORUM FEES

Pursuant to Rule 10332 of the *Code*, the following Forum Fees are assessed against Claimant.

Non-refundable Filing Fee:	\$250.00
Non-refundable Counterclaim Filing Fee	\$500.00
Pre-hearing Conference Fees:	\$2,500.00 (8 conferences @ \$300.00 per conference)
Hearing Sessions Fees:	\$20,000.00 (20 hearing sessions @ \$1000.00 per session)
Total Fees:	\$22,900.00

1. Respondents are assessed \$1,000.00 for the postponement of the July 13, 1995 hearing. Respondents previously deposited \$8,600.00 and are entitled to a refund in the amount of \$7,600.00.
2. Claimant is assessed \$376.00 in costs for duplication of tapes. Claimant is also assessed \$2,000.00 in fees for postponement of the March 18 and 19, 1993 hearings and the November 30, 1995 hearings. Claimant is further assessed \$22,900.00 in forum fees. The total fees assessed to Claimant are \$25,276.00. Claimant previously deposited \$9,130.00 and owes a balance of \$16,146.00.
3. Claimant shall satisfy the fees assessed by reimbursing Respondents \$7,600.00 and by remitting the balance, \$8,546.00 to NASD Regulation, Inc.

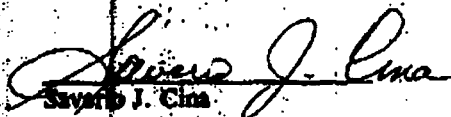
Case No. 92-00768

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ARBITRATION PANEL

Cynthia L. Boyce, Esq.	-	Public Chairperson
Saverio J. Cina	-	Public Panelist
Andrew Reegen	-	Industry Panelist

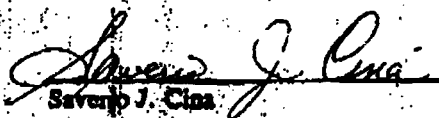
Concurring Arbitrator's Signature


Saverio J. Cina

Date of Decision: August 8, 1997

AFFIRMATION

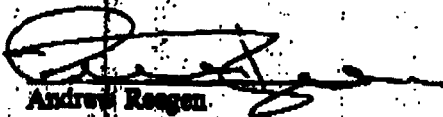
I, Saverio J. Cina, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.


Saverio J. Cina

ARBITRATION PANEL

Cynthia L. Boyce, Esq.	-	Public Chairperson
Saverio J. Cina	-	Public Panelist
Andrew Reagen	-	Industry Panelist

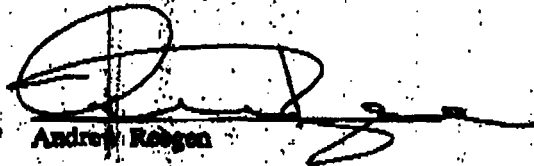
Concurring Arbitrator's Signature


Andrew Reagen

Date of Decision: August 8, 1997

AFFIRMATION

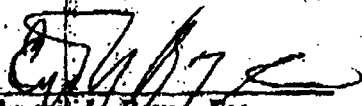
I, Andrew Reagen, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.


Andrew Reagen

ARBITRATION PANEL

Cynthia L. Boyce, Esq.	-	Public Chairperson
Saverio J. Cina	-	Public Panelist
Andrew Reegen	-	Industry Panelist

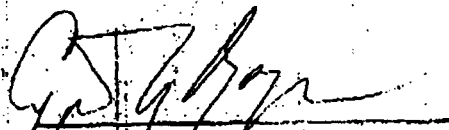
Concurring Arbitrator's Signature


Cynthia L. Boyce, Esq.

Date of Decision: August 8, 1997

AFFIRMATION

I, Cynthia L. Boyce, do hereby affirm pursuant to Article 7505 of the Civil Procedure Law and Rules, that this is my decision in the above captioned matter.


Cynthia L. Boyce, Esq.