

**NASD REGULATION AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**Name of Claimants**

Joseph S. Newman  
Shearson Lehman Brothers Inc.

92-01861

**Name of Respondent**

Gibraltar Securities Co.

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**REPRESENTATION**

For claimants Joseph S. Newman ("Newman") and Shearson Lehman Brothers Inc. ("Shearson") appeared Anthony Paduano, Esq. of the law firm of Smith Campbell & Paduano, located in New York, New York.

For respondent Gibraltar Securities Co. ("Gibraltar") appeared Lawrence T. Neher, Esq. of the law firm of Hannoch Weisman, located in Newark, New Jersey.

**CASE INFORMATION**

Claimants' Statement of Claim was filed on June 2, 1992. Claimants' Amended Statement of Claim was filed on July 31, 1992. Newman's Submission Agreement was signed on August 11, 1992. Shearson's Submission Agreement was signed on August 12, 1992.

Respondent's Answer to Amended Statement of Claim and Statement of Counterclaim was filed on September 22, 1992. Gibraltar's Submission Agreement was signed on September 17, 1992.

Claimants' Response to Counterclaim was filed on March 30, 1993.

**HEARING INFORMATION**

Pre-hearing conference:	June 21, 1996	-	Panel
Hearing Sessions/Dates:	August 28, 1996	-	Two Sessions
	August 29, 1996	-	Two Sessions
	October 1, 1996	-	Two Sessions
	October 2, 1996	-	Two Sessions

October 3, 1996	-	Three Sessions
December 5, 1996	-	One Session

The hearings conducted on August 28, 1996 and August 29, 1996 were held at the offices of the National Association of Securities Dealers located in New York, New York. The hearings conducted on October 1, 1996, October 2, 1996 and October 3, 1996 were held at the City Midday Club located at 140 Broadway, New York, New York. The session held on December 5, 1996 was conducted by telephone conference.

### **CASE SUMMARY**

Newman and Shearson alleged that, on or about June 1, 1992, Gibraltar served in the Superior Court of the State of New Jersey, Chancery Division, Morris County, a Summons and Verified Complaint naming them as defendants and concerning Newman's termination of his employment with Gibraltar and his subsequent employment with Shearson. Newman and Shearson further alleged that Gibraltar's filing of the complaint constituted a violation of Section 1(a) and 8(a) of the Code of Arbitration Procedure of the NASD. Newman and Gibraltar also contended that Gibraltar's refusal to abandon the New Jersey Court proceeding to arbitrate the dispute constituted a violation of Article III, Section 1 of the NASD Rules of Fair Practice.

Newman and Shearson alleged that, upon the termination of Newman's employment with Gibraltar on or about May 29, 1992, Gibraltar launched a campaign of falsely defaming Newman to his customers. Newman and Shearson further alleged that various Gibraltar officers and employees made telephone calls to many of Newman's customers and falsely stated that Newman had been dismissed from Gibraltar, that Newman had inappropriately handled their accounts, that certain investments in their accounts were unsuitable and that the New Jersey court had barred Newman from handling their accounts. Newman and Shearson further contended that these statements were knowingly and intentionally false and were made with the purpose of impugning Newman's reputation and interfering with his relationships with his customers and, as a result, he suffered impaired dealings with his customers which resulted in lost income to Newman.

Claimants also alleged that, upon termination of Newman's employment with Gibraltar he was owed the following amounts: (a) \$3,047 in commission for trades made during the period May, 1991 through May, 1992 (b) compensation in the form of a quarterly bonus payable in May, 1991 in the approximate amount of \$2,000.00; and (c) \$1,508.26 in the amounts incurred by Gibraltar on a credit card maintained by Newman which amounts were deducted from Newman's final commission check. Claimants further alleged that without basis in fact or law Gibraltar refused to pay this amount to Newman.

In its Answer to Amended Statement of Claim and Statement of Counterclaim, Gibraltar maintained that in the New Jersey proceeding it sought pre-arbitration relief in an appropriate manner which was necessitated by Newman's dishonest conduct. Gibraltar also maintained that the action it took was consistent with applicable law and was fully justified by Newman's fraudulent conduct.

Gibraltar alleged that, on or about April 8, 1985, Gibraltar and Newman entered into an Employment Agreement which contained a restrictive covenant prohibiting Newman from being employed by a municipal securities dealer for 90 days after the termination of his employment with Gibraltar and also prohibiting Newman from attempting to affect any transaction for the purchase or sale of municipal securities with any house customer. Gibraltar also alleged that Newman agreed not to use or disseminate any of Gibraltar's trade secrets, confidential and proprietary business information or confidential and proprietary customer relationships. Claimant contended that, on May 29, 1992, Newman terminated his employment with Gibraltar to become employed with Shearson. Claimant further contended that Newman breached his employment agreement and its post-employment restrictive covenants.

Gibraltar asserted that Newman took to Shearson certain confidential and proprietary information belonging to Gibraltar including, but not limited to, customer lists, a complete "holdings file" and originals of confirmations of present holdings or positions of customers. Claimant further asserted that this confidential and proprietary information has been used by Newman and Shearson to solicit Gibraltar customers, contrary to the Employment Agreement.

Gibraltar alleged that Shearson interfered with Gibraltar's business and the relationship with its customers by permitting Newman to utilize confidential and proprietary information belonging to Gibraltar to solicit "house" customers of Gibraltar and by accepting transferred accounts of Gibraltar in direct contradiction of the restrictive covenants of the industry and, specifically the terms of the Employment Agreement between Gibraltar and Newman. Gibraltar also alleged that upon the termination of his employment, Newman owed certain monies to Gibraltar which he wrongfully refused to pay.

In the Response to Counterclaim, Newman and Shearson maintained that the counterclaim failed to state a claim upon which relief can be granted, was barred by the doctrines of waiver, ratification and estoppel, was barred because Gibraltar sustained no injury arising from the conduct alleged in the counterclaim, and was barred because any losses sustained by Gibraltar were due to its actions or omission. Claimants further maintained that Gibraltar failed to mitigate any damages it may have suffered, that Gibraltar was precluded from relief because it was with unclean hands, by virtue of the decision rendered in the New Jersey proceeding and because the purported employment agreement was void and unenforceable as a matter of law.

### **RELIEF REQUESTED**

Claimants requested that the panel declare that they are not liable to Gibraltar in any respect; that the panel impose monetary sanctions against Gibraltar for its breach of Section 1(a) and 8(a) of the Code of Arbitration Procedure of the NASD, and that the panel award them their attorneys' fees, costs and expenses incurred in connection with this action. Claimants further requested that Gibraltar's counterclaim be dismissed in all respects and that they be awarded their costs and expenses incurred in responding to the counterclaim and in defending against it.

Gibraltar requested an award as follows:

- (a) enforcing the employment Agreement and its post-employment restrictive provisions;

- (b) continuing the New Jersey Superior Court's Order enjoining Newman and Shearson from utilizing any documents, memoranda, notes, records, account books, customer lists, customer records, holdings files, reports, sales material and all other documents concerning Gibraltar's business which were in their possession and certifying that they have no other copies and have not given copies to any other person or entity;
- (c) enjoining Newman and Shearson from the solicitation, sale or acceptance of account transfers or orders for the purchase or sale of municipal securities from any person, partnership or corporation whom Newman serviced as a customer or potential customer during the term of his employment by Gibraltar, or whom Shearson or Newman know to be a customer or a prospective customer of Gibraltar as provided in the Employment Agreement;
- (d) enjoining Newman and Shearson from accepting the transferred accounts (or Account Transfer Forms) solicited by Newman, in contravention of his Employment Agreement with Gibraltar;
- (e) awarding compensatory and punitive damages;
- (f) awarding attorneys' fees and costs incurred by Gibraltar;
- (g) awarding \$817.50 as monies owed by Newman to Gibraltar; and
- (h) for such other and further relief as the Panel deems just and proper.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

At the hearing on August 29, 1996, upon the request of all parties, arbitrator Pauline Mistretta recused herself from the panel. Pursuant to Rule 10313 (formerly Section 24) of the Code of Arbitration Procedure, the parties consented to having the hearings continue with the remaining two arbitrators. The parties also waived their right to object to the vacancy on the panel within five days of notification of the vacancy.

Claimants made a request to reopen the hearings in this matter. The panel denied the request to reopen the hearings and also determined that it would not accept additional written submissions from the parties.

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 pleadings, the testimony and the evidence presented at the hearing, the post-hearing submissions and the arguments made during the December 5, 1996 telephone conference, the undersigned arbitrators have decided in full and final resolution of the issues

submitted for determination as follows:

1. All claims of Newman and Shearson against Gibraltar be and hereby are dismissed in their entirety.
2. Newman and Shearson be and hereby are liable and shall pay Gibraltar the sum of \$15,970.00.
3. Each party shall bear their own costs, including attorneys' fees.
4. All other claims are hereby denied.

#### **FORUM FEES**

Pursuant to Rule (formerly Section 44(c)) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$500.00 filing fee previously deposited by claimant and the \$500.00 filing fee previously deposited by respondent and have assessed the following forum fees:

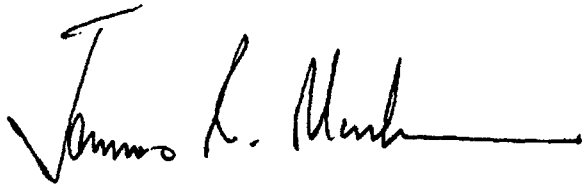
1 pre-hearing conference (panel)	= \$ 600.00
12 hearing sessions x \$600.00	= <u>\$6,600.00</u>
Total fees	= \$7,200.00

Forum fees assessed against:

1. Newman and Shearson be and hereby are jointly and severally liable for the sum of \$3,600.00, representing one-half of the total amount of forum fees assessed. Newman and Shearson previously deposited \$300.00 with the NASD, which shall be applied towards the total amount of fees assessed against claimants. Therefore, Newman and Shearson be and hereby are jointly and severally liable and shall pay the sum of \$3,300.00 to the NASD.
2. Gibraltar be and hereby is liable for the sum of \$3,600.00, representing one-half of the total amount of forum fees assessed. Gibraltar previously deposited \$300.00 with the NASD, which shall be applied toward the total amount of fees assessed. Therefore, Gibraltar be and hereby is liable and shall pay the sum of \$3,300.00 to the NASD.

Fees are payable to the NASD Regulation, Inc.

Arbitrators' Signatures

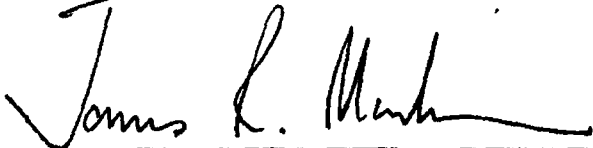


James R. Madan  
Chairperson-Industry Arbitrator

William E. O'Mara  
Industry Arbitrator

Date of decision: February 12, 1997

I, **James R. Madan**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my ~~award.~~



James R. Madan

2/12/97

Arbitrators' Signatures

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James R. Madan  
Chairperson-Industry Arbitrator

William E. O'Mara  
William E. O'Mara  
Industry Arbitrator

Date of decision: February 12, 1997

I, **William E. O'Mara**, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

William E. O'Mara  
William E. O'Mara