

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Brennan & Moore Profit Sharing Plan ...

92-01937

Name of Respondents

Shearson Lehman Brothers, Inc.
Richard L. Bailey

REPRESENTATION

For Claimant: Thomas E. Webb, Esq. of Robshaw, Randaccio & Fessard, P.C.

For Respondent: Lawrence M. Ross, Esq. of Shearson Lehman Brothers, Inc. and Richard L. Bailey, Esq. of Hurwitz & Fine, P.C.

CASE INFORMATION

Statement of Claim filed: June 8, 1992.

Claimant's Submission Agreement signed on: September 3, 1992.

Joint Statement of Answer filed by Respondents, Richard L. Bailey and Shearson Lehman Brothers, Inc. on: November 3, 1992.

Respondent, Richard L. Bailey's Submission Agreement signed on: October 8, 1992.

Respondent, Shearson Lehman Brother Inc.'s Submission Agreement signed on: October 1, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: July 7, 1992/2 sessions

Hearing Location: The Holiday Inn located in Buffalo, New York.

CASE SUMMARY

Claimant alleges that Respondent Richard L. Bailey ("Bailey") was negligent in advising and recommending the investments in AETNA Real Estate Association Limited Partnership ("AETNA LP") and Principal Growth Mortgage Investors Limited Partnership ("Principal Growth LP") because they were not sound, stable investments and not suitable in that the tax advantages of said investments could not be utilized if maintained in a Profit Sharing Trust. Alternatively, Claimant alleges that Respondent Bailey failed to provide the services that the Claimant contracted for, namely unbiased sound business advice, and is liable for breach of contract. Claimant further alleges that Respondent Bailey intentionally and fraudulently omitted to disclose to the Claimant that he was receiving a higher commission for the sale of limited partnerships and that this might affect his judgement and recommendation.

Respondents Bailey and Shearson Lehman Brothers, Inc. ("Shearson") maintain that Respondent Bailey reviewed the nature of each offering, its associated risks and benefits and distributed prospectuses at meetings with Claimant's Trustees. Respondents further maintain that, by its own terms, the Claimant's Trust Agreement places sole responsibility for the selection of assets with the Plan Trustee and that Claimant, with the benefit of clear hindsight, now seeks to recover for losses sustained due to legitimate and unforeseeable market fluctuations for which neither a brokerage firm nor its employees should be held liable. Respondents further maintain that both AETNA LP and Principal Growth LP were appropriate and proper investments for ERISA plans, and that neither Respondent Shearson nor Respondent Bailey improperly represented that the Claimant would unduly benefit from any tax advantages or tax shelter losses. Respondents further maintain that AETNA LP and Principal Growth LP were transferred out of Respondent Shearson and that, as of that date and at all times thereafter, the Trustees bore exclusive responsibility for the management of Claimant's assets actually received by them, in keeping with Claimant's Trust Agreement. Respondents also maintain that the commissions received with respect to the AETNA LP and Principal Growth LP investments were fair and reasonable and compare favorably to the market commission rate in effect at the time for the sale of limited partnership investments generally.

RELIEF REQUESTED

Claimant requested an award in the amount of \$35,000 on the claim for fraudulent non-disclosure, \$35,000 on the claim for negligence, \$35,000 on the claim for breach of contract, plus lost earnings at prime, punitive damages, fair and reasonable attorneys' fees, interest, costs and disbursements of this proceeding and such other and further relief as the Panel deems just and proper.

Respondents request that the Statement of Claim be dismissed in its entirety plus an award of costs, including reasonable attorneys' fees.

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) The claim is hereby dismissed in its entirety.
- 2) Each party shall bear their respective costs, including attorneys' fees.
- 3) Each party shall pay one-half of the forum fees for this arbitration.

FORUM FEES

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

2 sessions X \$400 = \$800 non-refundable filing fee of \$120.00.

Claimants shall pay the NASD the sum of \$400.00 to be offset by the \$400.00 hearing session deposit already made to the NASD.

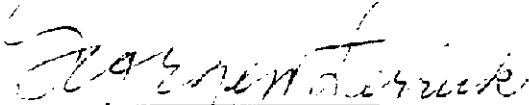
Respondents Shearson Lehman, Inc. and Richard L. Bailey are hereby jointly and severally liable and shall pay to the NASD, Inc. the sum of \$400.

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

Concurring Arbitrators' Signatures

Name

Public/Industry



George W. Petrick

Industry

Date of Decision: October 4, 1993

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Concurring Arbitrators' Signatures

Name

Public/Industry


John P. DeLuca

Public

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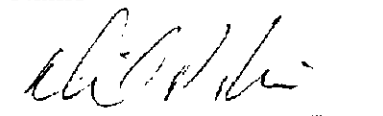
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Concurring Arbitrators' Signatures
Name

Public/Industry



David P. Polino

Public

Date of Decision: October 4, 1993