

N.A.S.D. REVISED AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Robert Maltz, Individually and as Trustee
for Abel Industries Profit Sharing and Pension
Trust Fund and Judith Maltz

Case No.
92-01962

Note: Any reference hereinafter to the Claimants or any of them
will be to Maltz unless otherwise specified in any of the
discussions.

Name of Respondent(s)

Shearson Lehman Brothers, Inc. and
Stephen Karelitz

Note: Any reference hereinafter to the Respondent Karelitz will
be to Karelitz and to Respondent Shearson Lehman Brothers, Inc.
will be to Shearson unless otherwise specified in any of the
discussions.

REPRESENTATION

For Claimant(s): Steven F. Gordon, Esq.
Gordon & Wise
101 Federal Street
Boston, MA 02110

For Respondent(s): Peter S. Michaels, Esq.
Office of the General Counsel
Shearson Lehman Brothers, Inc.
388 Greenwich Street
New York, NY 10013

CASE INFORMATION

Statement of Claim filed: June 10, 1992

Claimants' Submission Agreement signed on:

- Statement of Answer filed by Respondents, Shearson Lehman
Brothers, Inc. and Stephen Karelitz on: Statement of Answer
dated September 23, 1992

Respondents' Submission Agreement signed on:

HEARING INFORMATION

Pre-Hearing Conference: Reference is made to the Bern case No. 92-01976. Insofar as applicable the pre-hearing conference in the Bern case as it affected the Maltz case was held July 13, 1993, two sessions, one held during the morning with all three Arbitrators present and the other held during the afternoon with the Chairman and Counsel for Claimants and Respondents only.

Hearing Dates/Sessions: December 14, 1993, January 10 and January 11, 1994, both morning and afternoon sessions.

Hearing Location: Offices of NASD, Inc., 16th Floor, 260 Franklin Street, Boston, MA 02110 and Offices of Bingham, Dana & Gould, 150 Federal Street, Boston, MA 02110

CASE SUMMARY

Claimants allege the following counts after making an introduction and alleging certain activity identified in the claim as "PARTIES" and "FACTS":

1. Violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder against Karelitz and Shearson, including unsuitable excessive trading, providing Claimants with false information to induce Claimants to retain shares of Bally stock and artificially inflating market activity. Further allegations, in effect, were that Karelitz was acting in the scope of his employment to make Shearson responsible and jointly liable with Karelitz and that Maltz purchased and retained the Bally stock in reliance upon representations made by the Respondent.
2. Shearson is liable for the acts of Karelitz in violation of the above statutes under the Doctrine of Respondeat Superior.
3. Both Respondents have violated Massachusetts General Laws Chapter 110A, Sections 101 and 410 because of the Bally stock sale through misrepresentation and/or fraudulent practice.
4. Shearson and Karelitz breached a fiduciary duty owed to Claimants to make suitable investments, to keep the Claimants advised and informed as to such suitability and to refrain from misrepresentations or omissions in effect arising out of this fiduciary duty.

5. Shearson and Karelitz breached a duty of reasonable care in favor of the Claimants by failing to exercise reasonable care in the supervision and management of Claimants' accounts.
6. Shearson and Karelitz breached contracts with Claimants with duties thereunder to act as the Claimants' broker in maintaining their accounts with Shearson.
7. Shearson and Karelitz by their acts and conduct breached an implied covenant of good faith and fair dealing owed to the Claimants.
8. Shearson and Karelitz violated the provisions of Massachusetts General Laws Chapter 93A by failing to respond to a 93A demand letter under the terms of that Statute committing material fraudulent misrepresentations and omissions under Chapter 93A.
9. Karelitz committed a fraud against Claimants because of certain representations he made to the Claimants regarding Bally stock.

Respondents' Statement of Answer did not specifically address each allegation of each paragraph of the Statement of Claim.

In effect, the numbered paragraphs in the Statement of Answer provide some background information or allegations noting among other matters the following:

1. Karelitz has been a register representative for 32 years.
2. Claimants opened brokerage accounts with Respondent(s).
3. Claimants were sophisticated investors.
4. Claimant gave Karelitz his investment goals and other information concerning his background.
5. Claimant and Karelitz discussed some investment possibilities and in fact Claimant made a profit on some subsequent investments.
6. The client agreements signed by Claimants provide that New York law covers the arbitration.
7. Claimant and Karelitz continued socializing after the accounts were opened.

8. Claimant has maintained accounts with at least one other brokerage firm.
9. Claimants received monthly client statements and confirmation slips concerning all transactions.
10. Karelitz and Shearson conducted business with Claimants in a forthright and good faith matter.
11. The type of investment activity in Claimants' accounts was suitable and no churning took place.
12. Claimants ceased trading their accounts in 1991.
13. Claimants never made written complaint about any of the transactions in their accounts except at the time of the transactions.

Respondents also filed a number of affirmative defenses summarized as follows:

1. Failure of Claimants to state a claim upon which relief can be granted.
2. Because of their business and financial expertise and full knowledge of all activity in their accounts, Claimants are barred by principals of waiver and estoppel.
3. Since New York is the choice of law, Massachusetts state law claims must fail.
4. Laches and applicable statutes of limitations should result in dismissal of the claims.
5. By failing to repudiate any of the transactions made in their accounts, Claimants have ratified and affirmed all these transactions and, therefore, their claims should be dismissed.
6. Respondents did nothing directly or indirectly which resulted in any alleged wrongful conduct and all damage occurred as a result of Claimants' own actions or those of third parties.
7. Respondents breached no alleged fiduciary duty owed to Claimants.

RELIEF REQUESTED

Claimants requested:

1. A judgment against Karelitz on Counts I, III, IV, V, VI, VII, VIII and IX of the Statement of Claim.
2. Judgment against Shearson on Counts I, II, III, IV, V, VI, VII and VIII of the Statement of Claim.
3. An award for damages including actual consequential damages which exceed \$500,000.00 and that such damages be trebled.
4. That punitive damages be awarded to the Claimants.
5. That costs and expenses including attorney's fees be awarded to Claimants.
6. That such other and further relief be awarded as deemed just and proper.

Respondents requested:

1. All claims should be dismissed and costs of proceeding assessed against Claimants.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators have agreed to execute an original and two counterpart copies of the award, the original to be filed with the NASD and conformed copies to be distributed to the parties.

1. On June 29, 1993 counsel for the parties met with the panel to discuss the issue of the motion to consolidate this case along with two others, Bern et als v. Shearson Lehman, et als, NASD No. 92-01976 and Shulman et als v. Shearson Lehman, et als, NASD No. 92-10969. After a considerable argument, including a review of some written documentation, the opposing attorneys then conferred at great length privately in agreeing to a consolidation of the three cases subject to certain procedural guidelines, especially with regard to presentation of the cases even though a consolidation had been worked out.

2. The parties had worked out most of the discovery matters previously except for a termination of employment document between Shearson and Karelitz.

3. Subsequent to this, counsel notified the panel that the Shulman case, above noted, had been settled and would no longer be a part of the consolidation proceedings. In conjunction with going forward on the Bern and Maltz cases, Counsel for Claimants also stated that part of his reasoning for withdrawing any objection to the consolidation of the cases was that the

Arbitrators would decide the Bern case first. In reaching their decision and determining the award, the Arbitrators would not disclose such decision and award to anyone including the NASD. Only after making such decision and award, if any, the Arbitrators would proceed forward on the hearing of the Maltz claims. In fact, the Arbitrators did meet to deliberate and determine the Bern case at the conclusion of the Bern hearings and prior to starting the Maltz hearings.

AWARD

The parties agree that the Claimants have no claims for excessive trading and/or unsuitability. No part of this award is based on those claims and, therefore, the claims of excessive trading and unsuitability are DISMISSED.

After considering the pleadings, the testimony and the evidence presented at the hearings and reviewing the post hearing submissions, including arguments and briefs, as applicable, taking into account certain legal memoranda carried over from the Bern case, the undersigned Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Reference is made to the prayers for relief in the Statement of Claim and, although not in the order of the requests, the arbitrators have determined as follows:

1. No award of punitive damages will be made to the Claimants under any of the counts and allegations contained in the Statement of Claim.
2. Even assuming the applicability of Massachusetts General Laws Chapter 93A no treble damages are awarded to the Claimants.
3. No award of attorney's fees is made to the Claimants. Again, even assuming the applicability of Massachusetts General Laws Chapter 93A no effort was made to introduce any evidence about what the attorney's fees were or would have been through completion of this case, such as an itemized statement. The Arbitrators are not in a position to have to independently determine what attorney's fees should be.
4. The only costs and expenses which would be awarded to Claimants would be those analogous to filing a lawsuit in a court, such as a filing fee or a submission fee. If such fees were paid by Claimants then they are awarded these as part of their damages.

Specifically the Arbitrators unanimously have ruled against the allegations of Claimants in Count I, Count II, Count III, Count V, Count VI, Count VIII and Count IX.

The Arbitrators have determined and adjudicated that Shearson and Karelitz have violated certain stated duties and/or were negligent in performing such duties arising out of the allegations in Count IV and Count VII of the Statement of Claim all in respect to the so-called Bally accounts or transactions.

DECISION

Claimant Judith Maltz did not testify, therefore any reference to the summarized explanation herein is meant to include her within the testimony of her husband, Robert Maltz. Reference to him, unless something is stated to the contrary herein, will include him both individually and as Trustee for Abel Industries Profit Sharing and Pension Trust Fund.

Although the Arbitrators did not listen to as much testimony as in the companion Bern case there was a fair amount of documentation and other paperwork concerning the issues in this case. Again, like in the Bern case, and taking into account Maltz's testimony in that case, there was much disputed testimony with especially with regard to that of Maltz in contrast to that of Karelitz. The Arbitrators then, similar to the Bern case, had to weigh the credibility of the testimony against the backgrounds and character of Maltz and Karelitz as measured against documentary evidence concerning the transactions raised in the Statement of Claim and Statement of Response. Following are some of the material conclusions reached by the Arbitrators incorporated into their decision.

In essence other than the Bally accounts, all other claims made by the Claimants covering other stock transactions were not pursued in the hearings. Therefore, only with reference made to the Bally accounts do the Arbitrators review all of the evidence and make their determination.

Like Bern, Maltz is a business man. who over the years has had several business operations which he controlled. Also, prior to his opening up any accounts with Shearson Maltz had other investment accounts. Also, it is clear that Maltz wanted to retain control over his investment accounts with Shearson because he did not relinquish control over these accounts. There is no question that neither of the two accounts was a discretionary account. There is no disputed testimony that Maltz had continuing contact with Karelitz about the two accounts frequently on a daily basis involving more than one telephone call a day. There was also ongoing social contact between Maltz and Karelitz over a considerable period of time. Maltz tried to keep on top of what was happening with the two accounts. There is no dispute as to receiving confirmation slips, monthly client statements of account or anything else by Maltz regarding these two accounts.

Similar to the Bern case the Bally transactions present a different matter. The Arbitrators believed that Karelitz promoted this stock to Maltz and the Claimants in the Bern case. Whether or not he had a legal obligation to disclose his own holdings Karelitz, in effect, told Maltz and the Claimants in the Bern case that he held 100,000 shares of stock along with approximately 1.2 million shares in customers' accounts. The Arbitrators had to rely upon the printouts concerning the Bally purchases for the two accounts to establish the chronological order of the purchases. Again similar to the Bern case, there is reference to a meeting of Karelitz, Maltz and others down on the Cape at or near the end of July, 1989. There was continuing discussion with regard to the Bally holdings at that time. Karelitz testified that he was asked down the Cape how many shares of Bally he owned. He stated that he did own 100,000 shares of Bally himself. The Arbitrators looked closely at the testimony of Karelitz and also tracked the Bally transactions, especially the sale of his holdings in Bally.

What is stated in this paragraph carries over from the Bern decision since it clearly affects the Maltz claims.

Karelitz testified that, in effect, he was going to dispose of all of his Bally stock and he contacted all of his customers about such intent. The Arbitrators do not why this was necessary. Karelitz never testified about any pattern of notifying customers of sales of stock he held, which were also in customer accounts. The Arbitrators could not clearly delineate when this occurred in reviewing his testimony, especially with regard to the Maltz accounts. It was not done down at the Cape. Apparently some time shortly thereafter Karelitz left for a European vacation or trip. No one's testimony clearly explains when Karelitz started this trip or how long he was on the trip. Karelitz, without identifying with whom he talks, stated, in effect, that he told "them" that he was selling his Bally stock. The rest of this conversation then apparently develops around the fact that "they" did not want to sell out their Bally holdings because of what had happened with the Lilly warrants situation. Again, there is no explanation as to who "they" were. Did Karelitz have this conversation by telephone? Did he do it while he was in Europe? Were Maltz and others supposedly at the other end of this telephone conversation? The evidence is too unclear about this.

What also becomes important at this juncture is the testimony of Maltz initially in the Bern case. Maltz testified, in effect, that in August, 1989, he had to make contact with Karelitz's son, Neil Karelitz, because Karelitz was not available, presumably in Europe. Maltz was concerned about the drop in price in the Bally stock. Maltz wanted to know if Karelitz had sold his Bally

stock. He was told that Karelitz, in effect, had sold a few shares. No one disputed this telephone call that Maltz had made. Neil Karelitz did not come in as a witness to testify regarding any of this.

Apparently Maltz had some further contact with Neil Karelitz and then directly with Karelitz after Karelitz returned from Europe. Curiously, neither Maltz nor Karelitz have any further conversations regarding the Bally Stock that each held especially with regard Karelitz's holdings. Maltz did not testify as to telling Karelitz that he had contact with Neil Karelitz while Karelitz was in Europe regarding Maltz's holdings in the Bally stock. The next stage apparently occurs when Maltz is notified there has been a margin call against his Bally holdings. But again, Maltz does not testify that, in effect, he confronted Karelitz about Bally and what Karelitz had done with his Bally holdings, assuming that Karelitz had not previously advised Maltz that Karelitz was going to dispose of his own Bally stock. Instead Maltz testifies, in effect, that it was difficult to get responsive information out of Karelitz.

As noted in the companion Bern case the next incident that developed concerning the Bally stock is the meeting or confrontation that Maltz and others had with Karelitz at the restaurant/diner sometime in October, 1991. Maltz does not dispute, in effect, what happened at the meeting as evidenced by the testimony of Bern in the Bern case. Again, just to review what happened at this confrontation in terms of Karelitz's testimony, this likewise carries over from the Bern case. Karelitz states that Bern did all of the talking at the restaurant, in effect, questioning whether Karelitz did hold 100,000 shares of Bally. Bern wanted to see some statement that Karelitz held all of these shares. Karelitz testified that he told them he did hold 100,000 shares. Karelitz, in effect, stated that he gave some specific figures disputing what Bern had told him about the price on some of the sales of Bern's Bally stock. Karelitz then returned to his office to look at the records on the prices that Bern's Bally shares sold for.

Curiously, Karelitz did not testify at this confrontation about whether he said anything to those present about having told them earlier that he was selling off all of his Bally stock and that they had known this. Maltz (and Bern in conjunction with the Bern case as applicable) testified, in effect, that the confrontation was about whether Karelitz had the Bally holdings and whether he had sold off his Bally stock. This seems more in line with the actuality of the confrontation. Merely to ask Karelitz whether he originally held the Bally stock without asking whether he still held the stock or had sold it off would not be consistent with the demands for information. Karelitz

makes no mention at this meeting about prior conversations with regard to Maltz and the others present wanting to retain their Bally holdings because of what had happened in the Lilly warrants situation.

The Arbitrators believe that Maltz utilized Karelitz far more than just executing buy and sell orders. This is especially evident from the ongoing, almost daily, contact that Maltz had with Karelitz, again noted previously as possibly more than once a day. Again similar to the Bern case, given the position of Karelitz in the investment community Maltz would rely upon Karelitz to provide investment counseling especially with regard to certain types of investments, especially for the two accounts in issue. Even if Maltz had the final authority on the purchases in the Bally stocks for his two accounts that is not the controlling factor in this case. What became important was that Maltz did not have full knowledge from Karelitz about selling off the Bally stock in both accounts. Delays occurred in selling off the stock in these two accounts following the sale by Karelitz of his stock in Bally.

The Arbitrators conclude that Karelitz and, as a consequence, Shearson breached a duty to Maltz to keep Maltz informed as to the Bally accounts especially given the active role Karelitz had in promoting the Bally stock. The Arbitrators also conclude that there was an implied covenant of good faith and fair dealing owed to Maltz regarding disclosure of what Karelitz was doing with his holdings in Bally.

Even with Maltz retaining control over his two accounts and assuming for argument that the creation of the two accounts in dispute did not, perforce, establish a strict fiduciary relationship between Karelitz and Maltz, Karelitz did change the nature of the relationship from other investment activity with the Bally transactions. There appears to have been so much ongoing discussion between and among Maltz, Karelitz and others about Bally that Maltz and the others reasonably relied upon Karelitz to keep them informed about Bally and especially his holdings in Bally. It just does not make sense for Maltz to have called Karelitz's office after the meeting down the Cape to inquire about whether Karelitz still held his Bally stock, if as Karelitz testified, he had told "them" he was liquidating his Bally holdings prior to that. It does not make sense for Maltz and the others to have engineered the meeting at the deli to confront Karelitz about Bally and the discussions that took place there if Maltz and the others knew about Karelitz's sale of his Bally stock.

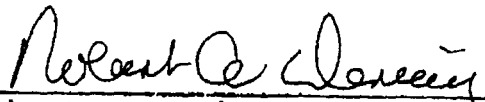
The Arbitrators did not find there was sufficient evidence that Karelitz intentionally deceived Maltz about Karelitz sale of his own Bally stock. The failure to keep Maltz advised about the Bally situation after the Cape meeting up and through the sale of Bally in the two Maltz accounts is not enough to prove all of the necessary elements of a fraud.

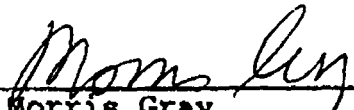
Notwithstanding the failure by Maltz, and, as a consequence, of Shearson, to keep Maltz properly advised about Bally and Karelitz' sale of his stock in Bally, in due course, Maltz would have received the confirmation slips and the monthly client's statements covering the Bally transactions because of his continuing, almost daily, contact with Karelitz, Maltz would have received more immediate information about the transactions than possibly Bern did in the Bern case. Again, like in the Bern case, Maltz could never take the position that Karelitz was a Guarantor of profitability for Maltz in the Bally accounts.


Maltz sustained losses in the two Bally accounts. Similar to the Bern case, the Maltz case was presented so as to clearly indicate that if Maltz had known about the sale by Karelitz of his Bally stock, then Maltz would have had Karelitz sell Maltz' Bally stock at about the same period of time. To calculate Maltz' losses in the two accounts, the Arbitrators determined what it originally cost Maltz to purchase the Bally stock or to have the Bally stock purchased for Maltz. The Arbitrators then reviewed the sales by Maltz of his Bally holdings. The Arbitrators took an average based upon the sale price by Karelitz of his holdings in Bally. Then the Arbitrators took the total number of shares in both Maltz accounts and multiplied that figure by the Karelitz sale price to reach the figure that Maltz would have realized if the Bally stock had been sold during the period of the Karelitz sales. From this was subtracted the total cost to Maltz of all of the Bally purchases. Attached hereto is a Schedule of the computation necessary to understand these figures.

Based upon the above calculations, the Maltz joint account sustained a loss of \$22,250.00. The Abel Profit Sharing Plan sustained a loss of \$7,331.50. To this loss figure from both accounts should be added interest at twelve (12%) percent per annum beginning June 10, 1992, the date of the Statement of Claim. The Arbitrators have used the interest calculation based upon the Massachusetts Statutes, taking the position that nothing to the contrary about the pertinent New York law came before the Arbitrators for review. The Arbitrators believe that Counsel for both parties are competent enough to work out the total amount of interest owed up to the date of payment.

As noted previously, both Karelitz and Shearson are jointly and severally liable for the award herein.


Robert A. Derian, Esq.
Chairman.


Morris Gray


Arthur Flint

Date of Decision: May 17, 1994

Date of Revised Award: July 26, 1994

Mr. & Mrs. Robert Maltz

Bally Manufacturing Stock

| <u>Purchased</u> | <u>Price</u> | <u>Cost</u> |
|------------------|--------------|----------------------|
| 6/1/89 9600 shs | 24.25 | \$ 238,802.00 |
| 7/24/89 6000 | 25.375 | 153,752.00 |
| 15600 | Total | <u>\$ 392,554.00</u> |

| <u>Sold</u> | <u>Price</u> | <u>Proceeds</u> |
|----------------|--------------|-----------------|
| 11/13/89 15600 | 17.375 | \$ 267,918.96 |

| | | |
|------------------|---------|----------------------|
| If 15600 Sold at | \$26.59 | <u>\$ 414,804.00</u> |
| | Profit | 22,250.00 |

Stephen Karelitz sold 100,000 @26.59 per share or \$2,658,607.67

| | |
|--------|--------------------|
| | 7,331.50 |
| Profit | <u>\$29,581.50</u> |

Abel Profit Sharing Plan

Bally Manufacturing Stock

| <u>Purchased</u> | | <u>Price</u> | <u>Cost</u> |
|------------------|--------------|--------------|-------------------|
| 6/1/89 | 4000 | 24.625 | \$ 99,502.00 |
| 7/28/89 | 700 | 25.275 | 17,937.50 |
| 7/28/89 | 3300 | 25.50 | 84,977.00 |
| 8/2/89 | 4500 | 27.00 | 122,627.00 |
| | <u>12500</u> | | <u>325,043.50</u> |
| | | Total | |

| <u>Sold</u> | | <u>Price</u> | <u>Proceeds</u> |
|-------------|--------------|--------------|---------------------|
| 11/13/89 | 2500 | 17.375 | 42,934.05 |
| 12/27/89 | <u>10000</u> | 13.50 | <u>132,993.50</u> |
| | <u>12500</u> | | <u>\$175,927.55</u> |

| | | |
|------------------|--------|--------------------|
| If 12500 Sold at | 26.59 | \$332,375.00 |
| | Profit | <u>\$ 7,331.50</u> |

Stephen Karelitz sold 100,000 @ \$26.59 per share or \$ 2,658,607.67

N.A.S.D. REVISED AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Gerald I. Bern, Individually and as Trustee
of Marsh Construction Corp. Profit Sharing &
Trust and Lillian Bern

Case No.
92-01976

Note: Any reference hereinafter to the Claimants or any of them
will be to Bern unless otherwise specified in any of the
discussions.

Name of Respondent(s)

Shearson Lehman Brothers, Inc. and
Stephen Karelitz

Note: Any reference hereinafter to the Respondent Karelitz will
be to Karelitz and to Respondent Shearson Lehman Brothers, Inc.
will be to Shearson unless otherwise specified in any of the
discussions.

REPRESENTATION

For Claimant(s): Steven F. Gordon, Esq.
Gordon & Wise
101 Federal Street
Boston, MA 02110

For Respondent(s): Peter S. Michaels, Esq.
Office of the General Counsel
Shearson Lehman Brothers, Inc.
388 Greenwich Street
New York, NY 10013

CASE INFORMATION

Statement of Claim filed: June 9, 1992.

Claimants' Submission Agreement signed on:

Statement of Answer filed by Respondents, Shearson Lehman
Brothers, Inc. and Stephen Karelitz on: Statement of Answer
dated September 23, 1992

Respondents' Submission Agreement signed on: October 20, 1992

HEARING INFORMATION

Pre-Hearing Conference: July 13, 1993, two sessions, one held during the morning with all three Arbitrators present and the other held during the afternoon with the Chairman and Counsel for Claimants and Respondents only

Hearing Dates/Sessions: 1993: August 10, 11, September 28 morning session, September 29, October 13, October 14, November 12, November 22, December 1, December 2, December 13

Hearing Location: Offices of NASD, Inc., 16th Floor, 260 Franklin Street, Boston, MA 02110

CASE SUMMARY

Claimants allege the following counts after making an introduction and alleging certain activity identified in the claim as "PARTIES" and "FACTS":

1. Violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder against Karelitz and Shearson, including unsuitable excessive trading, providing Claimants with false information to induce Claimants to retain shares of Bally stock and artificially inflating market activity. Further allegations, in effect, were that Karelitz was acting in the scope of his employment to make Shearson responsible and jointly liable with Karelitz and that Bern purchased and retained the Bally stock in reliance upon representations made by the Respondent.
2. Shearson is liable for the acts of Karelitz in violation of the above statutes under the Doctrine of Respondeat Superior.
3. Both Respondents have violated Massachusetts General Laws Chapter 110A, Sections 101 and 410. because of the Bally stock sale through misrepresentation and/or fraudulent practice.
4. Shearson and Karelitz breached a fiduciary duty owed to Claimants to make suitable investments, to keep the Claimants advised and informed as to such suitability and to refrain from misrepresentations or omissions in effect arising out of this fiduciary duty.

5. Shearson and Karelitz breached a duty of reasonable care in favor of the Claimants by failing to exercise reasonable care in the supervision and management of Claimants' accounts.
6. Shearson and Karelitz breached contracts with Claimants with duties thereunder to act as the Claimants' broker in maintaining their accounts with Shearson.
7. Shearson and Karelitz by their acts and conduct breached an implied covenant of good faith and fair dealing owed to the Claimants.
8. Shearson and Karelitz violated the provisions of Massachusetts General Laws Chapter 93A by failing to respond to a 93A demand letter under the terms of that statute and committing material fraudulent misrepresentations and omissions under Chapter 93A.
9. Karelitz committed a fraud against Claimants because of certain representations he made to the Claimants regarding Bally stock.

Respondents' Statement of Answer did not specifically address each allegation of each paragraph of the Statement of Claim.

In effect, the numbered paragraphs in the Statement of Answer provide some background information or allegations noting among other matters the following:

1. Claimants signed client agreements with Respondent(s).
2. There was continuing contact with Claimants.
3. Claimants were sophisticated investors.
4. Respondent(s) sent monthly client statements including account activity and confirmation slips concerning every transaction in their accounts.
5. Respondent(s) conducted their business with Claimants in a forthright and good faith manner.
6. The activities in the accounts were suitable for Claimants and no churning took place.
7. Claimants never made written complaint concerning these transactions at the time they occurred.
8. Claimants ceased trading their accounts in 1991.

Respondents also filed a number of affirmative defenses summarized as follows:

1. Failure of Claimants to state a claim upon which relief can be granted.
2. Because of their business and financial expertise and full knowledge of all activity in their accounts, Claimants are barred by principals of waiver and estoppel.
3. Since New York is the choice of law, Massachusetts state law claims must fail.
4. Laches and applicable statutes of limitations should result in dismissal of the claims.
5. By failing to repudiate any of the transactions made in their accounts, Claimants have ratified and affirmed all these transactions and, therefore, their claims should be dismissed.
6. Respondents did nothing directly or indirectly which resulted in any alleged wrongful conduct and all damage occurred as a result of Claimants own actions or those of third parties.
7. Respondents breached no alleged fiduciary duty owed to Claimants.
8. This defense sounds similar to some of the prior responses and is based upon Claimants having experience and being sophisticated in business and investment matters.
9. Any claim for punitive damages should be dismissed.
10. Claimants breached a duty to mitigate their own damages and the claim should be dismissed.

RELIEF REQUESTED

Claimants requested:

1. A judgement against Karelitz on Counts I, III, IV, V, VI, VII, VIII and IX of the Statement of Claim.
2. Judgment against Shearson on Counts I, II, III, IV, V, VI, VII and VIII of the Statement of Claim.

3. An award for damages including actual consequential damages which exceed \$500,000 and that such damages be trebled.
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Respondents requested:

All claims should be dismissed and costs of the proceeding assessed against Claimants.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators have agreed to execute an original and two counterpart copies of the award, the original to be filed with the NASD and conformed copies to be distributed to the parties.

1. On June 29, 1993, counsel for the parties met with the panel to discuss the issue of the motion to consolidate this case along with two others, Maltz et als v. Shearson Lehman, et als, NASD No. 92-01962 and Shulman et als v. Shearson Lehman, et als, NASD No. 92-01969. After a considerable argument, including a review of some written documentation, the opposing attorneys then conferred at great length privately in agreeing to a consolidation of the three cases subject to certain procedural guidelines, especially with regard to presentation of the cases even though a consolidation had been worked out.

2. The parties had worked out most of the discovery matters previously except for questions concerning the tax returns of the Claimants and a termination of employment document between Shearson and Karelitz.

3. Subsequent to this, counsel notified the panel that the Shulman case, above noted, had been settled and would no longer be a part of the consolidation proceedings. In conjunction with going forward on the Bern and Maltz cases, Counsel for Claimants also stated that part of his reasoning for withdrawing any objection to the consolidation of the cases was that the Arbitrators would decide the Bern case first. In reaching their decision and determining the award, the Arbitrators would not disclose such decision and award to anyone including the NASD.

Only after making such decision and award, if any, the Arbitrators would proceed forward on the hearing of the Maltz claims. In fact, the Arbitrators did meet to deliberate and determine the Bern case at the conclusion of the Bern hearings and prior to starting the Maltz hearings.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearings and reviewing the post hearing submissions, including arguments and briefs, as applicable, the undersigned Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Reference is made to the prayers for relief in the Statement of Claim and, although not in the order of the requests, the arbitrators have determined as follows:

1. No award of punitive damages will be made to the Claimants under any of the counts and allegations contained in the Statement of Claim.

2. Even assuming the applicability of Massachusetts General Laws Chapter 93A no trouble damages are awarded to the Claimants.

3. No award of attorney's fees is made to Claimants. Again, even assuming the applicability of Massachusetts General Laws Chapter 93A no effort was made to introduce any evidence about what the attorney's fees were or would have been through completion of this case, such as an itemized statement. The arbitrators are not in a position to have to independently determine what attorney's fees should be.

4. The only costs and expenses which would be awarded to Claimants would be those analogous to filing a lawsuit in a court, such as a filing fee or a submission fee. If such fees were paid by Claimants then they are awarded these as part of their damages.

Specifically the Arbitrators unanimously have ruled against the allegations of Claimants in Count I, Count II, Count III, Count V, Count VI, Count VIII and Count IX.

The Arbitrators have determined and adjudicated that Shearson and Karelitz have violated certain stated duties and/or were negligent in performing such duties arising out of the allegations in Count IV and Count VII of the Statement of Claim all in respect to the so-called Bally accounts or transactions. See explanation in Decision for further particulars.

DECISION

Claimant Lillian Bern did not testify therefore any reference to the summarized explanation herein is meant to include her within the testimony of her husband, Claimant Gerald I. Bern. Reference to him, unless something is stated to the contrary herein, will include him both individually and as Trustee for Marsh Construction Corporation Profit Plan.

The Arbitrators listened to extensive testimony and reviewed voluminous documentation and other paperwork concerning the issues in this case. Naturally, there was much disputed testimony especially with regard to that of Bern in contrast to that of Karelitz. Robert Maltz, a Claimant in a companion case, testified in the Bern case for the limited purpose of providing some substantiation for the Bern claims. The Arbitrators then had to weigh the credibility of the testimony against the backgrounds and character of Bern and Karelitz as measured against documentary evidence concerning the transactions raised in the Statement of Claim and Statement of Response. Following are some of the material conclusions reached by the Arbitrators incorporated into their decision.

Bern is a businessman having been involved over the years in a number of business activities. He has been instrumental in the creation of corporations or other business operations frequently becoming, as a matter of record, the treasurer or chief financial officer of these businesses. Prior to his opening up any accounts with Shearson, Bern had other investment accounts. He knew enough about different kinds of investment accounts with different objectives since he had other accounts with Shearson.

Only two of these accounts with Shearson became part of the dispute raised in the Statement of Claim. Because of the contradictions in testimony between Bern and Karelitz as to the nature of these two accounts and the type of control to be exercised over these two accounts the Arbitrators focused on the paperwork creating the two accounts, primarily the New Account Application and Suitability Forms. One of these two accounts, the so-called joint account, was a discretionary account, according to the documentation, meaning that Karelitz could make investments on behalf of Bern in such account without obtaining Bern's prior permission, either in buying or selling in this account. The other account, the so-called trust account, did not carry such discretion, according to the paperwork. This meant that Bern had the authority to control this account to include deciding upon the investments and directing Karelitz to sell or buy in this account.

Although Bern has disputed the type of control he had on both accounts and testified that Karelitz was involved in a number of activities over which, in effect, Bern was unaware, the evidence clearly indicates that Bern was receiving on a regular basis the confirmation slips concerning all transactions in the two accounts, monthly client statements of accounts and, occasionally, activity letters which, in effect, called for a response from Bern in the event of dissatisfaction with the handling of the accounts. In addition to his own general knowledge of stock market activity Bern had a bookkeeper in his offices who took in information regarding the two Shearson accounts and also had annual tax returns completed which reflected all of the Shearson activity.

Other than the Bally investments, even with all of this documentation provided by Shearson to Bern over the active life of the two accounts Bern took no action to change what was happening with regard to these accounts until a letter of October 24, 1991, directed to Karelitz.

In the October 24, 1991, letter Bern states to Karelitz that Karelitz had told him that all of Bern's accounts were supposed to be aggressive accounts. The Arbitrators cannot make sense of what this means since Bern had a number of accounts with Shearson and has made no claim on aggressive activity in these accounts. Bern does not offer any detailed explanation of what he meant in that letter of October 24, 1991. Bern, in effect, testified that he knew that other accounts with Shearson were passive accounts involving very little trading activity.

In fact, on several occasions during the course of his testimony Bern either stated or acknowledged that but for the Bally accounts, in effect, he would not be involved with these NASD proceedings. The Bally accounts were the triggering mechanism that resulted in Bern bringing not only the claims on the Bally accounts but apparently on other activity of Karelitz.

Karelitz's position, in effect, was that Bern was well informed about all of the transactional activity on both accounts. Even though the joint account, above noted, was originally created as a discretionary account Karelitz testified that Bern directed him to change this status within a year of the creation of the account so that only Bern could actually control the account. Whether this is true or not Karelitz had the obligation to complete the necessary paperwork to note the change on the account and there is no record that this was done. Notwithstanding, Shearson did continue to provide Bern with all of the above noted paperwork concerning transactional activity in both accounts.

The Bally transactions present a different matter. The Arbitrators believe that Karelitz promoted this stock to Bern and the Claimants in the Maltz case. Whether or not he had a legal obligation to disclose his own holdings Karelitz, in effect, told Bern and the Claimants in the Maltz case that he held 100,000 shares of stock along with approximately 1.2 million shares in customers' accounts. The Arbitrators had to rely upon the printouts concerning the Bally purchases for the two accounts to establish the chronological order of the purchases. In conjunction with this there was a meeting of Bern, Karelitz and others down on the Cape at or about the end of July, 1989. Apparently some continuing discussion occurred with regard to the Bally holdings. Karelitz testified that he was asked down at the Cape how many shares of Bally he owned. He stated that he did own 100,000 shares of Bally himself. The Arbitrators looked closely at the testimony of Karelitz and also tracked the Bally transactions, especially the sale of his holdings in Bally.

Karelitz testified that, in effect, he was going to dispose of all of his Bally stock and he contacted all of his customers about such intent. The Arbitrators do not why this was necessary. Karelitz never testified about any pattern of notifying customers of sales of stock he held, which were also in customer accounts. The Arbitrators could not clearly delineate when this occurred in reviewing his testimony, especially with regard to the Bern accounts. It was not done down at the Cape. Apparently some time shortly thereafter Karelitz left for a European vacation or trip. No one's testimony clearly explains when Karelitz started this trip or how long he was on the trip. Karelitz, without identifying with whom he talks, stated, in effect, that he told "them" that he was selling his Bally stock. The rest of this conversation then apparently develops around the fact that "they" did not want to sell out their Bally holdings because of what had happened with the Lilly warrants situation. Again, there is no explanation as to who "they" were. Did Karelitz have this conversation by telephone? Did he do it while he was in Europe? Were Bern and others supposedly at the other end of this telephone conversation? The evidence is too unclear about this.

What also becomes important at this juncture is the testimony of Robert Maltz (Maltz) in the Bern case. Maltz testified, in effect, that in August, 1989, he had to make contact with Karelitz's son, Neil Karelitz, because Karelitz was not available, presumably in Europe. Maltz was concerned about the drop in price in the Bally stock. Maltz wanted to know if Karelitz had sold his Bally stock. He was told that Karelitz, in effect, had sold a few shares. No one disputed this telephone call that Maltz had made. Neil Karelitz did not come in as a witness to testify regarding any of this.

Karelitz then testified that the Bally stock started to go down. He stated that he was talking to Bern practically every day. Karelitz recommended that the Bally stock be sold. Karelitz then stated that Bern gave Karelitz the go ahead to sell the stock. Again, these details are sketchy. Why is there no further mention by Karelitz at this time about his own liquidation of his Bally holdings? If Bern had allegedly not been willing previously to sell off Bally stock, what changed his position? Why was there no further discussion, again, about the Lilly warrants situation? What controls the incremental sale of the Bally stock? If Bern gave Karelitz the authority to sell it, why was it sold over several different periods of time? Karelitz had the opportunity to testify in detail about the sale of the Bally stock in the two accounts but nothing more developed concerning this. Bern, in effect, had testified that Karelitz had not been keeping him informed about the Bally situation and, therefore, did not direct Karelitz to sell the Bally holdings when the sales went through.

The next incident that develops concerning the Bally stock is the meeting or confrontation that Bern and others have with Karelitz at the restaurant/diner sometime in October of 1991. Apparently this occurred before the above-noted October 24, 1991, letter of Bern to Karelitz. Karelitz states that Bern did all of the talking at the restaurant, in effect, questioning whether Karelitz did hold 100,000 shares of Bally. Bern wanted to see some statement that Karelitz held all of these shares. Karelitz testified that he told them he did hold 100,000 shares. Karelitz, in effect, stated that he gave some specific figures disputing what Bern had told him about the price on some of the sales of Bern's Bally stock. Karelitz then returned to his office to look at the records on the prices that Bern's Bally shares sold for.

Curiously, Karelitz did not testify at this confrontation about whether he said anything to those present about having told them earlier that he was selling off all of his Bally stock and that they had known this. Bern (and Maltz in conjunction with the Bern case as applicable) testified, in effect, that the confrontation was about whether Karelitz had the Bally holdings and whether he had sold off his Bally stock. This seems more in line with the actuality of the confrontation. Merely to ask Karelitz whether he originally held the Bally stock without asking whether he still held the stock or had sold it off would not be consistent with the demands for information. Karelitz makes no mention at this meeting about prior conversations with regard to Bern and the others present wanting to retain their Bally holdings because of what had happened in the Lilly warrants situation.

The Arbitrators believe that Bern utilized Karelitz far more than just executing buy and sell orders. Given the position of Karelitz in the investment community Bern would rely upon Karelitz to provide investment counseling especially with regard to certain types of investments, especially for the two accounts in issue. Whether or not Bern made the original decisions to purchase the Bally stocks for the two accounts or whether Karelitz did does not become the controlling factor here. What became important was that Bern did not have full knowledge from Karelitz about selling off the Bally stock in both accounts. Delays occurred in selling off the stock in these two accounts following the sale by Karelitz of his stock in Bally.

The Arbitrators conclude that Karelitz and, as a consequence, Shearson breached a duty to Bern to keep Bern informed as to the Bally accounts especially given the active role Karelitz had in promoting the Bally stock. The Arbitrators also conclude that there was an implied covenant of good faith and fair dealing owed to Bern regarding disclosure of what Karelitz was doing with his holdings in Bally.

Even assuming for argument that the creation of the two accounts in dispute did not, perforce, establish a strict fiduciary relationship between Karelitz and Bern, Karelitz did change the nature of the relationship from other investment activity with the Bally transactions. There appears to have been so much ongoing discussion between and among Bern, Karelitz and others about Bally that Bern and the others reasonably relied upon Karelitz to keep them informed about Bally and especially his holdings in Bally. It just does not make sense for Maltz to have called Karelitz's office after the meeting down the Cape to inquire about whether Karelitz still held his Bally stock, if as Karelitz testified, he had told "them" he was liquidating his Bally holdings prior to that. It does not make sense for Bern and the others to have engineered the meeting at the deli to confront Karelitz about Bally and the discussions that took place there if Bern and the others knew about Karelitz's sale of his Bally stock.

The Arbitrators did not find there was sufficient evidence produced to warrant a decision that Karelitz intentionally deceived Bern about Karelitz's sale of his own Bally stock. The failure to keep Bern advised about the Bally situation after the Cape meeting up and through the sale of Bally in the two Bern accounts is not enough to prove all of the necessary elements of a fraud.

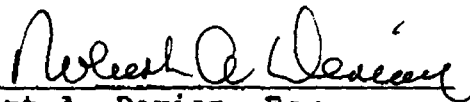
Notwithstanding the failure by Karelitz, and, as a consequence, of Shearson, to keep Bern properly advised about Bally and Karelitz' sale of his stock in Bally, in due course, Bern would have received the confirmation slips and the monthly client's

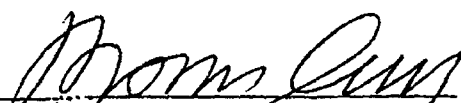
statements covering the Bally transactions. Bern just could not disregard the information in these documents. Bern testified, in effect, as to the following business relationship that he had developed with Karelitz. Bern stated that Karelitz was his friend and he believed that Karelitz would do nothing to hurt Bern financially. He also testified that Karelitz had told him that Karelitz would make good losses that Bern had incurred if Bern stuck with Karelitz. Whether or not such summarized testimony is true, it is not realistic, measured against Bern's status as a businessman continually involved in financial operations, to solely rely upon Karelitz to insure profitability for Bern in the stock market. Stockbrokers are not guarantors.

Bern sustained losses in the two Bally accounts. The thrust of the Bern case as to the way it was presented clearly indicates that if Bern had known about the sale by Karelitz of his Bally stock then Bern would have had Karelitz sell Bern's Bally stock at about that same period of time. To calculate Bern's losses in the two accounts the Arbitrators determined what it originally cost Bern to purchase the Bally stock or to have the Bally stock purchased for Bern. The Arbitrators then reviewed the sales by Karelitz of his Bally holdings. The Arbitrators took an average based upon the sale price by Karelitz of his holdings in Bally. Then the Arbitrators took the total number of shares in both the Bern accounts and multiplied that figure by the Karelitz sale price to reach the figure that Bern would have realized if the Bally stock had been sold during the period of the Karelitz sales. From this was subtracted the total cost to Bern of all of the Bally purchases. Attached hereto is a Schedule of the compulation necessary to understand these figures.

Based upon the above calculations the Bern joint account sustained a loss of \$35,008.50 and the Marsh Construction account sustained a loss of \$20,633.50. To this total figure should be added interest at 12% per annum beginning June 9, 1992, the date of the Statement of Claim. The Arbitrators have used the interest calculation based upon the Massachusetts Statutes, taking the position that nothing to the contrary about the pertinent New York law came before the Arbitrators for review. The Arbitrators believe that Counsel for the parties are competent enough to work out the total amount of interest owed up to the date of payment.

As noted previously both Karelitz and Shearson are jointly and severally liable for the award herein.


Robert A. Derian, Esq.
Chairman


Morris Gray


Arthur Flint

Date of Decision: December 13, 1993

Date of Revised Award: July 26, 1994

Prepared for Gerald I & Lillian Bern

Purchase & Sale History of Bally Manufacturing Stock

| <u>Purchased</u> | <u>Price</u> | <u>Cost</u> |
|------------------|--------------|--------------|
| 2/2/89 1800 shs | 22.375 | \$ 40,727.00 |
| 2/2/89 2200 | 22.50 | 50,050.00 |
| 2/8/89 1000 | 22.875 | 23,127.00 |
| 3/21/89 4000 | 23.125 | 93,502.00 |
| 6/9/89 200 | 24.875 | 5,027.00 |
| 6/22/89 300 | 24.75 | 7,502.00 |
| 7/25/89 2500 | 25.875 | 65,314.50 |
| 7/31/89 1000 | 25.75 | 26,000.00 |
| 7/31/89 1000 | 25.75 | 26,002.00 |
| 14000 | Total | \$337,251.50 |

| <u>Sold</u> | <u>Price</u> | <u>Proceeds</u> |
|---------------|--------------|-----------------|
| 2/15/89 2500 | 23.75 | 58,746.02 |
| 2/16/89 2500 | 24.375 | 60,308.46 |
| 10/3/89 2000 | 22.625 | 44,746.49 |
| 10/10/89 2500 | 22.75 | 56,246.10 |
| 10/11/89 1500 | 22.75 | 33,748.86 |
| 10/11/89 2000 | 22.75 | 44,996.48 |
| 10/12/89 1000 | 22.75 | 22,497.24 |
| 14000 | Total | \$321,289.65 |

| | | |
|-----------------|--------|------------|
| If 14000 sold @ | 26.59 | 372,260.00 |
| | COST | 337,251.50 |
| | Profit | 35,008.50 |

Stephen Karelitz sold 100,000 = 2,658,607.67 or 26.59 per share
not 107,000 this was an error due to the fact that 7,000 was done
on a day trade basis.

Prepared for Marsh Construction Company P/S/Trust

Purchase and Sale History of Bally Manufacturing Stock

| <u>Purchased</u> | <u>Price</u> | <u>Cost</u> |
|------------------|--------------|--------------|
| 1/31/89 1000 | 22.625 | \$ 22,877.00 |
| 2/8/89 1900 | 22.875 | 43,939.50 |
| 9/15/89 3000 | 23.75 | 72,002.00 |
| 7/25/89 3000 | 25.875 | 78,377.00 |
| 7/31/89 1000 | 25.75 | 26,000.00 |
| 7/31/89 1000 | 25.75 | 26,002.00 |
| 10900 | Total | \$269,197.50 |

| <u>Sold</u> | <u>Price</u> | <u>Proceeds</u> |
|---------------|--------------|-----------------|
| 2/16/89 1200 | 24.375 | 28,947.02 |
| 2/16/89 1700 | 24.375 | 41,009.11 |
| 10/3/89 500 | 22.50 | 11,122.62 |
| 10/10/89 2500 | 22.75 | 56,246.10 |
| 10/11/89 2000 | 22.75 | 44,996.48 |
| 10/12/89 3000 | 22.75 | 67,495.72 |
| 10900 | Total | \$249,817.05 |

| | | |
|------------------|-------|-------------------|
| If 10,900 sold @ | 26.59 | \$ 289,831.00 |
| | | <u>269,197.50</u> |
| PROFIT | | \$ 20,633.50 |