

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Bert and Roberta Hoffman

92-02206

Name of Respondents

Shearson Lehman Brothers, Inc., f/k/a
Shearson Lehman Hutton, Inc., a/k/a/
Lehman Brothers;
Nick DiMinico

REPRESENTATION

For Claimants: Roberta and Bert E. Hoffman (collectively "Hoffman") were represented by Morris Tabak, Esq. of Frank Shaw & Associates, in Houston, Texas.

For Respondents: Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc., a/k/a Lehman Brothers ("Shearson") was represented by Andrew R. Harvin, Esq. of Doyle, Reed, Restrepo, Harvin & Robbins in Houston, Texas.

Nick DiMinico ("DiMinico") was represented by Don Fogel, Esq. of Ware, Snow & Fogel, P.C., in Houston, Texas.

CASE INFORMATION

Statement of Claim filed on: July 2, 1992.

Claimants' Submission Agreement signed on: June 17, 1992.

Respondents' Joint Statement of Answer was filed: October 8, 1992.

Respondent Shearson's Submission agreement signed on: December 28, 1992 by Ann Parry, Vice President, Shearson Lehman Brothers, Inc.

Respondent Diminico's Submission Agreement signed on: December 23, 1992.

HEARING INFORMATION

Pre-Hearing Conference: May 11, 1993 for One (1) session before One (1) Arbitrator.
Hearing Dates/Sessions: September 15, 1993 for Two (2) sessions;
September 16, 1993 for Three (3) sessions.

Hearing Location: Houston, Texas

CASE SUMMARY

Claimants Hoffman alleged that Respondent Diminico, while employed by and acting as an agent for Respondent Shearson, pursued an investment strategy in the Claimants IRA account which was unsuitable; failed to disclose and/or misrepresented investment risks and returns; failed to follow Claimants' specific investment directions; charged excessive commissions; converted Claimants' account; and negligently and/or fraudulently maintained Hoffmans' account. The Hoffmans specifically alleged that:

1. Prior to their involvement with Respondents, the Hoffmans maintained their retirement savings in certificates of deposit with federally insured financial institutions. In order to obtain a higher rate of return, their accountant suggested investment in the bond market, referring Claimants to DiMinico. Their accountant told DiMinico that the Hoffmans were extremely conservative, did not want high risk, speculative growth investments, and wanted to open a retirement account utilizing investments in the bond market;
2. The Hoffman opened accounts with DiMinico, giving investment instructions the custodian was authorized to invest the contributions in the IRA as fully as possible in "money market bonds ('0' coupon)";
3. Initially, the Hoffmans' instructions were followed and they received a return on their money. Subsequently, Respondents began investing an inordinate portion of the Hoffmans' money in New World Entertainment Ltd., a volatile and risky OTC stock of which Shearson was a Market maker. The Hoffmans were unsophisticated investors who did not understand the nature or risks of this investment;
4. When the Hoffmans became aware of the financial condition they were in because of the investment, they made over thirty phone calls to DiMinico which were not returned. When they asked to speak to a supervisor or another broker

for instructions, they were told that could not be done unless DiMinico authorized it;

5. In addition, DiMinico was generating excessive commissions in all trades associated with the Hoffmans' account.

Based upon the above allegations, Hoffman asserted claims for violations of the New York Stock Exchange Suitability Rule (Rule 405); the Anti-Fraud Provisions of the Securities and Exchange Act of 1934 (Section 10(b) and Rule 10b-5); Vernon's Ann. Civ. Stat. Article 581-4; and the VTCA Bus. and Comm. Code (Sections 17.41, 27.01 and 1.203); breach of fiduciary duty; gross and willful negligence or, alternatively, conscious indifference; and common law fraud.

Respondents Shearson and DiMinico denied any liability to the Hoffmans, alleging that:

1. The only securities transaction identified in the Claim is the purchase of New World Entertainment Ltd. stock and claims based on this purchase are barred by the applicable Statute of Limitations. According to the account statements, 1000 shares at 17-7/8 were purchased for the Keogh account on April 1, 1986, 900 shares at 18.00 were purchased for the joint account on April 14, 1986, and 500 shares at 19-3/8 were purchased for the IRA account on April 15, 1986. At Roberta Hoffman's request, 450 shares of New World in the joint account were sold on June 16, 1986 at 18-3/4. Research on the stock was provided to the Hoffmans during this period. The stock prices began to drop substantially in the summer of 1986. Therefore, any complaint should have been brought within one year after the summer of 1986;
2. The Hoffmans have failed to state claims for which relief can be granted;
3. The damages allegedly suffered by the Hoffmans have no causal relationship with any act committed by or legally attributable to Respondents, but were caused by normal market fluctuations over which Respondents had no control;
4. The claims are barred by the doctrines of waiver, estoppel, ratification and laches;
5. The injuries alleged were caused, in whole or in part, by the Hoffmans' failure to mitigate damages;
6. The Hoffmans are barred from asserting any claim for losses incurred with respect to their purchase of New World because the company was the subject of

a class action lawsuit filed to seek relief for all persons who purchased shares of New World common stock during the period October 25, 1985 through March 28, 1988. Claimant failed to opt out of the class and are now barred by the doctrines of *res judicata* and collateral estoppel;

7. The Hoffmans have failed to state a cause of action under the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE Sec. 17.41, *et seq.*;
8. The Hoffmans are not entitled to an award of punitive damages or attorneys' fees; and
9. The claims asserted by Claimants are groundless, brought in bad faith, and are barred by the applicable statute of limitations.

RELIEF REQUESTED

Claimants requested an entry of an award against Respondents Shearson Lehman and Nick Diminico in the sum of \$58,252.72 in actual damages; punitive damages in the amount of \$100,000.00; DTPA damages in the amount of \$116,500.00; and \$100,000.00 for intentional infliction of emotional distress. Claimants also requested a refund of attorney's and out-of-pocket expenses in the sum of \$5,000.00, approximately \$20,000.00 in attorneys' fees, approximately \$2,500.00 in expenses of arbitration and interest from October 25, 1991 at the rate of 9% annum until resolution.

Respondents requested that all claims be dismissed in their entirety. In addition, Respondents requested an award of attorneys' fees and expenses incurred in defending this action pursuant to TEX. BUS. & COMM. CODE Sec. 17.50(c), FED. R. CIV. P. 11, and other applicable statutes and limitations.

OTHER ISSUES CONSIDERED & DECIDED

Respondents presented a Motion for More Definite Statement of Claim as part of the Statement of Answer. At hearing, the Respondents waived the Motion.

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 undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The Statement of Claim is hereby dismissed with prejudice and denied in its entirety;
2. Claimants Bert A. Hoffman and Roberta Hoffman are liable for and shall pay to Respondent Shearson Lehman Brothers, Inc., f/k/a Shearson Lehman Hutton, Inc., a/k/a Lehman Brothers, the sum of \$10,000.00 as attorneys' fees. In addition, Claimants Bert A. Hoffman and Roberta Hoffman are liable for and shall pay to Respondent Nick DiMinico the sum of \$5,000.00 as attorneys' fees. In making this award of attorneys' fees, the Panel considered the arguments of the parties, as well as TEX. BUS. & COMM. CODE Sec. 17.50(c), and determined that authority existed for an award of attorneys' fees to Respondents Shearson and DiMinico;
3. All other costs of arbitration, including attorneys' fees, shall be borne by the party incurring the cost, except for those specifically enumerated herein; and
4. Any relief not specifically awarded is hereby denied.

OTHER COSTS

The National Association of Securities Dealers, Inc. shall retain the \$1,000.00 postponement fee previously paid by Respondent Shearson.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing session x \$300.00 per session = \$300.00; Five (5) hearing sessions x \$750.00 per session = \$3,750.00; Total Forum Fees = \$4,050.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 non-refundable claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimants, Bert A. Hoffman and Roberta Hoffman. Claimants Bert A. Hoffman and Roberta Hoffman are liable for and shall pay to the NASD forum fees in the sum of \$3,300.00.

N.A.S.D. Arbitration No. 92-02206
Award Page 6 of 6

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

Concurring Arbitrators' Signatures

Name

Date

David G. Beerbower, Esq.
David G. Beerbower, Esq.
Public Arbitrator
Chairperson

December 7, 1993

James P. Hoefling
James P. Hoefling
Public Arbitrator

December 9, 1993

John J. Dallahan
John J. Dallahan
Industry Arbitrator

December 8, 1993

For NASD Use Only

Date of Service of Award: 12-10-93