

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Harry D. Tyszko  
Diane D. Hodgson

vs.

AWARD  
NASD #92-02660

Name of Respondents

E.F. Hutton and Company, Inc.  
Shearson Lehman Hutton, Inc.  
Smith Barney Hutton Upham & Company  
Brian G. DiJulio  
Barbara J. DiJulio

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REPRESENTATION

For Claimants': Gregory D. Lucas, Esq. of Lucas & Lucas of Bellevue, Washington.

For Respondents' Shearson Lehman Hutton (SLH) & E.F. Hutton: John Bender, Jr., Esq. of Weiss, Jensen, Ellis & Botteri of Seattle, Washington.

For Respondent's Smith Barney Hutton Upham (SBHU): Linda Alpert, Esq. of New York, New York.

For Respondents' Brian G. DiJulio and Barbara J. DiJulio: Roger Mellem, Esq. of Foster, Pepper & Shefelman of Seattle, Washington.

CASE INFORMATION

Statement of Claim filed: August 10, 1992

Claimant's Submission Agreement signed: April 28, 1992

Statement of Answer filed by Respondents on:

E.F. Hutton/SLH: November 9, 1992

SBHU:

October 13, 1992

Brian and Barbara DiJulio:

October 13, 1992

Respondents' Submission Agreements signed on:

E.F. Hutton/SLH:	November 4, 1992
SBHU:	October 12, 1992
Brian DiJulio:	September 24, 1992
Barbara DiJulio:	September 29, 1992

### **HEARING INFORMATION**

Prehearing Conference(s) Date(s) Sessions: None

Hearing Date/ Sessions:    March 16, 1993 (two sessions)  
                                      March 17, 1993 (two sessions)  
                                      March 18, 1993 (three sessions)  
                                      March 19, 1993 (two sessions)  
                                      March 20, 1993 (three sessions)

Hearing Location: Seattle, Washington

### **CASE SUMMARY**

**Claimants alleged:** Unauthorized transactions, excessive trading, lack of suitability, lack of disclosure on confirmation, use of fraudulent devices, lack of supervision, violation of Federal and State Securities Statutes, common law fraud and misrepresentations, negligence and breach of fiduciary duties, breach of contract and violation of state Consumer Protection Statute in the purchase of inferior securities' positions, 85 % of which was tied up in high-risk, common shares of Egghead and Ryka. Neither claimant is a sophisticated investor and both had investment objectives to preserve capital and generate modest, current income.

**Respondents E.F. Hutton/Shearson Lehman Brothers (SLH) alleged:** All trading involved in this dispute involved only claimant Hodgson and was within the parameters of her investment objectives and authorized. Of the \$39,000 in approximate losses, some \$20,000 occurred after the stock market crash of 1987. After Brian DiJulio left the employ of SLH in December 1987, SLH had no control over his trading of claimants' account as he became employed by SBHU. Respondent also alleged the affirmative defense of the statute of limitations.

**Respondent SBHU denied all allegations of wrongdoing and alleged:** All transactions were authorized, approved and/or ratified by claimants. The trades were suitable, claimants understood the risks and the alleged loss was due to market forces outside SBHU's control. SBHU adopted the Answer of Brian DiJulio as if fully set forth in its Answer. SBHU also alleged several affirmative defenses.

Respondent Brian and Barbara DiJulio alleged: Claimants' investments were suitable given their circumstances and goals, were self-directed and they understood the risks. Full disclosure was made of the risks of the investments and no churning occurred. Respondents denied all allegations to the extent inconsistent with their Answer. To the extent not inconsistent with their Answer, respondents adopted the Answers of SLH and SBHU, and asserted several affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested: Claimants Hodgson and Tyszko sought compensatory damages in an amount to be proved at the arbitration hearing, but believed to be in excess of \$261,600, including, but not limited to, out of pocket losses in capital through September, 1990, in excess of \$151,700; commissions from excessive and unsuitable trading in excess of \$85,700; and margin interest in excess of \$24,060.

The claimants have also suffered losses in the form of lost opportunity costs for those securities which they owned and transferred to respondents, then valued in excess of \$81,700, thereafter sold for other than investment reasons from accounts managed by respondents. Also, entitlements under the Consumer Protection Act include \$10,000 for the cited violations and \$8,000 in reasonable attorney fees and costs. Finally, in view of the criminal conduct indicated - which includes the fraudulent alteration of the Options Agreement and demonstrated "insider trading" - punitive damages and victim compensation are appropriate.

Dependent upon additional facts and other matters to be established during further discovery and proven during the arbitration process, the arbitration panel was requested to consider and award to claimants several of the following:

1. Rescission of each and every sale, and the return of all securities claimants turned over to respondents, then valued in excess of \$81,700, plus the appreciation in such securities from January 31, 1988, through July 31, 1992;
2. Return of all money (\$116,600) claimants deposited with respondents, plus the legal rate of interest from January 31, 1988, through date of award;
3. Restitution of commissions and margin interest, which the claimants paid respondents for services rendered;
4. Compensatory damages for loss of capital in the amount of \$151,700, through September, 1990, in addition to consequential and incidental damages (e.g., compensation for the speculative, low priced securities held in the accounts in September, 1990) in an amount to be determined by the Arbitration panel;

5. Restitution of \$18,340, plus legal interest from January 31, 1988, until date of award, as the difference between reported withdrawals (\$63,341) from the four accounts and that amount actually received (\$45,000) by claimants;
6. Rescission of each and every sale, and the return (or replacement) to claimants, of those securities held in their accounts in April, 1989, then valued in excess of \$332,800, subject to the then existing margin debt of \$169,326 without interest to present;
7. General and special damages for respondents' unjust enrichment, in an amount to be determined by the Arbitration panel;
8. Treble damages up to \$10,000 for each violation of the Consumer Protection Act;
9. Maximum prejudgment legal interest from August 20, 1990, until the date of award herein;
10. Maximum legal interest from the date of award, until the date in which the award has been satisfied in full;
11. Reasonable fees and costs to the attorneys and consultants. Due to the complexity of this action, in fact and in law, reasonable attorneys' and consultant's fees and costs in the event that this action is not contested are \$8,000 and, in the alternative, such greater amount as shall be determined by the Arbitration panel at the time of award;
12. Costs of this arbitration action; and
13. Such other and further relief as Arbitration panel may deem just and proper.

#### **OTHER ISSUES CONSIDERED & DECIDED**

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. All claims against respondent E.F. Hutton, Inc. by claimant Hodgson were dismissed at the arbitration hearing on statute of limitations grounds;
2. All claims against respondent Barbara DiJulio are dismissed;
3. Respondents SBHU and Brian DiJulio are jointly and severally liable and shall pay the claimant Hodgson \$37,429, apportioned as follows:
  - a) \$27,804 assessed against SBHU; and
  - b) \$ 9,625 assessed against Brian DiJulio;
4. All claims of claimant Hodgson against Brian DiJulio for events taking place prior to December 28, 1987 are dismissed on statute of limitations grounds;
5. Respondents SBHU and DiJulio are jointly and severally liable for and shall pay claimant Tyszko \$108,533, apportioned as follows:
  - a) \$80,558 assessed against SBHU; and
  - b) \$27,975 assessed against Brian DiJulio;
6. All other claims, including those for punitive damages, are dismissed.
7. The parties shall each bear their own costs, including attorney's fees.

#### **OTHER COSTS**

None.

#### **FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc. shall retain the \$750 hearing session deposit previously deposited by the claimant. Forum fees assessed against:

1. E.F. Hutton for \$4,125; and
2. SBHU for \$4,125;

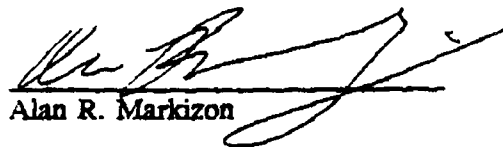
calculated as follows: Twelve hearing sessions at \$750/session equals \$9,000, minus \$750 already paid by claimant as a hearing deposit, equals \$8,250, split evenly between respondent E.F. Hutton and SBHU.

Fees are payable to the National Association of Securities Dealers,

**ARBITRATION PANEL**

**Public/Industry**  
Public Arbitrator  
Public Arbitrator  
Industry Arbitrator

Signature

  
Alan R. Markizon

DATE SERVED: 04/28/93

Date of Decision: 3/20/93