

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Sumner Herzog t/a Herzog Associates

92-02844

Name of Respondent/ Third - Party Claimant

Shearson Lehman Brothers, Inc.

Name of Third-Party Respondent

Constant Queller

CONSOLIDATED WITH

In the Matter of the Arbitration Between

Name of Claimant

Sumner Herzog t/a Herzog Associates

93-01394

Name of Respondent

Constant Queller

REPRESENTATION

For Claimant Sumner Herzog t/a Herzog Associates ("Herzog") appeared Bennett Stern, Esq. of the law firm of Stern, Lavinthal, Norgaard & Daly, Livingston, NJ.

For Respondent Shearson Lehman Brothers, Inc. ("Shearson") appeared Brian F.

McDonough, Esq. of the law firm of Shanley & Fisher, P.C., New York, NY.

For Third-Party Respondent/ Respondent Constant Queller ("Queller") appeared John F. Hipp, Esq., Midland Park, NJ.

CASE INFORMATION

The Statement of Claim filed against Shearson Lehman Brothers, Inc. was filed on August 20, 1992 and Shearson's Submission Agreement was executed on September 16, 1992.

The Statement of Answer and Third-Party Claim of Respondent Shearson was filed on November 27, 1992. Respondent Shearson's Submission Agreement was executed on October 29, 1992.

The Statement of Claim filed against Respondent Constant Queller was filed on April 6, 1993 and Herzog's Submission Agreement was executed on April 5, 1993.

The Statement of Answer of Respondent Constant Queller was filed on June 29, 1993 and Respondent Queller's Submission Agreement was executed on June 29, 1993.

HEARING INFORMATION

Hearing Dates/Sessions:	March 9, 1994	-	Two Sessions
	March 10, 1994	-	Two Sessions
	March 15, 1994	-	Two Sessions
	March 16, 1994	-	Two Sessions
	April 27, 1994	-	Two Sessions
	April 28, 1994	-	Two Sessions
	May 10, 1994	-	Three Sessions
	May 11, 1994	-	Three Sessions
	July 25, 1994	-	Two Sessions
	July 26, 1994	-	Two Sessions
	August 11, 1994	-	Two Sessions
	August 12, 1994	-	Two Sessions

The hearing was held at the National Association of Securities Dealers, Inc. offices located in New York city, New York.

CASE SUMMARY

Claimant Sumner Herzog t/a Herzog Associates ("Herzog") alleged that Respondent Queller, a Second Vice-President of Shearson Lehman Brothers, Inc. ("Shearson") fraudulently induced Claimant to loan money and acquire stock in Emkay Mfg. Co., Inc. ("Emkay"), a privately held company based in New Jersey. Claimant also alleged that prior to his making a loan to Emkay and acquiring stock in that company, Queller made numerous fraudulent representations to Herzog which included, but were not limited to, the financial viability of Emkay; the immediate prospect of a merger of Emkay with a company traded on the Vancouver Stock Exchange; the prospective concomitant increase in the value of Emkay stock once this merger took place; the assurance by Queller that the principal and interest on a \$150,000.00 loan would be repaid; and Shearson's participation in the negotiation of the merger and the underwriting of the public offering to follow.

Further, Claimant alleged that based upon the numerous false and fraudulent representations and Queller's actual and/or apparent authority, Claimant loaned the sum of \$150,000.00 to Emkay and acquired stock in the company; that in addition to Shearson's vicarious liability for the fraudulent inducement by Queller of Herzog, Shearson is vicariously liable for Queller's improper diversion of corporate funds of Emkay; and that Shearson is liable to Herzog by virtue of its negligent failure to supervise Queller.

Moreover, Claimant alleged that Queller violated the provisions of 15 U.S.C. Section 78j (b) of the Securities Exchange Act of 1934 and/or Rule 10b-5 of the Securities Exchange commission; that Shearson is a "controlling person" as defined in paragraph 20(a) of the Securities Exchange Act of 1934; and that by virtue of this section, Shearson is liable for the consequences of Queller's wrongful conduct.

Respondent Shearson denied all allegations of wrongdoing asserted against it in the Statement of Claim. Respondent Shearson maintained that Claimant is a secondary commercial lender who has made between one hundred and two hundred loans over his career; that his borrowers typically include individuals and small businesses who are unable to obtain traditional financing from banks or other major lenders, and who seek Herzog out as a last resort; and that Herzog typically charged borrowers 24-25 % on an annualized basis for the loan.

Further, Respondent Shearson maintained in April 1990, Claimant Herzog responded to an ad in the Sunday New York Times which sought short term financing. Claimant allegedly responded to the ad and communicated with a

professional "finder". Respondent Shearson maintained that after speaking with the "finder", Herzog visited Emkay's facilities and met the company's principals, and several company employees; that at some point prior to lending any money to Emkay, Claimant was provided with the company's business plan, projections, descriptions of its company and management, customer information, and audited financial statements; and that nowhere in the more than 120 pages of material was there any mention of Shearson. Additionally, Respondent Shearson maintained that prior to Claimant making the loan, Claimant had been told about a pending reverse takeover which would result in Emkay's stock being publicly traded. Respondent Shearson also maintained that the only Shearson representative with any relation to Emkay or this transaction was Respondent Queller. Respondent Queller was asked to forward Emkay's business plan to Shearson's Corporate Finance Department in August of 1988 but, maintained Respondent Shearson, Shearson rejected Emkay as a potential corporate finance client.

Moreover, Respondent Shearson maintained that Respondent Queller's alleged role in this affair was so far beyond the realm of his apparent duties as a retail registered representative that Shearson cannot be found liable for his actions under principles of respondeat superior.

Respondent Shearson asserted, as affirmative defenses, that the claim is barred, in whole or in part, by applicable Statute of Limitations; is barred by defenses of equitable and judicial estoppel, waiver, ratification, and laches; failed to state a claim upon which relief may be granted; and that Claimant failed to mitigate his damages. Further, Respondent Shearson asserted that Claimant's losses are due, in whole or in part, to the intervening negligence and legal malpractice of his own attorney in obtaining a defective guarantee that did not unambiguously guarantee repayment of the loan; that Claimant was contributorily negligent; that Claimant's claim for punitive damages is barred under New York law as contrary to public policy; and that Claimant's losses are due, in whole or in part, to independent events and the actions of independent parties over whom Shearson lacked control.

As and for its Third-Party Claim against Constant Queller, Shearson denied that it is liable to Claimant in any amount whatsoever, but in the event the panel concluded otherwise, then, however, Shearson maintained it was entitled to indemnification and/or contribution from its former associated person, Constant Queller.

Respondent Queller maintained that Claimant is a seasoned commercial lender seeking to recover the amount he was to receive from the proceeds of a letter of credit. The proceeds were assigned to Claimant, Respondent Queller alleged, by Emkay, a small privately held company that filed for Bankruptcy after being

unable to perform in accordance with the terms of the letter of credit. Respondent Queller also maintained that in the fall of 1989, when claimant did not get paid on the letter of credit, he and his attorney filed a verified complaint against Emkay and anyone remotely connected to it; that nowhere in the complaint did Claimant allege that Queller had made material misrepresentations in connection with the sale of securities; that none of the allegations upon which claimant relied in support of the present claim were set forth in the verified complaint; and that co-respondent Shearson was not even named as a defendant, let alone mentioned in the complaint.

Further, Respondent Queller maintained that after Claimant failed to get his money back from Emkay's owner, Claimant made the allegations against Queller and Shearson pertaining to securities fraud. Respondent Queller also maintained that in Claimant's search to get his money back, Claimant sees Shearson as the only "deep pocket" left and that the only way to get to Shearson is through Respondent Queller.

Respondent Queller asserted as affirmative defenses the doctrines of equitable and judicial estoppel, negligence and legal malpractice of Claimant's own attorney in obtaining a defective guarantee that failed to unambiguously guarantee repayment of the loan; and Claimant's failure to mitigate his damages. Respondent Queller also maintained that the claims as stated failed to state a claim upon which relief may be granted and that the claim is barred by the applicable statute of limitations.

Respondent Queller denied that he is liable to Shearson for indemnification or contribution in the event this panel concludes that Shearson is liable to Claimant.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$1,550,000.00 in favor of Herzog and also requested the imposition of punitive damages upon Shearson and Queller, attorneys fees and costs incurred by Herzog in prosecuting this action.

Respondent Shearson requested that the Statement of Claim be dismissed. Respondent Shearson further requested that in the event that a panel were to conclude that Shearson was liable to Herzog in any amount whatsoever, Shearson requests indemnification and/or contribution from its former associated person Constant Queller in an amount determined by the panel.

Respondent Queller requests that the panel reject the claims and further requests

that the panel award Queller his costs and attorneys' fees incurred in defending this matter.

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 Respondents Shearson Lehman Brothers, Inc. and Constant Queller be and hereby are dismissed in their entirety.
2. All claims against Respondents Shearson Lehman Brothers, Inc. and Constant Queller for punitive damages be and hereby are dismissed.
3. Each party shall bear their respective costs, including attorneys' fees.
4. All other claims be and hereby are dismissed.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitrators have determined that the following Forum Fees are assessed:

26 sessions X \$1000 = \$26,000 minus hearing session deposit of \$1650.00 = net \$24,350.00 due.

Forum fees Assessed Against:

1. Claimant is assessed the sum of \$13,000.00 representing one-half of the outstanding forum fees. However, Claimant had previously deposited \$1000.00 with the NASD. Therefore, the amount due and owing to the NASD by Claimant is \$12,000.00.
2. Respondents Shearson and Queller are jointly and severally assessed the sum of \$13,000.00 representing one-half of the outstanding forum fees. However, Respondent Shearson previously deposited with the NASD the sum of \$650.00. Therefore, the amount due and owing to the NASD by Respondents Shearson and Queller, jointly and severally, is \$12,350.00.

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

Concurring Arbitrators' Signatures

Name



Andrew Berger, Esq.

Public Arbitrator - Chairperson

Harry J. Lundgren, Jr.

Industry Arbitrator

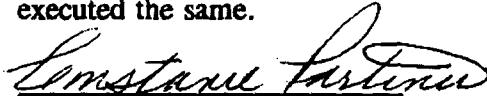
Barry A. Mahler, Esq.

Public Arbitrator

STATE OF *New York*

COUNTY OF *New York*

On this 21st day of September, 1994, before me personally appeared Andrew Berger known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he/she executed the same.



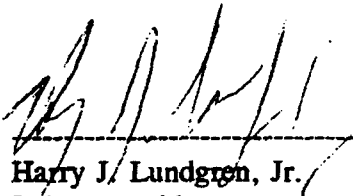
CONSTANCE M. PARTINICO
Notary Public, State of New York
No. 41-4808302
Qualified in Queens County
Commission Expires Sept. 28, 1995

Date of Decision: October 4, 1994

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

Concurring Arbitrators' Signatures
Name

Andrew Berger, Esq.
Public Arbitrator - Chairperson



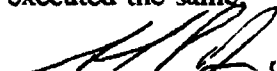
Harry J. Lundgren, Jr.
Industry Arbitrator

Barry A. Mahler, Esq.
Public Arbitrator

STATE OF NY

COUNTY OF NY

On this 30th day of September, 1994, before me personally appeared HARRY J. LUNDGREN JR known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he/she executed the same.



RICHARD P. DIAZ
Notary Public, State of New York
No. 31-5002124
Qualified in New York County
Commission Expires September 21, 1996

Executed on:
Date of Decision: September 30, 1994
~~xxxxxxxxxxxx~~

Date of Decision: October 4, 1994