

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Edward M. Swiggard

92-02965

Name of Respondents

Shearson Lehman Brothers, Inc.
George Schwelling

and

In the Matter of the Arbitration Between

Name of Claimant

Janet H. Doehlert

92-03161

Name of Respondents

Shearson Lehman Brothers, Inc.
George Schwelling

REPRESENTATION

Claimants Edward M. Swiggard ("Swiggard") and Janet H. Doehlert ("Doehlert"):
Janet K. DeCosta, Attorney at Law, Washington, D.C.

Respondents Shearson Lehman Brothers, Inc. ("Shearson") and George Schwelling
("Schwelling"); Charles R. Mills, Esq. of the law firm of Kirkpatrick & Lockhart,
Washington, D.C.

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CASE INFORMATION

Swiggard's Statement of Claim filed on: September 2, 1992
Swiggard's Submission Agreement signed on: August 18, 1992

Joint Statement of Answer to Swiggard's claim filed by Respondent Shearson and Schwelling (collectively referred to a "Respondents") on: November 20, 1992
Schwelling's Submission Agreement in the Swiggard matter signed on: December 7, 1992
Shearson's Submission Agreement in the Swiggard matter signed on: December 8, 1992

Doehlert's Statement of Claim filed on: September 17, 1992
Doehlert's Submission Agreement signed on: August 25, 1992

Joint Statement of Answer to Doehlert's claim filed by Respondent on: November 23, 1992
Schwelling's Submission Agreement signed in the Doehlert matter on: December 7, 1992
Shearson's Submission Agreement in the Doehlert matter signed on: December 8, 1992

HEARING INFORMATION

Pre hearing conference dates /sessions:

December 14, 1993 - 1 sessions (full panel)
December 15, 1993 - 2 sessions (full panel)

Hearing Dates/Sessions:

February 24, 1994 - 2 sessions
February 25, 1994 - 2 sessions
February 28, 1994 - 2 sessions
April 11, 1994 - 2 sessions
June 7, 1994 - 2 sessions
June 9, 1994 - 2 sessions

Hearing Location: Grand Hotel, Washington, D.C.
NASD Executive Offices, Washington, D.C.

CASE SUMMARY

Claimants Edward M. Swiggard and Janet Doehlert (hereinafter referred to as "Claimants") have consolidated their cases and bring their respective claims against the Respondents Shearson Lehman Brothers ("Shearson") and George Schwelling (Schwelling) alleging certain misrepresentations, omissions, unauthorized trading and excessive trading in their respective Dividend Roll-Over accounts maintained at Shearson and managed and controlled by Shearson's Vice President and portfolio manager, Schwelling. The Claimants alleged, among other things, that their respective losses began in or about early 1990 when the Claimants were introduced to Shearson's Dividend Roll-Over Program ("Program"). The Claimants alleged that Schwelling reiterated in various articles the strict selection criteria underlying the Program and the primary Program objective of capturing dividends on all purchases. The Claimants alleged that Schwelling asserted in an article, "Every time I've deviated from the Program I've lost money for my clients." The Claimants alleged that the Program represented the following components:

- 1) The Program was specifically designed to capture dividends on all stocks purchased.
- 2) Only stocks which would be passing through their ex-dividend date within the next two to three weeks would be purchased for the investor's account.
- 3) By placing "stop loss" orders to protect profits on the sale of all stocks purchased, the investor was assured that stocks would be sold after gaining value, but before losing a predetermined percentage of that gain.
- 4) Normally stock was held in the portfolio until the investor was able to realize a minimum net profit, after commissions, of approximately 6% per trade.
- 5) By purchasing from a select group of approximately 200 NYSE stocks, rated B+ or better by Standard & Poors, with a normal dividend yield of 4-6%, a dividend payment history of 10 years or more, a P/E of 10 to 15 or less, and the next year's earnings estimated to be higher than the current year's earnings, the investor was assured of the superior quality and consistent performance of all stocks to be purchased.

The Claimants alleged that Respondent Schwelling represented in an article that the trading strategy required that he place buy orders seven to ten days prior to the ex-dividend date, wait a full week after the dividend was payable and then generally place a sell-order at a price which would represent a 10% profit over the

purchase price with the "stop-loss" sell order component in place to allow a stock to rise, but also to protect profits. Claimants alleged that Schwellings repeated and consistent written statements that the stocks must be purchased within a window of only a few weeks and repeated assurances that dividends would be paid on all purchases and including the name of the Program, "The Dividend Roll-Over Program" convinced that Claimants that the timing of trades and the capture of dividends were crucial to the success of the program. Claimants alleged that Schwelling's failure to adhere to the components of the Program resulted in unauthorized trades made more than four weeks before the ex-dividend date. Claimants alleged that Schwelling's failure to adhere to the Program resulted in their failure to capture dividends. Claimants alleged that Schwelling also failed to follow stop-loss parameters; that he failed to follow stock quality guidelines and that he churned their accounts. Claimants alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 promulgated thereunder. Claimants further alleged violations of Sections 15 and 20 of the Exchange Act. Claimants alleged common law causes of action and violation of NASD Rules of Fair Practice, Article 3, Section 2 therein.

Respondents categorically deny all allegations of wrongdoing and any liability to the Claimants.

Respondents maintained that Claimants' case is an attempt through arbitration to recoup losses from certain stocks in their accounts by asserting the existence of technical limitations on Schwelling's direction of the Program. Respondents alleged that no such limitation may reasonably be inferred. Respondents alleged that the written materials are not intended to be and are not contractual obligations or even suggestive of specific limitations on the exercise of Schwelling's judgment in his effort to maximize the effectiveness of the Program. Respondents alleged the conditions effecting Claimants' accounts included, among other things, the invasion of Kuwait by Iraq forces on or about August 2, 1990, the general bear market which occurred in that period, and the down market for blue chip stocks which occurred in the Fall of 1991. Respondents alleged that the losses that occurred in Claimants accounts resulted from (1) decline in the market value of certain of the stocks held by the Claimants, and (2) the decision of the Claimants, in conjunction with the directive of their independent adviser, Michael Welchel (unaffiliated with Respondents), to liquidate their accounts at an inopportune time and against the recommendation of Schwelling.

Respondents maintained that in or about February, 1990, Claimants opened custodial accounts with Independent Trust Corporation ("InTrust") for it to act as custodian for accounts in which Schwelling would direct the purchase and sale of stocks for Claimants' benefit. Respondents maintained that Claimants' custodial

agreement with Intrust also provided for review and approval of transactions in the accounts by Claimants' independent investment advisor, Financial Planning Consultants Ltd. Respondents alleged that following the opening of Claimants' accounts, Schwelling directed transactions for Claimants' benefit consistent with the strategies of the Program for the market environment existing at that time. Respondents alleged that Intrust sent Claimants' quarterly statements for their accounts which detailed the name of the security, the dates of purchase and sale, the transaction prices, all dividends paid on the securities, and the net worth of the account. Shearson alleged that they similarly provided written confirmations and monthly statements to Intrust as custodian/agent for the Claimants. Respondents alleged that the Program is not a strategy which employs automatic buys and sells but rather a general investment strategy which involves a significant degree of judgment by Schwelling with respect to the stock selections and the timing of purchases and sales. Respondents alleged that to impose an artificial requirement as Claimants seek, that stocks be purchased only with a two-week period prior to an ex-dividend could hamper the effectiveness of the Program in particular market conditions. Respondents alleged that with respect to purchase of certain stocks, dividends were not ultimately received owing to (1) precipitous unexpected price declines requiring, in the interest of capital preservation and protection of the customer's interest, a sale prior to the payment of a dividend; or (2) the desire to realize profits by selling the stock prior to the ex-dividend date. Respondents further alleged that such events cannot reasonably be seen as wilful and improper departure from the Program nor gives rise to the level of a breach of fiduciary duty or fraud. Respondents alleged that there are no specific strictures on the time when a stock should be liquidated in Claimants' accounts since that decision is committed to Schwelling's judgment. Respondents alleged that the Program's brochure does not provide that every particular criteria identified therein must apply to each stock in order for it to be considered for purchase. Respondents further maintained that the Programs criteria was not inflexible, and that departures from the Program was contemplated. Respondents alleged that the generation of commissions was not inconsistent with the dividend roll-over strategy since the Program's brochure makes clear that the strategy had the potential to create not insignificant activity and envisioned that activity would be a part of the strategy. Respondents further maintained that given these objectives, it cannot be held that Schwelling disregarded the objectives of his clients and executed transactions solely for purposes of generating commissions.

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 arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. That Respondents Shearson Lehman Brothers, Inc. and George C. Schwelling are jointly and severally liable to Edward M. Swiggard and shall pay to Mr. Swiggard the sum of \$7,800.00; exclusive of interest.
2. That Respondents Shearson Lehman Brothers, Inc. and George C. Schwelling are jointly and severally liable to Claimant Janet H. Doehlert and shall pay to Ms. Doehlert the sum of \$10,500.00; exclusive of interest.
3. Each party shall bear their respective costs including attorney's fees; except for as specifically provided for herein.
4. Punitive damages are denied in their entirety.
5. Any and all other claims asserted by the parties are denied in their entirety.

FORUM FEES

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

15 sessions x \$400 = \$6,000

Forum Fees Assessed Against: Forum fees are to be split equally among the parties so that each party bears 25% of the forum fees or \$1,500.

Edward M. Swiggard is assessed forum fees in the amount of \$1,500; however, he is entitled to offset this amount with his hearing session deposit of \$300 so that the amount due as forum fee from Mr. Swiggard is \$1,200.

Janet Doehlert is assessed forum fees in the amount of \$1,500; however, she is

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entitled to offset this amount with her hearing session deposit of \$300 so that the amount due as forum fee from Ms. Doehlert is \$1,200.

Respondent Shearson is assessed forum fees in the amount of \$1,500.
Respondent Schwelling is assessed forum fees in the amount of \$1,500.

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

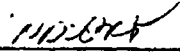
Concurring Arbitrator's Signature

Name

Public/Industry



Charles G. Ellison



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Respondent Shearson is assessed forum fees in the amount of \$1,500.
Respondent Schwelling is assessed forum fees in the amount of \$1,500.

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

Concurring Arbitrator's Signature
Name

David Freund
David Freund

Public/Industry

Public

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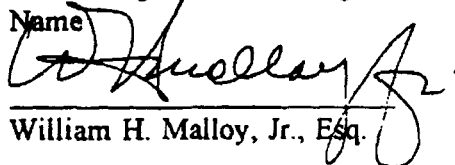
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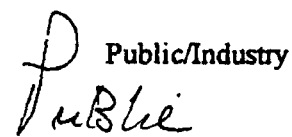
Respondent Shearson is assessed forum fees in the amount of \$1,500.
Respondent Schwelling is assessed forum fees in the amount of \$1,500.

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

Concurring Arbitrator's Signature

Name


William H. Malloy, Jr., Esq.


Public/Industry

NASD DATE OF DECISION: July 22, 1994