

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

Neurosurgical Associates of  
Indiana, P.C., et al.,  
Claimants,

v.

No. 92-03965

Rhoda Israelov, and  
Shearson Lehman Brothers, Inc.,  
Respondents.

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**REPRESENTATION OF PARTIES**

Claimants, Neurosurgical Associates of Indiana, P.C.; Neurosurgical Associates of Indiana Employee's Money Purchase Plan; and Neurosurgical Associates of Indiana, P.C., Employees' Profit Sharing Plan ("Claimants"), were represented by J. Bradley Schooley, Esq., and James S. Kowalik, Esq., of Hostetler & Kowalik, P.C., Indianapolis, Indiana.

Respondents, Shearson Lehman Brothers, Inc. n/k/a Smith Barney Shearson and Rhoda Israelov ("Respondents"), were represented by Harry D. Frisch, Esq., First Vice President and Associate General Counsel, Smith Barney Shearson, New York, New York.

**CASE INFORMATION**

Claimants' Statement of Claim was filed on or about November 23, 1992.

Claimants' Submission Agreements signed on November 11, 1992, and December 30, 1992.

Claimants' First Amendment to the Statement of Claim was filed on or about June 1, 1993.

Claimants' Second Amended Statement of Claim was filed on or about July 29, 1993.

Respondents' joint Statement of Answer was filed on or about October 22, 1993.

Respondents' executed Submission Agreements were filed with the NASD on or about November 22, 1993.

### HEARING INFORMATION

Pre-hearing Conference date: November 2, 1993. One (1) session.

Hearing dates: January 18, 1994. Two (2) sessions.  
January 19, 1994. Two (2) sessions.  
January 20, 1994. Two (2) sessions.  
February 14, 1994. Two (2) sessions.  
February 15, 1994. Two (2) sessions.  
February 16, 1994. Two (2) sessions.  
February 17, 1994. Two (2) sessions.

Hearing Location: Indianapolis, Indiana.

### CASE SUMMARY

Claimants alleged: Unsuitability; breach of fiduciary duty; fraud and deceit (misrepresentations and failure to disclose material information); and failure to supervise by the Respondents. Claimants further alleged that Respondents' activities in their accounts were in violation of ERISA guidelines for pension plans. Claimants further alleged that the misrepresentations and omissions made by the Respondents were made on a continuing basis in that Respondents continued to report the value of Claimants' investments in limited partnerships at the original purchase price instead of at market value. These misrepresentations and omissions were alleged to have continued until the Respondents reported the market value of the investment in Claimants' December 1989 monthly statement. The allegations arose out of transactions in limited partnerships in the Claimants' accounts such as: Silver Screen Partners IV; Mendik 86B B-4; and other investments more fully discussed and documented at the hearing in this matter.

Unless specifically admitted in their Answer, Respondents denied the allegations contained in the Claimants' Statement of Claim. In addition, Respondents set forth the following affirmative defenses:

1. The Statement of Claim fails to state a claim upon which relief may be granted.
2. Claimants' claims, in whole or in part, are barred by applicable statutes of limitations.
3. Claimants' claims are barred by the principles of laches and estoppel.
4. Claimants have waived their right to maintain this action against the Respondents.
5. The injuries, if any, alleged to have been sustained by Claimants' were caused by, in whole or in part, their failure to mitigate damages.
6. The Claimants authorized all of the transactions of which they are complaining.

7. Respondents did not charge excessive commissions or churn the Claimants' account, which Claimants controlled.
8. Claimants ratified all the transactions about which they are complaining.
9. Respondents made no misrepresentation of any material fact upon which Claimants detrimentally relied.
10. The losses allegedly suffered by Claimants have no causal relationship with any act committed by or legally attributable to the Respondents.
11. The Claimants controlled all of the trading about which they presently complain, and they are responsible for any losses generated in their accounts.
12. The Respondents are not liable as a result of the matters alleged in the Statement of Claim in that they, at all times, acted in good faith, without scienter and in compliance with all the applicable rules, regulations and industry standards and practices, and they did not directly or indirectly induce the act or acts constituting the alleged violations.
13. The Claimants seek punitive damages in violation of the Due Process Clause of the United States Constitution and applicable provisions of the New York State Constitution.
14. The Claimants seek punitive damages in violation of New York and Indiana law which prohibits an arbitrator from awarding punitive damages. See Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991); Fahnstock & Co., Inc. v. Waltham, 935 F.2d 512 (2d Cir. 1991); Garrity Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976); and Lloyds of London v. United Home Life, 549 N.E.2d 67, 70 (Ind. App. 1st Dist.), *aff'd*, 563 N.E.2d 609, 610 (Ind. 1990). See also, United States Fidelity & Guaranty Co. v. DeFluiter, 456 N.E.2d 429, 432 (Ind. App. 3d Dist. 1983); and School City of East Chicago v. East Chicago, 422 N.E.2d 656, 663 (Ind. App. 3d Dist 1981).
15. Applicable law does not entitle the Claimants to recover attorneys fees for the claims which they have asserted.

#### **RELIEF REQUESTED**

Claimants, requested the following award against the Respondents:

- A. Rescission of all transactions identified in Claimants' Exhibit #40 for \$274,855.00 in consideration for the return of all of the limited partnership certificates;
- B. Award of damages to the Plans of \$406,762.00 plus interest from the date of the award to the date of payment at the rate of 10%;
- C. Restitution of all compensation received by Respondents without set off for services performed for the plans in the amount of \$169,427.00;

- D. Payment of all costs, expenses, attorneys' and experts' fees incurred by Claimants as part of and in conjunction with this proceeding in the amount of \$177,641.99 together with all forum fees and costs of this arbitration; and
- E. Punitive damages.

Respondents requested that the Statement of Claim as submitted by the Claimants should be dismissed and requested that the costs of the proceedings be assessed against the Claimants.

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

On or about April 2, 1993, Respondents filed a Motion for a More Definite Statement of Claim. On or about May 18, 1993, Claimants filed their Response to Respondents' motion. After review of the relevant documents and deliberation, the arbitrators granted the motion.

On October 12, 1993, Claimants filed a Motion to Bar, pursuant to Section 25(b)(1) of the NASD Code of Arbitration Procedure (the "Code"), Respondents from filing any Answer or making any defenses to the Statement of Claim. On October 26, 1993, Respondents filed their Opposition to the Motion to Bar. The hearing dates originally set to commence on November 2, 1993, were postponed, and an in-person pre-hearing conference was held between the parties and the undersigned arbitrators on the Motion to Bar, as well as on discovery matters. After hearing argument from the parties, review of the documents, and deliberation, the panel denied Claimants' motion.

The parties have agreed that the Award in this matter may be executed by 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 original(s) remain on file with the NASD.

The record of this case was closed as of April 27, 1994.

The arbitrators distinguish the instant facts and circumstances from that cited by Respondents, Farm King Supply, Inc. v. Edward D. Jones (see Respondents Exhibit #59 for the cite), in that unlike Farm King, the Respondent presented specific investments all of which were accepted by the Claimants, and Respondent Rhoda Israelov was the sole advisor to the Claimants during the period in question. In Farm King, a group of securities was presented to the Claimant of which one or more were selected by the Trustees. Further, in Farm King, there was more than one broker making recommendations at one time. Further, this case is distinguishable from others in that:

1. The broker provided investment advice on a regular basis pursuant

- to a plan (written or otherwise).
2. The advice was intended to serve as the primary basis for decisions.
  3. The advice was tailored to the individual investment needs of the plan.

These found facts delineate and satisfy the requirements to find the Respondents fiduciaries and impose the obligations of such status.

### **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. Claimants' claims made for inappropriate pension plan investments and fraud and deceit are hereby, and each of them, denied and dismissed with prejudice.
2. The undersigned arbitrators have found in favor of the Claimants as to their breach of fiduciary duty claims. Accordingly, Respondents are, and each of them, jointly and severally liable for, and shall pay to the Claimants the sums of : \$160,000.00 as satisfaction of their claims for compensatory damages; \$160,000.00 as an award of punitive damages; and \$100,000.00 as an award of attorneys' fees and expenses. The authority for the award of attorneys' fees and expenses and punitive damages can be found in ERISA, cited by Claimants in their Exhibit 59(N), Vol. III, page 914.

### **OTHER COSTS**

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully in this Award.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

- 1 Pre-hearing conference session x \$300.00 = \$300.00  
14 Hearing sessions x \$1,000.00 = \$14,000.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall RETAIN the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimants.

Additional Forum Fees in the amount of \$6,150.00 are assessed against the Claimants.

Additional Forum Fees in the amount of \$7,150.00 are assessed jointly and severally against the Respondents.

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

**CONCURRING ARBITRATORS**

Dated:

Name:

April 27, 1994

Joseph L. Claypool/s/  
Joseph L. Claypool  
Presiding Chair  
Public Arbitrator

April 27, 1994

George W. Harding/s/  
George W. Harding  
Public Arbitrator

April 27, 1994

Bernard Lally/s/  
Bernard Lally  
Industry Arbitrator

Date of Service by the NASD: 4-29-94