

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Paul and Antoinette Sue Sharkey

92-04111

Name of Respondents

Shearson Lehman Brothers, Inc.  
Edward V. Kelly

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**REPRESENTATION**

For Claimants Paul and Antoinette Sue Sharkey ("Claimants") appeared Walter D'Ull, Esq., New York City, NY.

For Respondents Shearson Lehman Brothers, Inc. ("Shearson") and Edward Kelly ("Kelly") appeared Pete S. Michaels, Esq. of Smith Barney Shearson, Inc.'s in-house counsel, New York City, NY.

**CASE INFORMATION**

The Statement of Claim was filed on December 4, 1992 and Claimant's Submission Agreement signed on January 11, 1993.

The Joint Statement of Answer was filed by Respondents on March 8, 1993. Respondent, Shearson Lehman Brothers, Inc.'s Submission Agreement was signed on April 1, 1993.

Respondent, Edward V. Kelly's Submission Agreement was signed on April 5, 1993.

**HEARING INFORMATION**

Pre-Hearing Conference:	January 5, 1994	-	1 Session
Hearing Dates/Sessions:	May 9, 1994	-	2 Sessions
	August 2, 1994	-	2 Sessions

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

### CASE SUMMARY

Claimants alleged that Respondent Kelly was the registered representative assigned to Claimants' account since 1969; that because Respondent's office was located in town, Claimants spent a lot of time with respondent Kelly discussing Claimants' financial and family circumstances; and that Claimants had a great respect for Respondent Kelly, and trusted him implicitly. Claimants also alleged that when Claimant Paul Sharkey retired from teaching in 1985, Claimants explained to Respondent Kelly that no investment risks could be taken in their accounts as Claimants could no longer replace any of the losses; that notwithstanding Claimants' pleas, Respondent Kelly recommended Claimants buy stocks which were risky and unsuitable for Claimants.

Further, Claimants alleged that on November 3, 1986, Respondent Kelly recommended Prime Cable Partnership; that Claimants purchased a \$10,000.00 interest in this partnership; and that on March 14, 1987, Claimants purchased an additional \$15,000.00 interest of Prime Cable, for which there was a total loss of \$5,000.00. Also in January, 1987, Claimants alleged, Respondent Kelly recommended that Claimants sell their position in LILCO and purchase 1,000 shares of Pegasus Gold; that in March 1987, Claimants purchased another 1,500 shares and again 1000 shares in May for a total of 3,500 shares, for which there was a loss of \$10,907. Claimant further alleged that in May, 1987, Respondent Kelly recommended Total Erickson Resources, which resulted in a loss of \$2,951; Silver States Mining which resulted in a loss of \$549; and B.S.D. Medical which resulted in a loss of \$4,655. Claimant further alleged that during 1987 additional unsuitable stocks were purchased for Claimants. Respondent then purchased for Claimant 3,000 shares of B.S.D. medical in January, 1988, another 1,400 shares in March, and another 1,000 shares in September, without Claimant's consent, and the value of these shares is at a loss of \$12,525. Claimant also alleged that an additional 6,900 shares of B.S.D. medical were purchased in 1989, which have resulted in a loss of \$11,631.

Further, Claimant Paul Sharkey alleged that he made an appointment to see Respondent Kelly in 1988, to see what could be done about the losses Claimant incurred; that Respondent Kelly advised Claimants that the stocks would recover their value; and that Claimant did not hear from Respondent Kelly for three months. Moreover, Claimant alleged Respondent Kelly then contacted Claimants and advised Claimants that there was money in their account and recommended that Claimants purchase WTS Pegasus Gold, which Claimants did. Claimants alleged that his losses for this transaction were \$3,564.

Claimants alleged that Respondent Kelly placed their retirement funds into speculative, undiversified securities which were not suitable for Claimants in their financial position; that Respondents breached their fiduciary duty to Claimants; misrepresented their expertise; and violated the Rules of Fair Practice. Claimant also alleged that Respondent Shearson failed to properly supervise their employee; that Respondent Kelly engaged in unauthorized trading; and that Respondents violated R10(b) of the Securities & Exchange Act of 1934.

Respondents denied the allegations contained in Claimants' Statement of Claim and submitted that they were not liable to Claimants for any damages allegedly incurred by them.

Respondents maintained that the Claimants opened a number of accounts with Respondent Kelly serving as their financial consultant; that the vast majority of the account activity was directed by Mr. Sharkey; that the Claimants' accounts were not discretionary accounts; that each and every transaction in Claimants' accounts were executed with their express approval; and that the transactions conducted in these accounts were conducted on both an unsolicited and solicited basis. Respondent further maintained that Mr. Sharkey was a well-informed investor who had dealt in the types of investments complained of in the Statement of Claim for many years without complaint.

Further, Respondent maintained that the Statement of Claim fails to state a claim upon which relief can be granted; Claimants are barred by the principles of waiver, estoppel, and laches; Claimants were provided with regular and timely notification of all transactions made in their accounts; Claimants claims are barred by the doctrines of ratification and affirmance; and Respondent acted in compliance with all applicable rules and regulations and acted in good faith. Respondent also maintained that no civil cause of action exists for violations of NASD and NYSE Rules.

#### **RELIEF REQUESTED**

Claimants requested actual losses, attorneys' fees, interest and costs as follows:

Out of Pocket Losses	\$ 126,590.
Interest	\$ 94,747.
Attorneys fees	\$ 110,668.

Respondents requested that the claims of Claimants be dismissed in their entirety, that Claimants be assessed all forum fees, and that respondents be awarded all costs incurred in this matter and such other relief as the panel deems just and equitable.

### **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 by the Claimants against the Respondents be and hereby are dismissed.
2. Each party shall bear their respective costs, including attorneys' fees.
3. All other claims be and hereby are denied.

### **FORUM FEES**

Pursuant to Section 43c of the Code of Arbitration Procedure, the arbitration panel has determined that the following Forum Fees are assessed:

1 Pre-hearing x \$300.00 = \$300.00

5 Sessions x \$750.00 = \$3,750.00 - \$750 hearing session deposit = net \$3,000. due.

**TOTAL OUTSTANDING FEES = \$3,300.00**

1. Respondents be and hereby are, jointly and severally, liable and shall pay to the NASD, Inc. the sum of \$3,300.00 representing outstanding forum fees.

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

Concurring Arbitrators' Signatures  
Name

David I. Gilchrist

David I. Gilchrist, Esq.

Public Arbitrator - Chairperson

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Alvin Meentemeier  
Industry Arbitrator

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Stanley J. Weitzenberg, Esq.  
Public Arbitrator

STATE OF

COUNTY OF

On this 12th day of Sept, 1994, before me personally appeared DAVID I. GILCHRIST, 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.

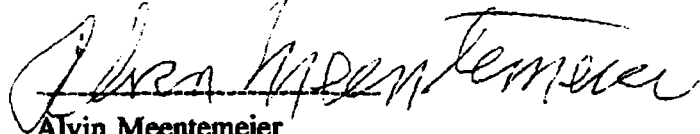
Noreen A. McCulley

NOREEN A. McCULLEY  
Notary Public, State of New York  
No. 4940046  
Qualified in Suffolk County  
Term Expires August 1, 1996

Date of Decision: September 20, 1994

Concurring Arbitrators' Signatures  
Name

\_\_\_\_\_  
David I. Gilchrist, Esq.  
Public Arbitrator - Chairperson

  
Alvin Meentemeier  
Industry Arbitrator

\_\_\_\_\_  
Stanley J. Weitzenberg, Esq.  
Public Arbitrator

STATE OF New Jersey  
COUNTY OF Union

On this 12th day of Sept., 1994, before me personally appeared \_\_\_\_\_  
ALVIN MEENTEMEIER 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.

  
PAMELA G. RHODES  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Jan. 17, 1995

Date of Decision: September 20, 1994

Concurring Arbitrators' Signatures  
Name

\_\_\_\_\_  
David I. Gilchrist, Esq.  
Public Arbitrator - Chairperson

\_\_\_\_\_  
Alvin Meentemeier  
Industry Arbitrator

  
\_\_\_\_\_  
Stanley J. Weisenberg, Esq.  
Public Arbitrator

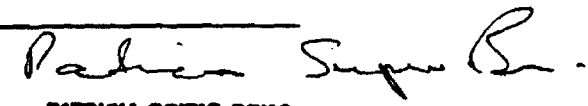
STATE OF

NY

COUNTY OF

NY

On this 12 day of September, 1994, before me personally appeared Stanley J. Weisenberg, 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.

  
\_\_\_\_\_  
PATRICIA SCIPIO-BRUM  
Notary Public, State of New York  
No. 24-6004241  
Qualified in Kings County  
Commission Expires November 18, 1994

Date of Decision: \_\_\_\_\_

9/12/94  
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Date of Decision: September 20, 1994