

**N.A.S.D. AWARD****NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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**In the Matter of the Arbitration Between****Name of Claimant(s)**

Michael Lerner individually and as  
executor of the Estate of Minnie Lerner,  
Phyllis Mate individually and as  
executor of the Estate of Minnie Lerner,  
Eleanor Linder individually and as  
executor of the Estate of Minnie Lerner

93-00002

**Name of Respondent(s)**

Shearson Lehman Brothers, Inc.  
Josephthal Lyon & Ross, Inc.  
Jean Schneideman  
Richard Schwartz  
Patricia Selin  
Josephthal & Co., Inc.  
Jesup, Josephthal Securities Group, Inc.

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**REPRESENTATION**

For Claimants, Michael Lerner individually ("M. Lerner"), Phyllis Mate individually ("P. Mate") and Eleanor Linder individually ("Linder") and collectively as executors of the Estate of Minnie Lerner ("the Estate"): Marc Ross, Esq. of Bernstein & Wasserman, New York, NY.

For Respondent, Josephthal Lyon & Ross ("JL & R"): Robert Murphy, Esq. of JL & R, New York, NY.

For Respondents, Shearson Lehman Brothers, Inc. ("Shearson") and Jean Schneideman: William Hohanser, Esq. of Shearson, New York, NY.

For Respondents, Josephthal & Co. ("J & Co.") and Jesup, Josephthal Securities Group, Inc. ("Jesup"): Robert Mannion of J & Co. and Jesup, Islip, NY.

For Respondent, Patricia Selin ("Selin"): Jeffrey Allan Hirsch, Esq. of Greenberg Traurig

NASD Case Number-93-60002

Award

Page - 2 -

Hoffman Lipoff Rosen & Quentel, P.A., Ft. Lauderdale, FL.

Respondent, Richard Schwartz ("Schwartz") was pro se.

### **CASE INFORMATION**

Statement of Claim filed: December 31, 1992. Claimants' Submission Agreements signed on: January 23, 1993.

Statement of Answer filed by Respondent, Shearson on: May 12, 1993. Respondent, Shearson's Submission Agreement signed on: May 7, 1993 by William Hohausser, Esq. on behalf of Shearson.

Statement of Answer filed by Solin on: March 8, 1993. Respondent, Solin's Submission Agreement signed on: March 4, 1993.

Statement of Answer and Third Party Claim filed by Respondent, JL & R on March 24, 1993. Respondent, JL & R's Submission Agreement signed on March 23, 1993 by Michael Loew on behalf of JL & R.

Respondents, Schneiderman, Schwartz, J & Co., and Jomp failed to file Statements of Answer and failed to sign Submission Agreements as required pursuant to Sections 12 and 25 of the NASD Code of Arbitration Procedure ("Code") (see "Other Issues").

### **HEARING INFORMATION**

On March 8 and 9, 1993 in Ft. Lauderdale, Florida, hearings lasting five (5) sessions were conducted.

### **CASE SUMMARY**

Claimants, alleged that Respondents, Shearson, JL & R, Schwartz, Schneiderman and Solin were liable for Schwartz' actions in ignoring Minnie Lerner's investment goals by liquidating her municipal bonds and GNMA's and placing her in highly speculative "junk" bonds and "junk" bond funds. Additionally, Claimants alleged that Schwartz began to utilize margin without specific authorization from Minnie Lerner and that the use of margin was also unsuitable for her. Claimants further alleged that Schwartz misrepresented the status of her account and was not registered with the NYSE between October 1989 and June 1990. Claimants also alleged that in December 1989 a check in the amount of \$15,000.00 was withdrawn from the account and

**NASD Case Number 93-00002****Award****Page - 3 -**

there are no records to indicate that Minnie Lerner ever received those funds. Claimants alleged that Shearson and JL & R failed to properly supervise Schwartz and, while at JL & R, Schwartz liquidated certain assets from the account without authorization in order to satisfy margin and fraudulently misrepresented the value of the account.

Respondent, Shearson denied all allegations of wrongdoing and alleged that: the account was opened as a joint account with M. Lerner and Minnie Lerner; all communication regarding transactions were to be made through M. Lerner; the account performed fairly well for two and one half years until, in late 1986, \$2,500 per month began to be withdrawn instead of \$250.00 per month; after Schwartz was terminated from Shearson, M. Lerner wrote that he had no problems with the manner in which the account had been maintained. Shearson asserted affirmative defenses of statute of limitations and laches.

Respondent, JL & R denied all allegations of wrongdoing and alleged that: Schwartz' alleged conduct occurring prior to the date the account was transferred should not be attributed to JL & R; all the alleged damage to the account had occurred prior to the time the account was transferred to JL & R; no unauthorized transactions occurred while the account was at JL & R; Schwartz was never employed by JL & R as an unregistered representative and JL & R did not engage in any efforts to conceal his alleged misconduct; and, the documents sent to Claimants by Schwartz were sent without JL & R's knowledge, consent or authorization. JL & R asserted the affirmative defenses including: failure to state a cause of action.

Additionally, JL & R filed a Third Party Claim against J & Co. and Jessup alleging that: they were responsible for oversight of Claimant's account from the time it was transferred from Shearson in January 1990 until it was purchased by JL & R on September 20, 1991; Schwartz' conduct during that time is attributable to J & Co. and Jessup and should not be attributed to JL & R and, therefore, JL & R files the third party claim against them for any damages which JL & R may be found liable.

Respondent, Selin denied all allegations of wrongdoing and alleged that Claimants fail to state a cause of action against her and none of the allegations in the Statement of Claim relate to the period of time when she held the account. Selin made no purchases or recommendations, took orders only from the client and precisely followed her instructions.

Respondents, Schneideman, J & Co., Jessup and Schwartz failed to file Answers. Claimants dismissed their claims against Schneideman in June 1993. Claimants settled with Respondents Shearson and Selin in March 1995.

Respondents, Schwartz, J & Co., and Jessup failed to appear at the hearing to defend.

NASD Case Number 93-00002

Award

Page - 4 -

### **RELIEF REQUESTED**

Claimants requested damages in an amount not less than \$300,000.00 plus interest, punitive damages, attorney's fees and such other relief deemed fair and appropriate by the arbitrators.

Respondent, Shearson requested dismissal of the claim plus costs and attorney's fees.

Respondent, J.L. & E requested dismissal of the claim and any other relief which the arbitrators deem appropriate.

Respondent, Selin requested dismissal of the claim.

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

1. Jurisdiction exists pursuant to Sections 12 and 25 of the Code.
2. The panel finds that Respondents, Schneidman, J & Co., Jesup and Schwartz were required to file Statements of Answer and to sign Submission Agreements pursuant to Sections 12 and 25 of the Code, Schwartz and Schneidman being persons associated with NASD member firms and Respondents, J & Co. and Jesup being NASD member firms, at the time the facts giving rise to the controversy arose.
3. In June 1993, Claimants dismissed the claims against Respondent, Schneidman and, therefore, she was removed as a party to this action and no findings of wrongdoing were made as to her.
4. In March 1995, Respondents Selin and Shearson settled the claims against them with the Claimants and, therefore, were dismissed with prejudice as parties to this proceeding.
5. The panel finds that there was due notice to Respondents J & Co., Jesup and Schwartz. The NASD made every attempt to locate and serve J & Co. and Jesup with notice of this proceeding as evidenced by the documents contained in Arbitrator's Exhibits #2 and 3.
6. On March 8, 1995 (the first day of hearings) Schwartz phoned in and was placed on a speaker phone in the hearing room. Mr. Schwartz explained that he could not appear because he could not sit for an extended period of time. He advised that he was under doctor's orders to avoid stress due to a pending back operation scheduled for the following week. He stated that he did not want to testify because he was under medication for the pain. He also stated that he was not asking for any delay in the of the hearing and acknowledged that he had received notice from the NASD of the hearing. The panel found that Schwartz had due notice, was not requesting a postponement and had, therefore chosen not to appear. Schwartz was advised that

**NASD Case Number-93-00002**

**Award**

**Page - 5 -**

he had a right to be present at the hearing and could remain on the telephone in order to participate. He chose not to remain on the phone and disconnected.

### **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. Respondent, Schwartz is found liable and shall pay to Claimants the amount of \$67,000.00 inclusive of interest.
2. Respondent JL & R is found not liable and, therefore, the claim against it is hereby dismissed.
3. In light of the dismissal of the claim against JL & R, the Third Party claim filed by them against Respondents J & Co. and Jesup is deemed moot and is hereby dismissed.
4. Claimants' request for punitive damages and attorney's fees is denied.

### **OTHER COSTS**

Other than the forum fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$3,750.00.

1. Respondent, JL & R is hereby assessed \$3,750.00 for which the NASD shall retain the \$750.00 hearing session deposit previously paid by JL & R and for which the NASD shall also retain the \$750.00 hearing session deposit previously paid by Claimants in partial satisfaction of such forum fees, leaving a balance due to the NASD of \$2,250.00.
2. Respondent, JL & R shall refund, directly to Claimants, the \$750.00 hearing session deposit previously paid by Claimants.
3. The NASD shall retain the \$200.00 nonrefundable filing fee previously paid by Claimants

**NASD Case Number 93-60002**

**Award**

**Page - 6 -**

**and shall retain the \$750.00 nonrefundable filing fee previously paid by JL & R.**

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

**Concurring Arbitrators' Signatures**

**Name**

**Public/Industry**

/s/  
**Casey W. Mills, Esq.**

**Public/Chairman**

/s/  
**Peter Lavazzoli**

**Industry**

/s/  
**Stanley Fineberg**

**Public**

**Date of Decision: July 17, 1995**