

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of Arbitration Between

Name of Claimant

Henryk Kaston

vs.

Case # 93-00272

Name of Respondents

Shearson Lehman Brothers, Inc.  
Frank Tortorici

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**REPRESENTATION**

For Claimant, Henryk Kaston ("Claimant"), Dan Brecher Esq., from the law firm of Dan Brecher.

For Respondent, Shearson Lehman Brothers, Inc. ("Shearson") and Frank Tortorici ("Tortorici"), Harry D. Frisch Esq., in-house counsel of Smith Barney Shearson.

**CASE INFORMATION**

Statement of Claim was filed on January 25, 1993.

Claimant's Submission Agreement was signed on January 22, 1993.

Joint Statement of Answer filed by Shearson and Frank Tortorici on May 3, 1993.

Shearson Lehman Brother's Submission Agreement was signed on July 30, 1993.

Frank Tortorici's Submission Agreement was signed on July 30, 1993.

### HEARING INFORMATION

Hearing Dates/Sessions:	October 12, 1993	-	2 sessions
	October 13, 1993	-	2 sessions
	November 10, 1993	-	2 sessions
	November 11, 1993	-	2 sessions

Hearing Location: National Association of Securities Dealers, Inc.  
located at 33 Whitehall Street, New York, New York  
10004.

### CASE SUMMARY

Claimant alleged that Tortorici proposed to Claimant the idea of withdrawing Claimant's funds from the bank and depositing those funds in a Shearson brokerage account to be managed by Tortorici. Claimant alleged that Tortorici knew that Claimant had never maintained a brokerage account before, that Claimant did not understand the securities markets, that Claimant wanted to preserve his assets and that Claimant was unwilling to subject his assets to market risk. Claimant alleged that Tortorici represented to Claimant that he could safely preserve Claimant's assets and simultaneously increase Claimant's earnings over what could otherwise be earned in a bank. Claimant alleged that he made initial deposits totalling approximately \$1,205,000 in October, 1990 to fund the Shearson account. Claimant alleged that these funds constituted substantially all of Claimant's assets. Claimant alleged that based upon the representation of Shearson, in part, he gave Tortorici unrestricted access to Claimant's brokerage funds. Claimant alleged that Shearson and Tortorici, knowingly, intentionally and without Claimant's authorization and knowledge, and in reckless disregard of Claimant's investment objectives and financial needs, and contrary to Claimant's instructions and interest, engaged in excessive, unauthorized, speculative and unsuitable trading and traded Claimant's account for the purpose of generating commissions. Claimant alleged that Shearson and Tortorici generated an aggregate of over \$38,000.00 in commissions in relatively few trades, while Claimant's account earned virtually nothing. Claimant further alleged that, in order to effect the purchase of a high commission insurance product, Shearson and Tortorici falsely and fraudulently completed and submitted application documents in order to purchase an unsuitable insurance product for which Claimant was not properly qualified by reason of his advanced age. Claimant alleged that in handling his account, Shearson and Tortorici engaged in Common Law Fraud, Breach of Fiduciary duties, Negligence, Negligent misrepresentation, and Breach of Contract.

Shearson and Tortorici ("Respondents") maintained that no basis exists for any of the allegations in the Statement of Claim. Respondent maintained that over the one year and eleven month life of the account, Claimant deposited 1.2 million and withdrew approximately \$950,000.00 in cash. Respondents maintained that trading in the account was minimal and that merely making initial

investments of the cash brought into the account would have generated virtually all of the commissions that the Claimant now asserts were excessive. Respondents maintained that the investments recommended by Tortorici were suitable and consisted mainly of mutual funds and a split annuity. Respondent maintained that the split annuity, which was to generate monthly income of approximately \$3,300.00 of principal and interest for 5 years, did not generate high commissions relative to other investments. Respondents maintained that any allegations of unauthorized trading now, over a year after the last security purchase in the account, strains credulity, since Claimant and his tax advisor each received written confirmations shortly after each purchase and monthly statements every month informing Claimant of the contents of his account.

**RELIEF REQUESTED**

Claimant requested:

W/D

Claim I:

- (i) an amount of wrongful commissions charged at \$50,000.00.
- (ii) \$3,739 in margin interest charged.
- (iii) \$1,388 in out of pocket losses; and \$200,000.00 in lost income.

Claim II:

W/D

Common Law Fraud: \$255,127.00 plus interest.

Claim III:

Negligence: \$255,127.00 plus interest.

Claim IV:

Negligent Misrepresentation: \$255,127.00 plus interest.

Claim V:

Control Person Liability: \$255,127.00 plus interest.

Claim VI:

Breach of Contract: \$255,127.00 plus interest.

W/D Claim VII:

Punitive damages: \$765,381.00

All of the above relief is requested together with the costs and disbursements incurred in this action, plus attorney's fees and such other relief as this tribunal may deem just and equitable.

Respondents requested: that the Statement of Claim be dismissed in all respects.

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

The parties have agreed to receive conformed copies of the award while the original remain on file with the NASD.

Claimant withdrew Claim I; churning, II; Common Law Fraud and Breach of Fiduciary and Other Duties by Defendants and VII; Punitive Damages.

### **AWARD**

1. That Claimant's Claim be dismissed in its entirety.
2. Shearson shall pay all forum fees associated with this arbitration proceeding.

### **FORUM FEES**

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

Non-refundable Filing Fee: \$250.00

Hearing Session Fees: \$1,000.00 x 8 sessions = \$8,000.00

Total: \$8,250.00

1. Shearson shall pay to the NASD the sum of \$8,250.00 to represent all forum fees associated with the arbitration.

2. Shearson shall satisfy this amount by reimbursing Claimant \$1,250.00 which represents a \$250.00 filing fee and \$1,000.00 hearing session deposit already paid to the NASD by Claimant; and by
3. paying to the NASD the balance of \$7,000.00.

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

**ARBITRATORS' SIGNATURES**

  
Joseph B. Russell, Esq.

Public Arbitrator

DATE OF DECISION: January 25, 1994

STATE OF *NEW YORK*

S.S.:

COUNTY OF *NEW YORK*

On this *11* day of *JANUARY*, 199*4*, before me personally appeared **Joseph B. Russell, Esq.** known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he/she executed the same

*Arthur M. Richardson*

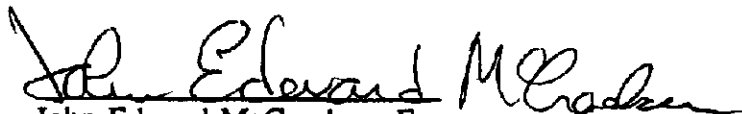
ARTHUR M. RICHARDSON  
Notary Public, State of New York  
No. 30-0008713

Qualified in Nassau County  
Certificate filed in New York County  
Commission Expires Sept. 20, 19*95*

2. Shearson shall satisfy this amount by reimbursing Claimant \$1,250.00 which represents a \$250.00 filing fee and \$1,000.00 hearing session deposit already paid to the NASD by Claimant; and by
3. paying to the NASD the balance of \$7,000.00.

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

**ARBITRATORS' SIGNATURES**

  
John Edward McCracken, Esq.

Public Arbitrator

DATE OF DECISION: January 25

STATE OF

S.S.:

COUNTY OF

On this            day of            , 1993, before me personally appeared **John Edward McCracken, Esq.** known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he/she executed the same

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2. Shearson shall satisfy this amount by reimbursing Claimant \$1,250.00 which represents a \$250.00 filing fee and \$1,000.00 hearing session deposit already paid to the NASD by Claimant; and by
3. paying to the NASD the balance of \$7,000.00.

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

**ARBITRATORS' SIGNATURES**

  
Robert A. Vaccaro

Industry Arbitrator

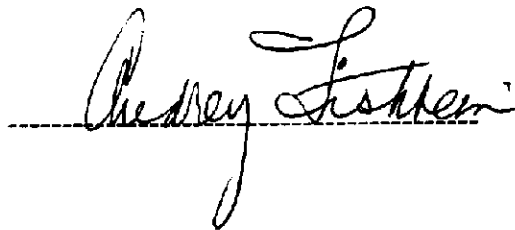
DATE OF DECISION: January 25, 1994

STATE OF NEW YORK

S.S.:

COUNTY OF NEW YORK

On this 12<sup>th</sup> day of January, 199<sup>4</sup>, before me personally appeared Robert A. Vaccaro known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he/she executed the same

A handwritten signature in cursive script, reading "Audrey Fishbein", is written over a horizontal dashed line.

AUDREY FISHBEIN  
Notary Public, State of New York  
No. 24-4956221  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires September 11, 1995