

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

---

*In the Matter of the Arbitration Between*

Name of Claimants

Judith W. DiGiovanni  
Capital Tile Co. Employee Benefit Plan  
Capital Tile Co., Inc.

93-01283

Name of Respondents

Shearson Lehman Brothers, Inc.  
John Moy  
Judith W. DiGiovanni and R. T. DiGiovanni

---

**REPRESENTATION**

For Claimants Judith W. DiGiovanni ("Ms. DiGiovanni"), Judith W. DiGiovanni and R.T. DiGiovanni, Trustees F/B/O Capital Tile Co. Employee Benefit Plan ("The Plan") and Capital Tile Co. ("Capital Tile") (Collectively "Claimants"): Gerald K. Keipert, Esq., of the law firm of Alexander and Cleaver, P.A., Fort Washington, Maryland.

For Respondents Shearson Lehman Brothers ("Shearson") and John Moy ("Mr. Moy"): George O. Richardson, III, Associate General Counsel at Shearson Lehman Brothers Inc.

For Respondents Judith W. DiGiovanni and R.T. DiGiovanni, Trustees F/B/O Capital Tile Co. Employee Benefit Plan ("Trustees"): Gary R. Alexander of the law firm of Alexander and Cleaver, P.A., Fort Washington, Maryland.

**CASE INFORMATION**

Statement of Claim filed: March 30, 1993.  
Claimants' Submission Agreement signed on: March 16, 1993.

Joint Statement of Answer filed by Respondents, Shearson and Mr. Moy (collectively "Respondents") on: August 3, 1993  
Joint Third-Party Claim filed by Respondents: August 3, 1993

Statement of Answer to Third Party Claim filed by the Trustees on:  
August 2, 1993.

Third party Respondent, R.T. DiGiovanni, Submission Agreement signed on:  
August 30, 1993.

### HEARING INFORMATION

Hearing Dates/Sessions:     April 11, 1994 - two sessions  
                                     April 12, 1994 - two sessions  
                                     May 6, 1994 - two sessions  
                                     May 13, 1994 - one session

Hearing Location: Omni Inner Harbor Hotel, Baltimore, Maryland

### CASE SUMMARY

Claimants alleged, among other things, that Respondents knew that they were unsophisticated investors who were retired. Claimants alleged that the nature of the complex transactions involved cannot be understood without an accounting. Claimants alleged that they advised Mr. Moy their investment objective was safety of principal and conservative investment. Claimants alleged that they advised Mr. Moy that The Plan's account was a trust account with the same investment objective. Claimants alleged that Respondents owed them a duty of reasonable care in the management of their accounts in accordance with their stated investment objective.

Claimants alleged that Mr. Moy fraudulently misrepresented the performance they could expect to receive from their investments. Claimants alleged that Respondents negligently handled the investments in Ms. DiGiovanni's accounts, the Capital account, and The Plan accounts. Claimants maintained that Respondents acted through a pattern of cajoling, solicitation of transactions, unauthorized transactions and undue influence over Claimants. Claimants alleged that Respondents caused loss of principal and a loss in reasonably expected profit from capital gains and interest. Claimants alleged that Mr. Moy churned Claimants' accounts for the purpose of generating commissions. Claimants alleged

that Respondents were aware of the above practices and intentionally, with actual malice, acted to keep Claimants ignorant of the situation. Claimants alleged that Respondents breached their fiduciary and contractual duty to Claimants. Claimants alleged that Shearson was negligent in retaining Mr. Moy as he was unfit to perform his assigned duties. Claimants alleged that Respondents failed to properly supervise their accounts. Claimants alleged that Respondents failed to comply with the applicable Federal and State laws.

Respondents categorically denied all allegations of wrongdoing. Respondents maintained that Claimants were sophisticated investors who understood their investment risks. Respondents alleged that the Claimants were former business owners who had prior investment experience. Respondents maintained that the Statement of Claim failed to set forth a cause of action upon which relief may be granted.

Respondents maintained that Claimants at all time had knowledge of their accounts and frequent conversations as to performance and alternative investments. Respondents maintained that they did not make a material misrepresentation or omit to state a material fact upon which Claimants relied. Respondents maintained that they had no fiduciary duty to The Plan account, as it was managed by Dreman Value Management. Respondents denied making unauthorized trades in Claimants' accounts as all securities were discussed with Claimants prior to purchase. Respondents maintained that Claimants received and reviewed monthly account statements and trade confirmations upon which they could object if they disagreed with the transaction. Respondents denied churning Claimants' accounts.

Respondents alleged, among other things, that the way in which they handled The Plan's account conformed with the investment objectives explained to Respondents by the Trustees. Respondents alleged that the Trustees are jointly and severally liable for any liability. Respondents alleged that the DiGiovannis' education, training and experience rendered them capable to evaluate recommendations made to them. Respondents alleged that if the Trustees were not sophisticated investors, then The Plan was negligent in appointing them. Respondents alleged that The Plan appointed the Trustees to make investment decisions binding upon The Plan. Respondents alleged that the DiGiovannis approved all investments made by The Plan or gave written discretion to Dreman. Respondent alleged that they relied upon The Plan's representation and the Trustees' decisions.

The Trustees categorically denied all allegations of wrongdoing. The Trustees maintained that the Third-Party claim failed to state a claim upon which relief can be granted. The Trustees maintained that they are unsophisticated investors who were not in a position to effectively evaluate the merits of Respondent's investment advice. The Trustees maintained that Mr. Moy was aware that the account documentation was unintelligible to them and his response to them was that they disregard it.

The Trustees maintained that throughout their relationship with the Respondents, their expressed investment objective with respect to The Plan's accounts was safety. The Trustees maintained that Mr. Moy fraudulently represented to them that he could earn ten to twelve percent per annum. The Trustees maintained that they relied on Respondents recommendation in their decision to allow Dreman to manage one of The Plan's accounts. The Plan maintained that it was not negligent in appointing the Trustees. The Plan maintained that the Trustees acted reasonably by seeking professional investment advice.

#### **RELIEF REQUESTED**

Claimants requested Respondents be required to provide a detailed accounting to the Claimants of all activity in the DiGiovanni accounts, The Plan accounts and the Capital accounts from the dates of their inception.

Claimants requested Compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS AND 00/100 (\$500,000) plus a reasonable rate of interest. Claimants requested punitive damages in the amount of ONE MILLION DOLLARS AND 00/100 (\$1,000,000). Claimants also requested that they be awarded their reasonable costs and attorneys' fees incurred in connection with this action.

Respondents requested that Claimants' claim be dismissed in its entirety and that Panel award Respondents all costs and fees associated with defending this claim. Respondents maintained that punitive damages may not be awarded under the circumstances of this case.

Respondents, in a third party claim, requested that the Trustees be held liable for any and all damages with respect to The Plan's accounts. Respondents also requested an amount equal to the costs of this proceeding and reasonable attorneys' fees.

The Trustees requested that the Respondents' third party claim be dismissed in its entirety and that the Panel award the Trustees all costs and fees associated with defending this claim.

#### **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 original remains 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. Judith DiGiovanni is awarded Thirty-Two Thousand Eight Hundred and Nine Dollars (\$32,809); exclusive of interest for her individual account claim.
2. All other claims, including Claimants' claim for punitive damages, are denied in their entirety.
3. Respondents' Third Party claim is dismissed.
4. Attorneys' fees and costs are to be borne by the respective parties, except as specifically provided herein.

**FORUM FEES**

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

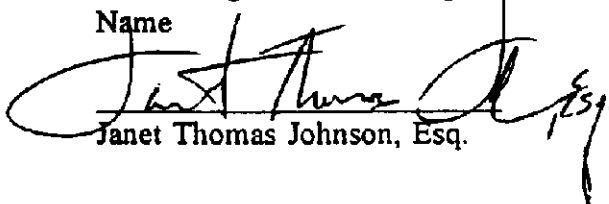
7 sessions X \$1,000 = \$7,000

Forum Fees are assessed equally against both parties. Claimants are assessed Forum Fees in the amount of \$3,500, however, Claimants are entitled to offset this amount with their hearing session deposit of \$1,000, so the amount due from Claimants is \$2500. Respondents are assessed Forum Fees in the amount of \$3,500, however, Respondents are entitled to offset this amount with their hearing session deposit of \$500, so the amount due from Respondents is \$3000.

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

Concurring Arbitrator's Signature

Name

  
Janet Thomas Johnson, Esq.

Public/Industry

  
Public Arb.

NASD Date of Decision: August 3, 1994

**FORUM FEES**

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

7 sessions X \$1,000 = \$7,000

Forum Fees are assessed equally against both parties. Claimants are assessed Forum Fees in the amount of \$3,500, however, Claimants are entitled to offset this amount with their hearing session deposit of \$1,000, so the amount due from Claimants is \$2500. Respondents are assessed Forum Fees in the amount of \$3,500, however, Respondents are entitled to offset this amount with their hearing session deposit of \$500, so the amount due from Respondents is \$3000.

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

Concurring Arbitrator's Signature  
Name

Public/Industry

  
Janet Stern Solomon

7-26-94

NASD Date of Decision: August 3, 1994

**FORUM FEES**

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

7 sessions X \$1,000 = \$7,000

Forum Fees are assessed equally against both parties. Claimants are assessed Forum Fees in the amount of \$3,500, however, Claimants are entitled to offset this amount with their hearing session deposit of \$1,000, so the amount due from Claimants is \$2500. Respondents are assessed Forum Fees in the amount of \$3,500, however, Respondents are entitled to offset this amount with their hearing session deposit of \$500, so the amount due from Respondents is \$3000.

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

Concurring Arbitrator's Signature  
Name

Public/Industry

  
Henry Hopkins, Esq.

NASD Date of Decision: August 3, 1994