

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Betty Joneschild

93-01867

Name of Respondents

Shearson Lehman Brothers, Inc., n/k/a Smith Barney Shearson, Inc.;
Michael Perez

REPRESENTATION

For Claimant: Betty Joneschild ("Joneschild") was represented by Thomas L. Popejoy, Esq. of the Popejoy Law Offices, located in Albuquerque, New Mexico.

For Respondents: Shearson Lehman Brothers, Inc., now known as Smith Barney Shearson, Inc. ("Shearson"), and Michael Perez ("Perez") were represented by Katherine W. Hall, Esq. of Baca, Coryell, Gershon & Hall, P.C., located in Santa Fe, New Mexico.

CASE INFORMATION

Statement of Claim filed: May 10, 1993.

Claimant's Submission Agreement signed on: April 27, 1993.

Statement of Answer filed by Respondents Shearson and Perez on: August 6, 1993.

Respondent Shearson's Submission Agreement signed on: July 1, 1993 by James Goddard, Vice President, Shearson Lehman Brothers, Inc.

Respondent Perez did not file an executed submission agreement.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: February 17, 1994 for Two (2) sessions.

Hearing Location: Albuquerque, New Mexico.

CASE SUMMARY

Claimant Joneschild alleged that Respondent Perez, while employed by or acting as an agent for Respondent Shearson, wrongfully persuaded her to invest about one-half of her net worth in two "junk bond" or "high-yield" bond funds which were unsuitable for her financial status and investment goals. Joneschild specifically alleged that:

1. In October, 1976, Joneschild opened an account at Shearson, completing a new account form which stated that her investment objectives were fixed income and tax-free income, and that she had a net worth of approximately \$150,000.00. Joneschild's funds were invested in a low-risk income fund, Public Service Company of New Mexico stock, and municipal bonds;

2. In September, 1988, Perez was assigned to Joneschild's account by Shearson. Perez claimed that he could get Joneschild a higher return by investing in a Keystone mutual fund which would pay from 12 to 13 percent return. After being advised that these were not junk bonds, Joneschild sold her Hutton Income Fund and shares of the Public Service Company in October of 1988 and purchased 6,000 shares of Keystone Cust. Fund Series B-4 at \$6.75 per share, which represented over one-half Joneschild's liquid assets;

3. In April of 1989, Perez persuaded Joneschild to invest her capital in "high income" funds,, again advising Joneschild that these were not junk bond funds. Perez persuaded Joneschild to sell her municipal bonds and purchase shares of Colonial Intermediate High Income Fund SBI, resulting in Joneschild's entire portfolio being in two funds which contained unrated or low-rated funds which were unsuitable for her account;

4. At the time of purchase, Perez knew or should have known of Joneschild's income, resources and investment objectives, but still persuaded her to invest in funds which contained unrated bonds and highly risky securities;

5. In late 1989, the value of the funds began to decline. In response to Joneschild's phone calls, Perez repeatedly assured her that everything was fine and not to sell, but never disclosed the true nature of the funds. In March of 1990, Perez eventually recommended and Joneschild agreed to sell a portion of the Colonial fund at a loss. In October of 1990, Joneschild transferred the Keystone funds from Series B-4 to Series B-1, a low risk fund, at a loss. In January of 1991, Jones child sold the remainder of the Colonial fund shares at a loss; and

6. Perez's actions were willful and in total disregard of the interests and rights of Joneschild, entitling her to punitive damages.

Respondents denied the material allegations of the Statement of Claim, alleging that:

1. At the time Perez was assigned to her account, Joneschild was a sophisticated investor who directed her own accounts and made her own decisions. After demonstrating considerable knowledge about junk bonds, Joneschild made an independent decision to purchase such bonds for her account;
2. In September of 1988, Joneschild advised Perez that she was unhappy with the Hutton fund and wanted to sell because the income had gone down and part of the principal had been paid back. Perez explained to Joneschild the nature of the Keystone fund, including what it was paying, how it performed, that the fund contained "junk bonds", and that he believed in the junk bond market;
3. Understanding the nature of junk bonds and wanting higher income than she was receiving from the Hutton fund, Joneschild sold the Hutton fund and Public Service Company stock and purchased the Keystone Series B-4;
4. Joneschild and Perez continued discussing various funds and her portfolio in numerous telephone calls and meetings. In the spring of 1989, they discussed the municipal bonds and the possibility of the bonds being called at a lower price than the current value. Perez advised her of the Colonial fund, specifically stating they were "junk bonds". Joneschild instructed Perez to sell the municipal bonds and purchase the Colonial fund;
5. These funds were suitable for Joneschild, whose main motivation was to obtain a higher income than she received in the past. The funds were widely diversified and the history had been good. The decline between 1989 and 1991 was unprecedented and the funds have done well since 1991; and
6. The decline of the funds was discussed several times and, in March of 1990, Perez recommended that Joneschild sell her Colonial shares. Joneschild chose to sell only a portion of her holding and ultimately sold the remaining shares in January of 1991 at a lower price. During the time Joneschild invested in the funds, she received \$10,110.00 in dividends from the Keystone Series B-4 and \$6,962.00 from the Colonial shares.

The Respondents asserted several affirmative defenses, including the following:

1. Claimant failed to object to the confirmations and monthly statements when received, and later engaged in the same type of trading, thereby ratifying the purchase of all shares at issue;
2. Claimant failed to mitigate damages by selling the shares at an earlier time or

when advised to do so; and

3. Pursuant to the terms of the Client Agreement, this matter is controlled by New York law and an award of punitive damages is not allowed. In addition, none of the actions Respondents are alleged to have done are sufficient to justify an award of Punitive damages.

RELIEF REQUESTED

Claimant requested entry of an award against Respondents for actual damages in the sum of \$39,607.00; interest on the actual damages; costs and attorneys' fees; and punitive damages in an amount deemed appropriate.

Respondents requested that the Statement of Claim be dismissed with prejudice and for whatever and further relief the panel deemed just and proper.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Perez did not file an executed submission agreement, but answered, appeared and testified at hearing, and pursuant to Section 12 of the NASD Code of Arbitration Procedure, is required to submit to arbitration of this matter.

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 originals remain on file with the NASD.

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. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically granted is hereby denied.

OTHER COSTS

Respondents Shearson Lehman Brothers, Inc., now known as Smith Barney Shearson, Inc., and Michael Perez are jointly and severally liable for and shall pay to Claimant Betty Joneschild the

sum of \$520.00 as reimbursement of the \$120.00 claim filing fee and the \$400.00 hearing session deposit previously paid by Claimant to the NASD.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) hearing sessions x \$400.00 per session = \$800.00.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee paid by Claimant Betty Joneschild. In addition, the NASD shall retain the \$400.00 hearing session deposit previously deposited by Claimant Betty Joneschild for forum fees. Respondents Shearson Lehman Brothers, Inc., now known as Smith Barney Shearson, Inc., and Michael Perez are jointly and severally liable for and shall pay to the NASD the sum of \$400.00 as additional forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Ross B. Perkal, Esq.
Ross B. Perkal, Esq.
Public Arbitrator
Chairperson

March 31, 1994

/s/ Lee R. Dye
Lee R. Dye
Public Arbitrator

April 1, 1994

/s/ Richard W. Arms, Jr.
Richard W. Arms, Jr.
Industry Arbitrator

March 31, 1994

For NASD Use Only

Date of Decision: 4-5-94