

**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)

Edward L. Pascarella

93-04590

Name of Respondent(s)

Shearson Lehman Brothers, Inc.  
John J. Flading

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**REPRESENTATION**

For Claimant Edward L. Pascarella: Jay M. Sawilowsky, Esq., Augusta, GA.

For Respondents Shearson Lehman Brothers, Inc. and John J. Flading: Terry R. Weiss, Esq. of the law firm of Long Alridge and Norman, Atlanta, GA.

**CASE INFORMATION**

Statement of Claim filed: November 2, 1993.

First Amendment to the Statement of Claim dated October 19, 1994.

Claimant's Submission Agreement signed on: October 26, 1993.

Joint Statement of Answer filed by Respondents Shearson Lehman Brothers, Inc. and John J. Flading on: March 11, 1994.

Answer of Respondents to First Amendment to Statement of Claim filed: November 7, 1994.

Respondent John J. Flading's Submission Agreement signed on: January 5, 1994.

Respondent Shearson Lehman Brothers, Inc.'s Submission Agreement signed on: December 23, 1993.

### **HEARING INFORMATION**

Pre-hearing conference: December 19, 1994

Hearing Dates/Sessions: January 10, 1995 / Two Sessions  
January 11, 1995 / Two Sessions  
January 12, 1995 / Two Sessions

Hearing Location: Swissotel, 3391 Peachtree Road, N.E., Atlanta, GA 30326.

### **CASE SUMMARY**

Claimant alleged the Respondents represented to him that because of the size, internal organization and research facilities available to the Respondents, the Claimant could reasonably expect to achieve consistent with the Claimant's investment objectives, a substantial growth rate from invested capital. Claimant further alleged the Respondents further represented that Respondent broker would personally supervise and manage Claimant's account in such a manner as to realize a capital growth and investment return for the Claimant that offered security for the original investment. Claimant further alleged in addition to the representations stated above, prior to and at the time the accounts were opened, Claimant was induced to enter into the securities transactions and to entrust the care in handling of the securities account to Respondents by their representations including:

- a. Respondents would carefully manage the funds and/or securities deposited into their control by Claimant;
- b. Respondents would carefully analyze prospective investments and would only invest Claimant's funds in those companies providing income and offering long term capital appreciation, all in accord with Claimant's stated investment objective; and,
- c. Claimant would be kept continuously advised with respect to the market performance and prospect of each security purchased for Claimant's account.

Claimant further alleged representations were material and were made with the intention that Claimant rely thereon and Claimant reasonably did rely thereon in executing the fiduciary trading authority, and in establishing and maintaining the account with Respondent brokerage and the representations were false, and Respondents, and each of them, either knew that they were false or made the representations without reasonable grounds for believing them to be true and with reckless disregard as to whether or not they were true and Claimant had complete

faith in Respondent broker, even to the extent of making the Respondent broker the Executor of Claimant's Will.

Claimant further alleged the trading activities were unsuitable for Claimant, were excessive in size and frequency and were transacted for Respondents' benefit and in disregard of the interests of Claimant and the commissions generated thereby were excessive in size and frequency and unwarranted in light of Claimant's total market investment, financial resources, stated investment objective, and the character of the account and the Respondents mismanaged Claimant's accounts.

Claimant further alleged during the applicable period of time, Respondents exercised complete control over the Claimant's accounts and undertook to trade Claimant's accounts, without consultation with or permission from the Claimant, in reckless disregard of the best interest of the Claimant and causing Claimant to suffer substantial losses in those accounts and the Respondents made trades in the Claimant's accounts without specific authorization of Claimant.

Claimant further alleged the above purchases, the combined ultimate sales which caused losses to Claimant were excessive in size and frequency and were unsuitable investments in light of Claimant's total market investment, financial resources, stated investment objective, and the character of the account.

Claimant further alleged the Respondents omitted to tell Claimant material facts, which, in light of the statements and representations made and the circumstances under which they were made, were also misleading and fraudulent. Those material facts were:

- a. The purchases being made were speculative and high risk;
- b. The securities being purchased and sold for Claimant generated large commissions to Respondents and the size of those commissions;
- c. Respondent broker's commission ratio varied from type of issue to type of issue and the accounts were consistently purchasing issues which generated greater commissions for broker;
- d. The size and amount of the losses as they occurred; (Flading stated: "Don't worry about your accounts, everything is alright and you are making money.");
- e. The actual risk and unsuitability involved in the transactions entered into by the Respondents in Claimant's accounts.

Claimant further alleged during the course of this relationship, the Respondent broker encouraged the Claimant to ignore the monthly statements, continuously reassuring the Claimant that he was handling everything ("I've taken care of everything.") and Claimant should not be concerned with studying the confirmation statements and should throw them away. Claimant further alleged Respondents' activities and conduct in the management of Claimant's account operated as a fraud and deception on Claimant, and constituted a manipulative and deceptive device and contrivance by Respondents and each of them.

Claimant further alleged the acts, misrepresentations and omissions of Respondents caused an unreasonable risk of emotional disturbance to Claimant and Respondents knew or should have known that their conduct would create this risk and as a proximate result of the fraudulent conduct of Respondents, Claimant has suffered and will continue to suffer mental anguish and emotional distress, causing damages to Claimant.

Respondents maintained Claimant is an experienced investor and a highly successful independent businessperson who at all times knew or should have known of the risks attendant to each securities trade he made with the assistance of Respondents and Claimant authorized, consented to, or ratified every trade, failed to exercise due diligence or otherwise exercise reasonable care and failed to mitigate damages. Respondents further maintained Claimant's alleged losses were caused by his own conduct or market forces well beyond the control of Respondents, and some of the claims are absolutely barred as untimely under the governing statute of limitations and under the facts and law applicable to this case and there is no basis whatsoever to hold Respondents responsible for any losses Claimant may have experienced as a result of Claimant's own investment decisions.

Respondents further maintained Claimant's Section 10(b) Rule 10b-5 claims are time-barred by the applicable statute of limitations; the claim violates the NASD Code of Arbitration Procedure and should be rejected; Claimant's allegations of unsuitability are without merit; there is no valid breach of fiduciary duty claim within the context of the relationship between the Claimant and the Respondents in this case; Claimant should not be entitled to recover because he authorized and ratified every trade; Claimant's alleged damages are grossly overstated and there is no viable churning claim as a matter of law.

**RELIEF REQUESTED**

Claimant requested compensatory damages in the sum of \$529,295.00; punitive damages in the sum of \$100,000.00; attorneys' fees in the sum of \$36,248.00 plus all other costs of the arbitration.

Respondent requested a dismissal of all of the Claimant's claims and an order that all costs of the arbitration be borne by the Claimant.

**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 Claimant against the Respondents are dismissed in all respects.
2. The Claimant's request for punitive damages is denied.
3. Each party shall bear their respective costs including attorneys' fees.

**FORUM FEES**

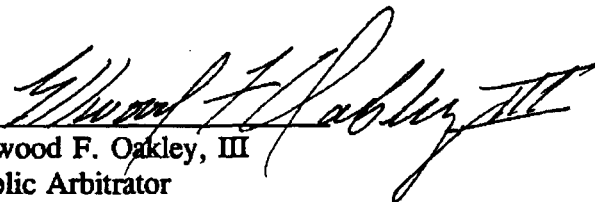
Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

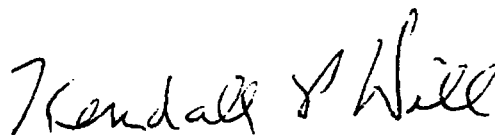
6 sessions (\$1,000.00) + 1 pre-hearing conference (\$300.00) = \$6,300.00  
less Claimant's hearing session deposit \$1,000.00 = net \$5,300.00 due.

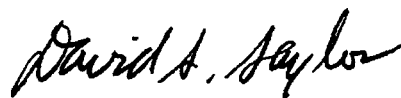
The Respondent Shearson Lehman Brothers, Inc. be and hereby is liable and shall pay to the NASD the sum of \$5,300.00 representing forum fees.

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

**ARBITRATOR'S SIGNATURE**

  
Ellwood F. Oakley, III  
Public Arbitrator

  
Kendall P. Hill  
Public Arbitrator

  
David S. Saylor  
Industry Arbitrator

Date of Decision: February 16, 1995