

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Clark Overbeck

Case No. 94-00123

Name of Respondent

Lew Lieberbaum & Co., Inc.

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**REPRESENTATION**

For Claimant, Clark Overbeck ("Overbeck"): Louis D. Putney, Esq. and James L. Watson, Esq., of Tampa, Florida.

For Respondent, Lew Lieberbaum & Co., Inc. ("Lew Lieberbaum"): Lawrence P. Sandor, Esq., Corporate Counsel, New York, New York.

**CASE INFORMATION**

Statement of Claim filed: January 7, 1994. Claimant's Submission Agreement signed: November 19, 1993.

Respondent's Answer filed: March 2, 1994. Respondent's Submission Agreement signed: March 2, 1994.

**HEARING INFORMATION**

On February 13, 1995, in Fort Lauderdale, Florida, a Pre-Hearing Conference lasting one session was conducted via telephone conference call with an arbitrator.

On February 15, 16 and 17, 1995, in Tampa, Florida, hearings lasting 8 sessions were conducted.

### **CASE SUMMARY**

Claimant alleged that beginning on October, 1992, without direction or approval from Claimant, Lieberbaum's broker moved the account into highly speculative and unsuitable investments, including units, common stock, and warrants of new or small companies. Many of these investments were purchased from the investors of Lieberbaum or their clearing agent, Bear Sterns Securities Corporation. These trades were done on a principal (net) basis where the commission was not readily apparent to Claimant. Claimant did not sign either a full or limited power of attorney giving Lieberbaum's broker permission to make discretionary trades.

Claimant alleged that on Claimant's investment of \$193,460.50, the account suffered a net capital loss of \$67,095.92, and that Lieberbaum received commissions and other charges against Claimant's account totalling at least \$43,491.33. Claimant alleged a lack of supervision by Lieberbaum of its broker, Wohlberg, who had held a license for only three weeks prior to taking Claimant on as a client, and alleged that Lieberbaum's failure to supervise was in reckless disregard for the rights and interests of Claimant. Claimant alleged that the evidence as a whole supports the conclusion that the account was being used as a source of commission revenues for Lieberbaum rather than a legitimate investment account for Claimant, and that Lieberbaum's actions were malicious, willful or exhibit gross negligence in complete disregard for the rights of Claimant, and constitute a breach of Lieberbaum's fiduciary duty to Claimant.

All issues between the parties were submitted to arbitration, including those cognizable in Federal Court and pendent claims in the courts of the State of Florida. Claimant alleged: violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. at 78; violations of Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. at 77q(a); violations of Rule 10b-5 of the Rules of the Securities Exchange Commission, 17 C.F.R. 240.10b-5; breach of fiduciary duty; common law fraud; negligence; violation of the Florida Securities and Investor Protection Act, Section 517.011, et seq., Florida Statutes; intentional infliction of emotional distress; and civil theft, pursuant to Section 812.014, Florida Statutes (including treble damages). Claimant's claims include claims for punitive damages, interest and attorney's fees.

Respondent denied all allegations of wrongdoing contained in the Statement of Claim.

Respondent contended that the Claimant was a sophisticated and experienced investor and that each of the investments met the Claimant's investments goals and objectives. Further, Respondent contended that each of the investments were suitable for Claimant. Respondent also contended that trading in the account was authorized and that the trading activity was not excessive in light of the financial condition and investment goals and objectives of Claimant. Claimant was a high income and high net worth individual who fully understood the trading strategy by Respondent.

**RELIEF REQUESTED**

Claimant requests:

- (a) Compensatory damages, including pre-judgement interest at the legal rate provided by Florida law (12%), in the total amount of \$178,947.52;
- (b) Interest at the legal rate provided by Florida law (12%) with respect to such award of compensatory damages calculated from the time of the arbitration award until such award is paid in full;
- (c) Costs incurred, including expert witness fees, totalling \$19,410.00;
- (d) Attorney's fees as provided by law, including the Florida Securities and Investor Protection Act; and,
- (e) Punitive damages in an amount which the Arbitration Panel deems appropriate.

Respondent Requests that the Claim be dismissed and that all costs be assessed against the Claimant.

**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 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) Respondent, Lieberbaum, is found liable and shall pay to Claimant the amount of \$67,095.92 plus interest on the net loss of the investment from September 1, 1993 to February 17, 1995 in the amount of \$11,801.53.
- (2) Respondent, Lieberbaum, shall pay to Claimant the amount of \$19,410.00 for costs and expenses incurred by Claimant in Connection with this proceeding.

- (3) Respondent, Lieberbaum, is also found liable and shall pay Claimant's attorneys' fees, the amount of which shall be determined by a court of competent jurisdiction.
- (4) Claimant's request for punitive damages are denied.
- (5) Respondents request for costs against the Claimant is denied.

**OTHER COSTS**

Other than the Forum Fees detailed 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 \$8,300.00 (one Pre-Hearing Conference x \$300.00, plus eight hearing sessions x \$1,000.00 per session).

Respondent, Lieberbaum, is hereby assessed \$8,300.00, \$1,000.00 of which shall be paid directly to the Claimant, and \$7,300.00 of which shall be paid to the National Association of Securities Dealers, Inc.

The NASD shall retain the non-refundable filing fee of \$250.00 paid by the Claimant.

Respondent shall reimburse the Claimant \$250.00 for the non-refundable filing fee.

The NASD shall retain the session deposit of \$1,000.00 paid by Claimant.

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

### Concurring Arbitrators' Signatures

/s/  
Bruce A. Beery

Public

/s/  
James E. Garside

Public

/s/  
Willard E. Fawcett

## Industry

**Date of Decision:** March 31, 1995