

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Elbert Derrick
and
Shearson Lehman Brothers, Inc.
and Jack Pausman

94-01347

REPRESENTATION OF PARTIES

Claimant, Elbert Derrick, was represented by Mark Larson, Esq. of Dommermuth, Brestal, Cobine & West, Ltd., Naperville, Illinois.

Respondents, Shearson Lehman Brothers, Inc. and Jack Pausman, were represented by Ann Parry, Esq. of Smith Barney, Inc., New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about March 28, 1994.

The Submission Agreement of Claimant, Elbert Derrick, was signed on April 29, 1994.

The Joint Statement of Answer was filed by Respondents, Shearson Lehman Brothers, Inc. and Jack Pausman, on or about June 29, 1994.

The Submission Agreement of Respondent, Shearson Lehman Brothers, Inc., was signed on June 29, 1994 by Ann Parry, Esq., Vice President of Smith Barney.

The Submission Agreement of Respondent, Jack Pausman, was signed on August 4, 1994.

HEARING INFORMATION

The hearing was held on April 25, 1995 in Chicago, Illinois for a total of two (2) sessions.

CASE SUMMARY

In the Statement of Claim, Claimant, Elbert Derrick ("Derrick") alleged that the Respondents, Shearson Lehman Brothers, Inc. ("Shearson") now known as Smith Barney, Inc. and Jack Pausman ("Pausman"), made unsuitable, unauthorized and excessive trades in maintaining the Claimant's three accounts at Shearson between August, 1990 and March, 1991. The Claimant alleged that the Respondents made misrepresentations or made omissions of material fact to the Claimant regarding the nature and the risks of option trading. In August of 1990, Derrick opened three accounts - a

securities account, a commodities account, and an IRA - with Shearson based on Pausman's alleged assurances of simplified record-keeping and a return of 14% to 20% with minimal risk. The Claimant contended that he was a investor with limited sophistication and resources with an interest in consolidating his investment accounts under one broker dealer for the sake of convenience, improved portfolio management, higher returns and better accountability. Claimant further contended that although he had not been entirely pleased with Pausman's performance at Shearson, Claimant transferred his accounts to Rauscher Pierce Refnes, Inc. ("Rauscher") in January 1991 when Pausman left Shearson and joined Rauscher.

Derrick further alleged that the Respondents breached their fiduciary duty and breached their contract with him by failing to provide professional services. The Claimant asserted that, when he notified Pausman concerning his difficulty in reviewing the confirmation slips or monthly statements due to the volume and complexity of the option strategies and margin activity, Pausman indicated his concerns were unfounded and suggested that Derrick simply lacked the ability to accurately evaluate the statements. According the Claim, Pausman assured Derrick that he had the expertise to manage the account effectively and that a high volume of activity was necessary to achieve long term profitability from his trading strategy. The Claimant made other specific allegations against the Respondents, including, but, not limited to, common law fraud, negligence, negligent misrepresentation, violations of various State Consumer Fraud & Deceptive Trade Practices Acts, violations of Federal and State Securities Laws including the Federal Securities Acts of 1933 and 1934 and the Illinois Securities Act of 1953, violations of the NASD Rules of Fair Practice and violations of various NYSE Rules.

Respondents, Shearson Lehman Brothers and Jack Pausman, denied the allegations set forth in the Statement of Claim and specifically claimed that Pausman thoroughly explained options and futures trading including the risks to the Claimant before either type of investment was made in the Claimant's accounts. The Respondents asserted the following affirmative defenses:

1. The Claimant failed to state a claim upon which relief can be granted.
2. By reason of his failure to complain promptly after receipt of written confirmations, monthly statements and other documents evidencing or setting forth the transaction in Claimant's account, Claimant is barred from recovery under the doctrines of ratification, account stated, estoppel, waiver and laches.

3. Claimant received monthly statements and confirmation slips from Shearson which apprised him of the status of his investments and equity in his account. If his investments failed to perform in accordance with his expectations, Claimant failed to timely notify Shearson or act to change his investment strategies. Accordingly, Claimant is barred from recovery herein.
4. Claimant's claims are barred by the applicable statutes of limitations.
5. Claimant's demand for judgment includes an award of punitive damages in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
6. Claimant's demand for judgment includes an award of punitive damages in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
7. New York law, which governs the relationship between Claimant and Respondents, does not permit the award of punitive damages in arbitration.
8. There can be no breach of fiduciary duty since the Respondents did not owe a fiduciary duty to Claimant in light of the fact that he had a non-discretionary account.
9. Any damages incurred by Claimant were caused by his own acts or omissions not by any acts or omissions on the part of Respondents.

RELIEF REQUESTED

Claimant, Elbert Derrick, requested an award in the amount of \$51,879.16 in actual damages and \$155,637.48 in punitive damages plus costs of arbitration and attorneys' fees.

Respondents, Shearson Lehman Brothers, Inc. and Jack Pausman, requested that the claims asserted against them be denied in their entirety and that they be awarded costs of arbitration.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that a handwritten, signed Award may be entered. 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 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; and
2. The parties shall pay their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session. There were two (2) sessions x \$750.00 = \$1,500.00 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure ("Code"), the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$200.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant. Respondent, Shearson Lehman Brothers, Inc., is hereby liable for and shall pay to the Claimant, Elbert Derrick, the amount of \$950.00 as reimbursement. Respondent, Shearson Lehman Brothers, is hereby liable for and shall pay to the NASD the sum of \$183.34 in additional forum fees and the sum of \$200.00 for the surcharge assessed in accordance with Section 45 of the Code. Respondent, Jack Pausman, is liable for and shall pay to the NASD additional forum fees in the amount of \$566.66. Fees are payable to the National Association of Securities Dealers, Inc.

Fay Clayton, Esq.
Fay Clayton, Esq.
Public Arbitrator, Presiding Chair

Wallace H. Hastings, Jr.
Wallace H. Hastings, Jr.
Public Arbitrator

David J. Gordon, Esq.
David J. Gordon, Esq.
Industry Arbitrator

Date served by the NASD: June 14, 1995