

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

Dennis N. Christensen,  
Claimant,

v.

No. 94-01650

Shearson Lehman Brothers, Inc., n/k/a  
Smith Barney, Inc., and  
Jamie Constantine,  
Respondents.

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**REPRESENTATION OF PARTIES**

Claimant Dennis N. Christensen ("Claimant") was represented by Dorothy K. Goodman, Esq., of Barnhill & Goodman P.C., Des Moines, Iowa, and Gale E. Boliver, Esq., of the Boliver Law Firm, Marshalltown, Iowa.

Respondent Shearson Lehman Brothers, Inc., n/k/a Smith Barney, Inc., ("Shearson") was represented by Peter S. Michaels, Esq., of Smith Barney, Inc., New York, New York.

Respondent Jamie Constantine ("Constantine") or referred to jointly with Shearson as ("Respondents") were represented by Kim Walker, Esq., of Faegre & Benson, Des Moines, Iowa.

**CASE INFORMATION**

Claimant's Statement of Claim was filed on or about April 26, 1994. Claimant's Submission Agreement was signed on May 26, 1994. Claimant's Amended Statement of Claim was filed on or about August 8, 1994.

Respondents' joint Answer was filed on or about August 9, 1994. Respondents' Submission Agreements were signed on August 8, 1994, and August 10, 1994. Respondents' joint Answer to Claimant's Amended Statement of Claim was filed on or about September 9, 1994.

**HEARING INFORMATION**

Pre-hearing Conference date: March 29, 1995; One (1) session.

Hearing date: April 10, 1995; Two (2) sessions.  
April 11, 1995; Two (2) sessions.

Hearing Location: Omaha, Nebraska.

**CASE SUMMARY**

Claimant alleged that Respondents: committed negligence; breached their fiduciary duty to the Claimant; breached their oral and written contract with Claimant. Claimant further alleged that Shearson failed to supervise the actions of its agent, Constantine, and that Respondents actions also violated the Iowa securities laws, and the NASD's Rules of Fair Practice. Claimant also alleged that Constantine used his relationship with the Claimant to induce him to invest a total of \$153,000.00 in a short-term loans to Wilson Railway Corporation ("Wilson Railway") in 1990, and that Constantine, in their regular discussions about Wilson Railway, did not ever suggest or imply that this was not an investment sanctioned through Shearson, or that Constantine had no actual knowledge of the financial stability of Wilson Railway. Next, Claimant alleged that Constantine had recommended the Wilson Railway transaction without adequate investigation, and in violation of the rules and regulations of his trade. Lastly, Claimant alleged that he has failed to receive a return on either of his investments as the corporation was at all times burdened with excessive debt, and was eventually declared insolvent.

In their joint Answer, unless specifically admitted therein, Respondents categorically denied each and every allegation contained in the Statement of Claim. Respondents also asserted that they were not liable to Claimant for any damages. In addition, Respondents asserted the following affirmative defenses:

1. Claimant's demand for damages is improper as a matter of law and fact, and therefore, his Statement of Claim fails to state a claim upon which relief may be granted.
2. Claimant is an individual who, at all relevant times, had full knowledge of all material facts concerning his investments, and knew that Wilson Railway had nothing to do with his account. Claimant is, accordingly, barred by the principles of waiver and estoppel from bringing this action and from obtaining recovery, and therefore he claim should be dismissed.
3. Under the New York choice-of-law clause in his Client Agreement Claimant's non-New York state law claims must fail.
4. Claimant's claims are barred in whole or in part by the doctrine of laches and the applicable statute of limitations, and therefore the claim should be dismissed.
5. Claimant was provided with regular and timely notification of all transactions made in his accounts, yet they failed to repudiate them. In addition, those regular notifications informed Claimant, through its absence on any of Respondents' documents, that Wilson Railway was not a Shearson investment. Consequently, Claimant's claims are barred in whole or in part by the doctrines of ratification and affirmance, and therefore the claim should be dismissed.
6. Respondents acted in compliance with all applicable rules and regulations and acted in good faith and did not directly or indirectly induce any of the alleged acts constituting the alleged wrongful conduct. If Claimant was damaged, which Respondents do not concede, any such damage occurred as the result of Claimant's own actions or the action of parties other than Respondents, including Wilson Railway and Douglas A. Wilson, and therefore the claim should be dismissed.
7. Under generally accepted principles of securities law, a broker-dealer and its employees owe

no fiduciary duty to a client such as the Claimant. Consequently, Respondents can bear no liability for the losses that Claimant may have incurred, and therefore the claim should be dismissed.

8. Claimant was informed of the nature and characteristics of all investments made on his behalf in his Shearson account. Prior to the period complained of in the Statement of Claim, claimant, a financial services professional, told Jamie Constantine that he was experienced and sophisticated in business and investment matters. Based on the information provided by the Claimant to Respondents, all transactions made in his account were suitable for him and, therefore, the claim should be dismissed.

### **RELIEF REQUESTED**

Claimant requested the following relief:

- a. Actual damages in the amount of \$153,000.00 at a comparable rate of return;
- b. Punitive damages in the amount of \$1,500,000.00;
- c. Attorney fees; and
- d. The cost of these proceedings.

Respondents requested that all of the claims against the Respondents be dismissed and the costs of this proceeding, including all forum fees, costs, and attorneys fees, should be assessed against the Claimant.

### **OTHER ISSUES CONSIDERED & DECIDED**

On February 28, 1995, Respondents filed a Motion to Dismiss the Statement of Claim. On or about March 17, 1995, Claimant filed a Motion to Strike and Resistance to Respondents' Motion to Dismiss. On March 16, 1995, Respondents filed their Resistance to Claimant's Resistance to Respondents' Motion to Dismiss. After consideration of the motion, the response, and deliberation, the arbitrators denied the motion during the hearing on this arbitration.

On April 10, 1995, the stenographic record kept by Thibault Suhr & Thibault, Omaha, Nebraska, was designated as the official record of this arbitration.

The parties have agreed that the Award in this matter may be executed by 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(s) 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. Claimant Dennis N. Christensen's claims made against Respondents Shearson Lehman Brothers, Inc. n/k/a Smith Barney, Inc. and Jamie Constantine are, and each of them, denied and dismissed with prejudice.

**OTHER COSTS**

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

**FORUM FEES**

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

1 Pre-hearing conference session @ \$300.00 per session = \$300.00

4 hearing sessions @ \$1,000.00 per session = \$4,000.00

Pursuant to Section 43(c) of the Code, the NASD shall **retain** the nonrefundable filing fee in the amount of \$250.00, and shall **retain** the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimant.

Pursuant to Section 45 of the Code, Smith Barney, Inc. shall pay to the NASD the sum of \$200.00 as payment of the membership surcharge.

Additional Forum Fees in the amount of \$3,300.00 are assessed against the Claimant.

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

**CONCURRING ARBITRATORS**

Dated:

Name:

April 26, 1995

W. Russell Bowie /s/  
W. Russell Bowie  
Presiding Chair  
Public Arbitrator

April 26, 1995

John P. Miller /s/  
John P. Miller  
Public Arbitrator

May 1, 1995

Mary K. Fay /s/  
Mary K. Fay  
Industry Arbitrator

5-4-95