

## **AWARD**

National Association of Securities Dealers Regulation, Inc.  
Office of Dispute Resolution

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In the Matter of the Arbitration Between

Eric Scheffey,

Claimant.

v.

Case Number 96-01256

Shearson Lehman Brothers  
and Joseph Bergner,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimant, Eric Scheffey was represented by Robert Karoly, Esquire and Dennis H. Taylor, Esquire of Taylor & Associates located in Longview, Texas.

Respondents, Shearson Lehman Brothers and Joseph Bergner were represented by William A. Olshan, Esquire of Lehman Brothers located in New York, New York.

### **CASE INFORMATION**

Claimant, Eric Scheffey's Statement of Claim was filed on or about March 21, 1996.

The Submission Agreement of Claimant, Eric Scheffey was signed on March 11, 1996.

Respondents, Shearson Lehman Brothers and Joseph Bergner's joint Statement of Answer was filed on or about June 5, 1997.

### **HEARING INFORMATION**

The hearing was held on:     April 16, 1997 for two (2) sessions;  
   April 17, 1997 for three (3) sessions; and  
   April 18, 1997 for two (2) sessions.

The hearing was held in:     Houston, Texas.

### CASE SUMMARY

In the Statement of Claim, Eric Scheffey ("Claimant") sought to recover monetary damages from Shearson Lehman Brothers, Inc. ("Shearson") and its representative, Joseph Bergner ("Bergner") (hereafter collectively referred to as "Respondents") for the following allegations: churning, unauthorized trading, unsuitability, breach of fiduciary duty, misrepresentations and omissions of fact.

Claimant opened an account consisting of money market investments and certificates of deposit with Shearson in Houston, Texas in November of 1990. Claimant alleged that he had no prior training, education or experience in investments and that Bergner persuaded Claimant to turn his account over to Bergner to manage due to Claimant's lack of experience and time. As alleged, Bergner through Shearson made several trades without Claimant's consent or permission which was contrary to Claimant's specific instructions to obtain prior approval before initiating a transaction. Claimant made only minor complaints following receipt of confirmations or monthly statements because of his reliance on Bergner's good faith, expertise and competence. Claimant alleged that he was not advised nor did he understand he had the right to challenge the suitability of the investments when they did not meet his stated investment objectives or when the transaction exceeded the limited authority for trading. According to Claimant, Bergner failed to explain or disclose the inherent risks when he knew or should have known Claimant would rely on him for this information. These omissions were allegedly particularly harmful when the trades made were in express excess of the quantities of shares authorized drawing on the maximum margin available when Bergner knew or should have known Claimant had no other means to meet margin calls. Claimant contended that his account had been churned by the Respondents since they made 158 transactions from November of 1990 until October of 1992. Claimant further contended that he reluctantly acquiesced when Bergner inappropriately recommended a risky strategy, telling Claimant the strategy would greatly enhance the account without endangering capital or assets outside the account. As alleged, Bergner was absent from the office frequently causing Claimant's account to suffer when Claimant was unable to get out of options in a timely manner and when Shearson placed the account into liquidation status.

In their Answer, Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated Claimant was a wealthy, sophisticated and experienced investor who implemented the riskiest and costliest transactions in his account on an unsolicited basis despite express warnings from Respondents about high degree of risk. Respondents claimed that Claimant bought and sold 20 different securities, including equities and equity options over the life of the account, having been well aware of the risks inherent in the transactions implemented in the account and having the financial wherewithal to accept such risks. According to Respondents, they disclosed the risks inherent in options trading, sent risk disclosure documents and confirmed Claimant's income of \$1 million, net worth of \$2 million, five years experience in options and investment objective of speculation in a letter to Claimant dated May 21, 1991. Moreover, in a letter dated May 14, 1991, the branch manager allegedly wrote to Claimant asking him to confirm that he was aware of the investment strategy utilized in his account, of the commissions generated as a result of the activity

and of his receipt of confirmations and monthly statements in a timely manner. Claimant allegedly executed the letter and returned it to Shearson on June 4, 1991. Respondents asserted that Claimant liquidated his account in order to avoid several hundred thousand dollars in losses. Respondents asserted the following affirmative defenses: (1) The Statement of Claim failed to state a claim upon which relief may be granted. (2) Claimant had or should have had full knowledge of all material facts concerning the investments he made, including the nature of those investments, as well as the associated risks. (3) Claimant directed and/or authorized the execution of all transactions in his account and, therefore, was estopped from bringing this action. (4) Immediately after the purchases were made, Claimant received written transactional confirmations and monthly statements advising him to contact the branch if he had any objections to his investments. He did not. Accordingly, his claims were barred by the equitable principles of waiver, estoppel and ratification. (5) Claimant's claims were barred because the alleged misrepresentations were expressions of opinion, not fact and as such were not actionable. (6) Claimant's claims were barred because the alleged misrepresentations were not material. (7) To the extent any losses or diminution in the value of Claimant's account had occurred, such losses were within the risk Claimant assumed. (8) To the extent Claimant account had diminished in value, such diminution is the result, in whole or in part, of unforeseen market fluctuations. (9) Respondents did not make any misrepresentations or omissions with respect to the investments in Claimant's account. (10) The allegations relating to punitive damages were merely conclusory and failed to set forth ultimate facts to state a claim for recovery of such damages. (11) The due process clause of the United States Constitution and applicable provisions of the New York State Constitution preclude Claimants from recovering punitive damages. (12) Claimant's claims were barred, in whole or part, by the applicable statutes of limitation. (13) Claimant's comparative fault, lack of diligence and failure to conduct his own affairs reasonably and responsibly barred any recovery of damages herein. (14) Claimant failed to mitigate his damages.

#### **RELIEF REQUESTED**

Claimant requested an award in the amount of \$536,071 in compensatory damages, punitive damages in the amount of three times the compensatory damages, \$217,068 in interest, approximately \$40,000 in costs along with attorneys' fees; for a total request of \$2,041,352.

Respondents requested that the claims asserted against them be denied in their entirety.

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

Respondents Shearson Lehman Brothers and Joseph Bergner did not file with the NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted. However, Respondents, Shearson Lehman Brothers

and Joseph Bergner orally agreed to submit to arbitration under oath, given by the arbitrators, at the beginning of the hearing on April 16, 1997.

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 Regulation, Inc. Office of Dispute Resolution.

### **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 submitted by Eric Scheffey is hereby denied in its entirety and dismissed with prejudice;
2. Other than forum fees which are specifically addressed below, the parties shall bear their own costs including attorneys' fees; and
3. Any relief not specifically granted herein is hereby denied in its entirety and dismissed with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There were seven (7) sessions x \$1,000 = \$7,000 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure ("the Code"), 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 § 10332(c) of the Code, the NASD Regulation, Inc. shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

In accordance with § 10332(c) of the Code, Eric Scheffey is liable for and shall pay to NASD Regulation, Inc. Office of Dispute Resolution \$2,500 in additional forum fees.

In accordance with § 10332(c) of the Code, Respondents Shearson Lehman Brothers and Joseph Bergner are, jointly and severally, liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution \$3,500 in forum fees.

Pursuant to § 10333 of the Code, Shearson Lehman Brothers is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution \$500 for its member surcharge.

**Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.**

Concurring Arbitrators' Signatures:

George A. Sellnau, Esquire  
George A. Sellnau, Esquire  
Public Arbitrator  
Presiding Chair

June 13, 1997  
Dated:

Irving Pozmantier  
Irving Pozmantier  
Public Arbitrator  
Panelist

June 14, 1997

Jerry Hoover, Esquire  
Jerry Hoover, Esquire  
Industry Arbitrator  
Panelist

June 19, 1997

For NASD Regulation, Inc. use only:  
Date served: June 19, 1997