

# **EXHIBIT 13**

917 F.2d 28, 1990 WL 160970 (C.A.9 (Or.))  
**(Table, Text in WESTLAW), Unpublished Disposition**  
**(Cite as: 917 F.2d 28, 1990 WL 160970 (C.A.9 (Or.)))**

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.  
 Ed PIETZ, Plaintiff-Appellee-Cross-Appellant,  
 v.

Forrest AMATO, Shearson Lehman Brothers, Inc.,  
 aka Shearson Lehman/American Express, Defendants-Appellants-Cross-Appellees.

**Nos. 89-35413, 89-35442.**

Argued and Submitted Sept. 13, 1990.  
 Decided Oct. 22, 1990.

Appeal from the United States District Court for the District of Oregon; [James A. Redden](#), District Judge, Presiding.  
 D.Or.

AFFIRMED.

Before [CANBY](#), [KOZINSKI](#) and [TROTT](#), Circuit Judges.

#### MEMORANDUM <sup>FN\*</sup>

\*1 Defendant appeals from various district court rulings after a jury verdict imposing damages for violations of the securities laws, breach of fiduciary duty and violation of the implied covenant of good faith and fair dealing. Plaintiff cross-appeals the district court's denial of prejudgment interest. We affirm.

#### I. Defendants' Appeal

##### A. Denial of JNOV

That Fordham prevailed on his motion for a directed verdict does not mean defendants were entitled to a directed verdict or a judgment notwithstanding the verdict. The trial court granted Fordham's motion because it found no evidence that plaintiff had told Fordham to monitor the bond account, no evidence that Fordham was plaintiff's fiduciary, and no evidence of Fordham's participation in securities fraud. Defendants seem to assert that because these findings contradicted plaintiff's testimony, the district court must have found plaintiff to be untruthful, and therefore found *all* of plaintiff's testimony to be false. However, the only evidence we know the district court disbelieved was plaintiff's testimony about his relationship with Fordham. The district court and the jury could still rely on the rest of plaintiff's testimony, some of which was corroborated.

##### B. Jury Instructions

1. The district court rejected defendants' jury instruction as to Fordham's agency and apparent authority because it did not reflect the defendants' theory of the case. For example, the defense relied to a great extent on Amato's testimony that the vast majority of transactions were directly approved by Pietz himself, and that Fordham cleared the others with Pietz. Thus, the very testimony on which the defense relied contradicted the notion that Fordham had independent authority to monitor and make decisions concerning Pietz's account. The district court did not abuse its discretion in rejecting the proffered instruction.

2. Nor did the district court abuse its discretion in refusing to give defendants' requested instruction on violations of stock exchange rules. Defendants' proposed instruction told the jury that violations of such rules did not give plaintiff an independent right of recovery and did not constitute a violation

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of Rule 10b-5. The district court instead instructed the jury that, in making its determination on fiduciary duty, it could consider whether defendants violated exchange rules. The district court's instruction was at least as good as, and probably better than, that proposed by defendants.

3. The district court properly rejected defendants' instruction on due diligence. Some instruction regarding plaintiff's ability to watch over his investment portfolio would no doubt have been appropriate with respect to one or more of plaintiff's claims. See *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 435 (N.D.Cal.1968) (evaluating an investor's sophistication in deciding a churning claim), *aff'd in part*, 430 F.2d 1202 (9th Cir.1970). But the proffered instruction, totally disconnected from any legal theory, was far too vague to be of any use. The district court did not abuse its discretion in refusing to give the instruction as proffered.

\*2 4. While the district court may have erred by failing to give defendants' ratification instruction, the error was harmless. Shearson's proposed instruction itself indicated that "ratification" was nearly the same as "estoppel," and did nothing to clarify any distinction between the two.

#### C. Affirmative Defense Instructions

The jury considered, and apparently rejected, defendants' affirmative defenses of estoppel, waiver and mitigation. Defendants have not established that they are entitled to judgment as a matter of law on these defenses, all of which turn on factual issues that defendants for some reason continue to debate on appeal.

#### D. Covenant of Good Faith and Fair Dealing

Although defendants concede that a covenant of good faith and fair dealing exists under Oregon law, they dispute that any remedy for breach of such a covenant applies in cases outside the insurance context. Defendants overlook *Best v. United States Na-*

*tional Bank of Oregon*, 303 Or. 557, 739 P.2d 554 (1987), in which the Supreme Court of Oregon stated: "This court has long stated ... that there is an obligation of good faith in the performance and enforcement of every contract.... [D]epositors can recover for the breach of this obligation just as they could for the breach of any other contractual obligation." 739 P.2d at 557. Having held the covenant applicable to banks, we see no reason that the Oregon Supreme Court would fail to apply it to securities dealers as well.

#### E. Breach of Fiduciary Duty

The court left it to the jury to determine whether or not defendants owed plaintiff a fiduciary duty, and if so, whether they breached it. Under the circumstances of this case, it was not clearly erroneous for the jury to find that defendants had breached such a fiduciary duty. For example, the jury could reasonably have found that defendants had churned plaintiffs' accounts, and had thus breached a fiduciary duty. See *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 326 (5th Cir.1981).

#### F. Inconsistency of Jury Verdict

We review de novo defendants' claim that the jury verdict was inconsistent with the jury's answers to the interrogatories. The jury ranked the various parties in terms of negligence. They found the plaintiff to be more than 50% negligent, and therefore correctly found against plaintiff on his negligence claim. But the jury's finding that plaintiff was 55% negligent does not preclude him from prevailing on his claims of securities laws violations, breach of fiduciary duty and breach of implied covenant of good faith and fair dealing.

## II. Plaintiff's Cross Appeal

We review for abuse of discretion the district court's decision to reject plaintiff's motion for pre-judgment interest. *Wessel v. Buhler*, 437 F.2d 279,

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284 (9th Cir.1971).

Plaintiff points to several jury instructions that appear to limit the amount of damages that the jury can award to damages incurred prior to June 30, 1986. However, these instructions only address the *harms* for which plaintiff can be compensated; they did not preclude the jury from compensating the plaintiff for lost use of money resulting from these harms. The district court refused to grant prejudgment interest because the jury “may or may not have included such an amount in the award.” ER at 10. The district court did not abuse its discretion in denying plaintiff’s motion for prejudgment interest.

**\*3 AFFIRMED.**

FN\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

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