

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

David Cherry

and

91-00024

Name of Respondent, CounterClaimant and
Third Party Claimant

PaineWebber, Inc.

Name of Third Party Respondent

Jeff Hayes

REPRESENTATION OF PARTIES

Claimant David Cherry was represented by Stuart S. Goldberg, Esq., Austin, Texas.

Respondent PaineWebber, Inc. was represented by Corbet Bryant, Esq. and Richard A. Rohan, Esq. of Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas.

Third Party Respondent Jeff Hayes was represented by Walter T. Weathers, Esq., Houston, Texas.

CASE INFORMATION

The Statement of Claim was filed on or about January 3, 1991. Additional Claim for Abuse of Process dated November 27, 1991. Answer to First Counterclaim was dated November 6, 1991. Amended Statement of Claim dated September 8, 1991. Claimant's Submission Agreement signed on December 28, 1990 by David Cherry. Motion to Dismiss was filed on or about January 24, 1992.

Statement of Answer and Third Party Claim filed by Respondent, PaineWebber, Inc. was dated April 3, 1991. Answer to Amended Statement of Claim, CounterClaim and Third Party Claim was dated October 10, 1991. Answer to CounterClaim of Jeff Hayes and Motion to Sever was dated December 26, 1991. Answer to Supplemental Pleading was dated December 26, 1991. Respondent PaineWebber,

Inc.'s Submission Agreement signed on January 24, 1991 by Joel E. Davidson.

Answer, Counterclaim and Third Party Claim filed by Jeffrey Hayes on or about May 24, 1991. Amended Answer and Counterclaim was filed on or about November 27, 1991. Response to Motion to Sever was filed on or about January 16, 1992. Jeff Hayes' Submission Agreement signed on May 23, 1991.

HEARING INFORMATION

A pre-hearing conference with all parties and arbitrators present was held on July 27, 1992 in Dallas, Texas for a total of two (2) sessions.

The hearing was held on Monday, October 12, 1992 for two (2) sessions, Tuesday, October 13, 1992 for two (2) sessions, Wednesday, October 14, 1992 for two (2) sessions, Thursday, October 15, 1992 for two (2) sessions, Friday, October 16, 1992 for two (2) sessions, Monday, October 19, 1992 for two (2) sessions, Tuesday, October 20, 1992 for two (2) sessions, Wednesday, October 21, 1992 for two (2) sessions, Thursday, October 22, 1992 for two (2) sessions, Monday, October 26, 1992 for two (2) sessions, Tuesday, October 27, 1992 for two (2) sessions, Wednesday, October 28, 1992 for two (2) sessions, Thursday, October 29, 1992 for two (2) sessions, Friday, October 30, 1992 for two (2) sessions, Tuesday, December 8, 1992 for two (2) sessions, Wednesday, December 9, 1992 for two (2) sessions, Thursday, December 10, 1992 for two (2) sessions, and Friday, December 11, 1992 for two (2) sessions, in Dallas, Texas for a total of thirty eight (38) sessions including the prehearing sessions.

CASE SUMMARY

Claimant alleged that Respondent PaineWebber, Inc. was guilty of misconduct. Claimant specifically alleged that PaineWebber, Inc.'s risk arbitrage department grossly understated the degree of risk associated with the purchase of UAL stock to the extent that what might otherwise be considered "mere opinion" and "forecasts" became material misstatements of fact; PaineWebber's Risk Arbitrage Department was issuing buy and hold recommendations to customer's including the Claimant, while the managers of the PaineWebber proprietary account and the accounts of senior management personnel were selling their positions in UAL; and PaineWebber failed to supervise.

Respondent PaineWebber, Inc categorically denied any liability to the Claimant and stated that the Claimant made his own decisions, understood the risks involved in investing in takeover stocks. PaineWebber specifically stated that: the Claimant had

an established 20,000 share block of UAL stock acquired prior to the opening of his account at PaineWebber; that Claimant was a very high net worth individual experienced in trading takeover stocks; that Claimant made each and every decision to purchase shares of UAL; that Claimant purchased 22,000 of his 57,000 UAL shares against the recommendation and advice of PaineWebber; and that Claimant continued to hold his shares of UAL for a ten (10) month period without voicing any complaint and without mitigating his damages. PaineWebber further stated that Claimant is simply a disgruntled investor who cannot admit that his own decisions led to the losses complained of. PaineWebber specifically denied that any misstatements were made to the Claimant. Respondent asserted affirmative defenses including but not limited to the following: the claims asserted herein by the Claimant are barred by the applicable statutes of limitation; there is no private right of action under NASD suitability rules; Claimant did not rely upon advice he may have received from PaineWebber; Claimant is a knowledgeable and sophisticated investor who knew and understood the risks involved in trading UAL stock; the claims are barred by the doctrines of estoppel, waiver, ratification and assumption of the risk; the claims asserted under state law are preempted by federal law and are not covered by the cited Texas statutes; and failure to mitigate.

In its Counterclaim and Third Party Claim, PaineWebber alleged based upon information and belief that the Claimant and Third Party Respondent Jeff Hayes had an agreement whereby Hayes would give favorable testimony on the Claimant's behalf and the Claimant will invest any award obtained herein with Hayes and give Hayes commission dollars and/or other remuneration in addition to paying the attorney's fees of Hayes. PaineWebber further alleged that certain sums were due and payable pursuant to the terms of two promissory notes executed by Jeffrey D. Hayes.

Third Party Respondent Jeffrey D. Hayes stated that both the Claimant, David Cherry and Respondent PaineWebber, Inc. agree that the handling of the Claimant's account by Hayes was proper. Hayes then alleged that his departure from PaineWebber was caused by PaineWebber's failure to obtain the proper licensing necessary to transact business in Canada. Hayes asserted a Counterclaim against PaineWebber for constructive discharge, infliction of emotional distress, criminal involvement and declaratory relief on promissory notes. The affirmative defenses of unclean hands, waiver, estoppel, the claims are barred by the applicable statutes of limitation, there is no private cause of action under N.A.S.D. or N.Y.S.E. rules, and PaineWebber's claims are barred by virtue of its own fraud and reckless disregard for the interests of its clients and brokers in addition to other affirmative defenses.

RELIEF REQUESTED

Claimant requested an award against Respondent PaineWebber, Inc. in the amount of \$10,166,939.00 as actual and compensatory damages; treble his out of pocket and margin interest portions of his actual compensatory damages, costs and attorney's fees based on the Texas Deceptive Trade Practices Act; punitive damages; costs; expenses; disbursements, including attorney's fees; prejudgment interest; and for such other relief as the arbitration panel deems just and proper.

Respondent, CounterClaimant and Third Party Claimant PaineWebber, Inc. requested that all claims be dismissed with prejudice, and that costs be assessed against Claimant, or alternatively, if any award is granted to Claimant, that it be awarded very substantial contribution of not less than \$1,050,000.00 on its CounterClaim and Second Third Party Claim against Jeff Hayes.

Third Party Respondent Jeffrey D. Hayes requested full compensation for his losses in UAL stock transactions and punitive damages in an amount not less than \$1,000,000.00; full compensation for his losses pertaining to PaineWebber's illegal Canadian activities, plus additional punitive damages in an amount not less than \$1,000,000.00; actual and punitive damages for mental anguish over being constructively terminated and the losses in Ual stock; for actual and punitive damages pertaining to PaineWebber knowingly subjecting him to criminal prosecution on the Province of Ontario, Canada; and for a declaration that the amount due on the two promissory notes are no longer due and payable. Jeffrey Hayes also requested attorney's fees and costs and that the claim for contribution be denied.

OTHER ISSUES CONSIDERED & DECIDED

The panel after hearing argument from the parties denied the Motion to Sever filed by PaineWebber.

Prior to the closing of the record in this matter Respondent, CounterClaimant and Third Party Claimant PaineWebber, Inc. and Jeffrey D. Hayes advised the arbitrators that they had settled all matters in dispute between them.

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 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 David Cherry is awarded the sum of \$2,732,500.00 (two million seven hundred thirty two thousand five hundred dollars).
2. Interest at the rate of 10% per annum is awarded on the above stated sum from and inclusive of the fifteenth day after service of this award to and inclusive of the date this award is paid in full.
3. The claims asserted by PaineWebber, Inc. shall be and hereby are dismissed in their entirety.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$300.00 and shall retain as a deposit of the additional honorarium agreed to between the Claimant David Cherry and Respondent PaineWebber, Inc. the hearing session deposit in the amount of \$30,900.00 previously deposited with the NASD by the Claimant and shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain as forum fees the \$30,550.00 previously deposited with the NASD by the Respondent PaineWebber, Inc. and shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain the hearing session deposit in the amount of \$650.00 previously deposited with the NASD by the Third Party Respondent/ Cross Claimant Jeff Hayes.

Claimant David Cherry and Respondent PaineWebber, Inc. agreed to the payment of additional honorarium to the undersigned arbitration panel. The parties agreed to pay each arbitrator an additional \$800.00 per hearing day, \$100.00 per hour study time up to twenty hours, and an additional \$3,000.00 from each party in the event that the panel spends more than twenty hours for study time. Each arbitrator has spent in excess of twenty hours of study time in this matter. Pursuant to that agreement, David Cherry has a credit of \$3,100.00 which will be retained and applied to the forum fees assessed in this matter and PaineWebber, Inc. has a credit of \$4,750.00 which will be retained and assessed as forum fees. Respondent PaineWebber, Inc. is assessed all forum fees in this matter and shall pay to the NASD the balance due of \$ 50,500.00 and shall reimburse the Claimant David Cherry the sum of \$3,100.00.

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Forum fees are calculated at the rate of \$1,500.00 per hearing session and \$300.00 for each prehearing conference, if any. There was a total of 38 hearing sessions for a total of \$57,000.00 in forum fees.

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

Dated:

February 1, 1993

s/ Leonard E. Hoffman, Jr., Esq.
Leonard E. Hoffman, Jr., Esq.
Presiding Chair
Public Arbitrator

February 19, 1993

s/ Carroll V. Galbreath
Carroll V. Galbreath
Public Arbitrator

March 1, 1993

s/ Earl A. Shields, Jr.
Earl A. Shields, Jr.
Industry Arbitrator