

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

David L. and Cynthia R. Foss

91-01155

Name of Respondent(s)

Rotan Mosle Inc.

REPRESENTATION

For Claimant: David L. Foss and Cynthia R. Foss were represented by James R. Hamnett, Esq., J. R. Hamnett & Associates, Austin, Texas.

For Respondent: Rotan Mosle, Inc. was represented by Edward Warner, Esq., PaineWebber Incorporated, Weehawken, New Jersey.

CASE INFORMATION

Statement of Claim filed: April 11, 1991

Claimant's Submission Agreement signed on: April 2, 1991

Claimant's 25(b)(2)(iii) Motion filed: October 11, 1991

Statement of Answer filed by Respondent Rotan Mosle, Inc. on: October 7, 1991

Respondent's Submission Agreement signed on: October 2, 1991 by Romaine L. Gardner, Esq., Corporate Vice President and Associate General Counsel, PaineWebber Incorporated.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: April 1, 1992 for one (1) session

Hearing Location: Houston, Texas

CASE SUMMARY

Claimants David L. Foss and Cynthia R. Foss ("Foss") alleged that a broker for Respondent Rotan Mosle, Inc. ("Rotan Mosle"), a subsidiary of PaineWebber Incorporated, engaged in unauthorized trades in the account of Cynthia R. Foss. As alleged in the Statement of Claim, Cynthia Foss executed two Client Agreements with PaineWebber Incorporated on January 28, 1985 and February 12, 1986, respectively. Foss claimed that when executed, the documents were modified by the addition, in Cynthia Foss' handwriting, of a note stating "David or Cynthia Foss to be notified before any trade ordered by R. Sadoff is made." Ronald Sadoff was the investment advisor with whom Foss had entered into an Investment Counseling Agreement in February of 1985 and had the right to buy or sell in the account without notice to the Foss'. In addition, the Foss' and Sadoff executed in January of 1985 a Rotan Mosle document called General Trading Authorization For Securities And/Or Options Accounts in which the following notation was added: "David Foss or Cynthia Foss to be notified before any transaction is made by Rotan Mosle O.K. per J. Qualls."

The allegations continued with the Foss' stating that on Monday, October 20, 1987, Ronald Sadoff, without contacting the Claimants, called and instructed the broker to liquidate certain stocks. The broker liquidated the stocks without informing Foss, did not accept any of Mr. Foss' phone calls and earned commissions in excess of \$1,200.00. Mr. Foss contacted the broker on Tuesday, October 21, 1987 and expressed his outrage at not being notified of the trades. The broker informed Foss that his obligation was to inform the clients after the trade as a matter of courtesy, which upset Mr. Foss and caused him to demand a meeting in person. The meeting was held on Wednesday, October 22, 1987, at which time Foss demanded to see the agreements to prove the obligation to inform Foss prior to the trades. The broker agreed to locate the documents as expeditiously as possible. In addition, the broker agreed that the trades had not been executed to cover a margin call. No remedy was offered or taken. For a period of two years, no documents were produced.

Respondent Rotan Mosle denied the material allegations of the Statement of Claim, alleging that:

1. The microfiche copy of the Client's Agreement dated January 28, 1985 in the possession of PaineWebber contains no handwriting modifying the contract;
2. The broker who serviced the account denied any knowledge of the contract modification and had no authority to alter the agreements in the manner alleged in the Statement of Claim;
3. Foss had given Sadoff a Power of Attorney over the account and the existence of such an agreement casts doubt on their claim that they wanted to control the account;
4. The first written complaint was sent on October 7, 1989, nearly two years after the trading activity complained of occurred and no attempt was made to repurchase the stocks sold in order to minimize damages; and

5. The damages were caused by the investment advisor who ordered the trades or by the extraordinary events of October 19, 1987.

Rotan Mosle asserted as affirmative defenses that the Statement of Claim fails to state a claim upon which relief can be granted and that the Claimants were estopped from pursuing the claim because they gave Sadoff power of attorney and any damages incurred were the result of orders entered into by the trading advisor.

RELIEF REQUESTED

Claimants requested entry of an award against Rotan Mosle for actual damages in excess of \$32,000.00 and treble damages under the Texas Deceptive Trade Practices-Consumer Protection Act.

Respondent Rotan Mosle requested that the Statement of Claim be dismissed and denied in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

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 originals remain on file with the NASD.

At hearing, argument was heard from the parties regarding the Claimant's Motion to Bar the Respondent from presenting any matter, arguments or defenses at hearing pursuant to Section 25(b)(2)(iii) of the Code of Arbitration Procedure. In addition, Claimants requested that if the Motion was denied, that they be awarded attorneys' fees incurred by the late filing. The panel adjourned for an executive session and determined that the Motion to Bar would be denied and that the Motion for Fees would be taken under advisement and heard further at the close of hearing. Upon review, the panel determined that the Motion for Fees would be denied.

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, the panel determining that there was no unauthorized trading;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: One (1) session x \$750.00 = \$750.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and refund \$375.00 of the \$750.00 of the initial hearing session deposit previously deposited by the Claimants, David L. and Cynthia R. Foss. Respondent Rotan Mosle, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$375.00.

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

CONCURREING ARBITRATORS' SIGNATURES

Dated:

Bentley Nettles
Bentley Nettles, Esq.
Public Arbitrator
Chairperson

May 7, 1992

Andrew Garber
Andrew Garber
Public Arbitrator

May 5, 1992

Timothy W. Kelley
Timothy W. Kelley
Industry Arbitrator

May 18, 1992

Date of Service:

May 28, 1992

N.A.S.D. DISCIPLINARY REFERRAL

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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91-01155

Name of Respondent(s)

Rotan Mosle, Inc.

During the course of the hearing in the above referenced matter, the undersigned arbitrators heard testimony and evidence which called into question the adequacy of record keeping policies and procedures of the Corpus Christi, Texas and Houston, Texas offices of Rotan Mosle, Inc. and PaineWebber Incorporated. We feel that the District Office of the NASD should look into the matter to determine whether the record keeping procedures in place in Rotan Mosle, Inc. and PaineWebber Incorporated are sufficient.

CONCERNING ARBITRATORS' SIGNATURES

Dated:

Bentley Nettles
Bentley Nettles, Esq.
Public Arbitrator
Chairperson

May 7, 1992

Andrew Garber
Andrew Garber
Public Arbitrator

May 5, 1992

Timothy W. Kelley
Timothy W. Kelley
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May 18, 1992