

## N.A.S.D. AWARD

## NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration BetweenName of Claimant

Patricia M. Cosimano, as Trustee of the Elchison  
and Associates Pension Trust

91-04015

Name of Respondents

Prudential Securities Incorporated;  
D.H. Blair & Company;  
Paragon Capital Corporation;  
Global America Inc.;  
Michael J. Markowski;  
Joseph DiCandio;  
Donna Mills;  
Anthony Bruno;  
Joseph Conway;  
John Steinmetz;  
Thomas Renna;  
Gary S. Boccio

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REPRESENTATION

For Claimant: Patricia M. Cosimano, as Trustee of the Elchison and Associates Pension Trust  
appeared pro se.

For Respondents: Prudential Securities Incorporated, D.H. Blair & Company, Donna Mills and  
Anthony Bruno were represented by James O. Browning, Esq. and Charles R. Peifer, Esq. of  
Browning & Peifer, P.A., located in Albuquerque, New Mexico. In addition, Respondent  
Prudential Securities Incorporated was represented by Lisa J. Rosenbaum, Esq. of Prudential  
Securities Incorporated, New York, New York.

Paragon Capital Corporation was represented by David S. Smith, Esq. of Smith Campbell &

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Paduano, located in New York, New York.

Michael Markowski appeared pro se.

Joseph DiCandio was represented by Leslie Case, Esq. of Gersten, Savage, Kaplowitz & Curtin, located in New York, New York.

Joseph Conway appeared pro se.

John Steinmetz was represented by Seymour H. Bucholz, Esq. of New York, New York, but appeared pro se at hearing.

Thomas Renna appeared pro se.

Gary Boccio appeared pro se.

#### CASE INFORMATION

Statement of Claim filed: December 18, 1993.

Claimant's Submission Agreement signed on: December 12, 1991 by Patricia M. Cosimano, a/k/a Patricia M.C. Elchison, Trustee of the Elchison and Associates Inc. Pension Trust.

Request to Amend to Include Respondent Gary Boccio filed by Claimant on: October 21, 1992.

Statement of Answer, Request for Dismissal and Cross-Claims filed by Respondent Prudential Securities Incorporated, Donna Mills and Anthony Bruno on: April 24, 1992.

Respondent Prudential Securities Incorporated's Submission Agreement signed on: April 24, 1992 by Donald R. Levine, First Vice President, Associate General Counsel, Prudential Securities Incorporated.

Respondent Donna Mill's Submission Agreement signed: May 6, 1992.

Respondent Anthony Bruno's Submission Agreement signed on: May 6, 1992.

Memorandum of Law in Support of Motion to Dismiss filed by Respondent D.H. Blair & Co., Inc. on: April 23, 1992.

Respondent D.H. Blair & Co., Inc.'s Submission Agreement signed on: April 20, 1992 by Michael Kley, Senior Vice President, D.H. Blair & Co., Inc.

Statement of Answer and Motion for Dismissal filed by Respondent Paragon Capital Corporation on: April 9, 1992.

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Respondent Paragon Capital Corporation's Submission Agreement signed on: April 29, 1992  
by Danny J. Levine, President, Paragon Capital Corporation.

Respondent Paragon Capital Corporation's Statement of Answer to the Cross-Claims asserted  
by Respondents Prudential Securities Incorporated, Anthony Bruno and Donna Mills filed: July  
7, 1992.

Statement of Answer filed by Respondent Michael J. Markowski on: December 2, 1992.  
Respondent Michael J. Markowski's Submission Agreement signed on: December 1, 1992.

Motion for Dismissal, Motion to Strike Punitive Damage Claim and Motion to Strike Redundant  
and Surplusage of Claim filed by Respondent Michael J. Markowski on: December 9, 1992.

Response to Motion for Dismissal, Motion to Strike Punitive Damage Claim and Motion to  
Strike Redundant and Surplusage of Claim filed by Claimant on: January 11, 1993.

Statement of Answer filed by Respondent Joseph DiCandio on: April 9, 1992.  
Respondent Joseph DiCandio's Submission Agreement signed on: April 7, 1992.  
Amended Statement of Answer and Request to Dismiss filed by Respondent Joseph DiCandio  
on: October 9, 1992

Statement of Answer of Respondent Thomas Renna filed on: April 15, 1992.  
Respondent Thomas Renna's Submission Agreement signed on: September 18, 1992.  
Amended Statement of Answer filed by Respondent Thomas Renna on: September 21, 1992.

Notice of Settlement received from Respondents Prudential Securities Incorporated, D.H. Blair  
& Co., Donna Mills and Anthony Bruno on: January 8, 1993.

Statement of Answer and Request for Dismissal filed by Respondent Joseph Conway on: April  
28, 1992.

Statement of Answer filed by Respondent John F. Steinmetz on: April 21, 1992.  
Respondent John F. Steinmetz's Submission Agreement signed on: April 23, 1992.

Statement of Answer and Motion to Dismiss filed by Respondent Gary S. Boccia on: December  
16, 1992.

Motion to File Brief or Memorandum of Law filed by Respondent Michael J. Markowski on:  
January 14, 1993.

Motion to Reopen Record filed by Respondent John F. Steinmetz on: January 19, 1993.

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Claimant's Response to the Motion to File Brief or Memorandum of Law and the Motion to Reopen Evidence filed on: February 4, 1993.

### HEARING INFORMATION

Pre-Hearing Conference: None Held.  
Hearing Dates/Sessions: January 11, 1993 for Two (2) sessions:  
January 12, 1993 for Two (2) sessions.  
  
Hearing Location: Albuquerque, New Mexico.

### CASE SUMMARY

Claimant Patricia M. Cosimano, as Trustee of the Elchison and Associates Pension Trust ("Cosimano"), alleged that the Respondents violated their fiduciary responsibility to preserve the assets in the account by violating a Temporary Domestic and/or the Qualified Domestic Relations Order filed in New Mexico which ordered transfer of the pension trust to her. In addition, she alleged that the Respondents failed to liquidate the account as she requested by letter on September 19, 1993.

Respondents Prudential Securities Incorporated ("Prudential"), Donna Mills ("Mills") and Anthony Bruno ("Bruno") denied the material allegations of the Statement of Claim, alleging that:

1. The court orders did not direct Prudential, Mills or Bruno to do anything and they were not required to act upon such orders;
2. Prudential, Miller and Bruno acted promptly upon Cosimano's request to change the address on the Account and transfer to her the remaining securities in the Account;
3. Prudential's duties as the clearing firm for the account were strictly limited to the post-execution tasks of processing, clearing and reporting those trades placed in the account by the Broker, and D. H. Blair and Global had exclusive control over the placement of orders and instructions with respect to the account; and
4. Prudential did not at any time have any fiduciary responsibility to Cosimano.

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In addition, Prudential, Mills and Bruno asserted as affirmative defenses that:

1. The Statement of Claim failed to state a claim against Respondents upon which relief can be granted;
2. Prudential complied with the controlling agreements of the parties, applicable laws and regulations and industry practices and standards;
3. Any damages sustained by Cosimano were caused, in whole or in part, by the intentional or negligent acts of persons, other than Prudential, Bruno or Mills over whom the Prudential respondents had no control and for whom they had no responsibility; and
4. Cosimano's claims are barred by the principles of waiver and estoppel.

Prudential asserted cross-claims against Respondents D.H. Blair & Co., Inc. and Global America Inc. for contractual indemnity pursuant to the express terms of the Clearing Agreement. Furthermore, Prudential, Bruno and Mills brought cross-claims against all Respondents designated by Cosimano for indemnity, or in the alternative, contribution, by operation of law.

Respondent D. H. Blair & Co., Inc. ("D.H. Blair") moved for dismissal of the Claim, alleging that D.H. Blair is not bound by the terms of the Temporary Domestic Order because it only applies to the parties to the divorce and an order issued by a New Mexico court cannot be enforced in New York.

Respondent Paragon Capital Corporation ("Paragon") denied any basis for liability to Cosimano, alleging that:

1. Cosimano was never a customer of Paragon and never had possession, custody or control over any securities belonging to Cosimano, her former husband, their company or its pension trust;
2. Paragon never had any affiliation with D. H. Blair or Global America, never acquired any interest in Global America, and only briefly employed two individuals, Thomas Renna and Michael Markowski, who previously worked at Global America;
3. The employment of two former employees of Global America is no basis for dragging Paragon into this matter and it possesses no knowledge concerning the allegations of the claim.

Based upon the above allegations, Paragon moved for dismissal of the claim. In regard to

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Prudential, Bruno and Mills' cross-claim. Paragon denied all liability to the Cross-claimants.

Respondent Michael J. Markowski ("Markowski") denied any liability to Cosimano, alleging that:

1. He had no knowledge, express or implied, of Cosimano's dealings with agents of Global America or D.H. Blair;
2. As a corporate officer of Global America, he could not be held responsible for the actions of agents in which he did not participate or have direct supervisory functions;
3. The section of the Claim addressing Markowski's liability or potential liability occurred when he was under the employ of Paragon and Paragon was dismissed;
4. Cosimano's ability to liquidate the retirement plan portfolio was questionable under the New Mexico State Law and under the laws of division of community property; and
5. Cosimano failed to mitigate damages by not soliciting the State Court which retained jurisdiction of the property settlement to enter a court order directing liquidation of the portfolio.

Respondent Joseph DiCandio ("DiCandio") denied liability to Cosimano, alleging that he worked for Respondent Global America only for a few months in 1989, more than one year prior to the wrongful conduct complained of in her claim. In addition, he alleged that he acted properly with respect to Cosimano during his short tenure with Global.

Respondent Joseph Conway ("Conway") denied the material allegations of the Statement of Claim, alleging that:

1. He was employed by Global America Inc. as Assistant Compliance Officer from November 1989 until the company ceased operations due to capital deficiencies on January 18, 1991;
2. He did not recall any conversation with Cosimano, nor does he recall receiving any correspondence, but any such action should have been recorded in the appropriate compliance file in the possession of Markowski;
3. As for Cosimano's later correspondence, he was not employed by Global at that time, did not receive the letter and had no knowledge of its existence.

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In addition, Conway asserted that the Statement of Claim did not assert a claim against him upon which relief could be granted.

Respondent John F. Steinmetz ("Steinmetz") denied the material allegation of the Statement of Claim, alleging that:

1. In 1985, when Steinmetz was an employee of D.H. Blair, Bruce Elchison opened a pension account and personal account. Steinmetz spoke to Elchison about three to five times a year, and the account was not traded;
2. In 1988, he received a call from Cosimano, who he did not know. She informed Steinmetz that she was the true owner of the account, whereupon Steinmetz advised her to send the supporting documentation to D.H. Blair's Compliance/Legal Department and he could not take any orders or instructions over the phone;
3. Steinmetz contacted Elchison, who acknowledged that Cosimano was his ex-wife and should be ignored;
4. In May of 1989, Steinmetz left D.H. Blair and joined Global America. Prudential, as clearing broker, informed the clients that the accounts would transfer unless the clients objected within 30 days. The Elchison accounts were transferred according to this procedure;
5. In Mid 1989, Steinmetz received a second call from Cosimano and once again, he asked her to send the paperwork to the legal department. He never heard from her again;
6. In January/February of 1990, the account was transferred to other brokers and Steinmetz never received the Qualified Domestic Relations Order. Steinmetz never received a sell order from Cosimano, he was no longer the broker of record and on January 18 1991, Global America ceased doing business.

Respondent Thomas Renna ("Renna") denied any responsibility for the allegations made in the Statement of Claim, alleging that:

1. He was employed as a clerk/assistant at Global America Incorporated from May, 1990 until the firm ceased operations in February of 1991;
2. As a clerk/assistant to Michael Markowski, Renna performed menial jobs, did not communicate directly with customers and had no knowledge of customer accounts, their handling or processing;

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3. He became licensed as a broker in January of 1991 and moved to Paragon upon Global America's demise and attempted to assist her in gaining control of her account after returning her call to Paragon;

4. Renna never serviced the account, had no control over its management, and the account was never a Paragon account.

Respondent Gary S. Boccio ("Boccio") denied any liability and alleged that he never spoke to Cosimano and had no knowledge of her account, but was only added after another Respondent made a reference to his involvement. In addition, Boccio asserted that the Statement of Claim does not state a claim against him for which relief can be granted under any statute, regulation or theory of law.

#### RELIEF REQUESTED

Claimant requested entry of an award against Respondents for \$27,351.50 which she alleged represented the value of the account when it should have been transferred to her; interest at the rate of 18% per year from June, 1990 until the sum is paid; costs related to the arbitration; and punitive damages in the sum of \$50,000.00 for compensation for costs, aggravation and loss of value in the account since January, 1988.

Respondents Prudential, Mills and Bruno requested that an award be rendered dismissing the Statement of Claim in its entirety against these Respondents; that in the event that Prudential is found liable, D.H. Blair and Global are found contractually bound to indemnify Prudential for any liability; that in the event Prudential, Mills or Bruno are found liable, that Blair, Global and the other Respondents are jointly and severally bound by operation of law to indemnify or provide contribution to these Respondents; and for such other relief as is just and proper.

Respondent D.H. Blair & Co., Inc. requested dismissal of Claimant's Statement of Claim and that the Panel award D. H. Blair all costs, including attorneys' fees, for having to defend this action.

Respondent Paragon requested that the Claim be dismissed summarily as against Paragon.

Respondent Markowski requested entry of a summary judgment and/or dismissal of this cause in his favor.

Respondent DiCandio requested that the Statement of Claim be dismissed as to him.

Respondent Conway requested that the Statement of Claim, insofar as it purports to assert a



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claim against him, be dismissed with prejudice.

Respondent Steinmetz requested that the Claimant's action, as it pertained to him, be dismissed with prejudice.

Respondent Renna requested that the matter be dismissed.

Respondent Boccio requested that the Statement of Claim, as it refers to him, be dismissed with prejudice.

#### OTHER ISSUES CONSIDERED & DECIDED

Respondent Global America Inc. did not file an Answer or an executed submission agreement. Upon review of the file, it is determined that Global America Inc. was not properly served with the Statement of Claim or Notice of the Hearing, and therefore, Respondent Global America Inc. is hereby dismissed without prejudice.

Respondents Conway and Boccio did not file properly executed submission agreements, but filed a Statement of Answer and appeared telephonically at hearing. In addition, Conway and Boccio are associated persons within the meaning of the NASD Code of Arbitration Procedure ("Code"), and are required to submit to arbitration pursuant to Section 12 of the Code.

On September 23, 1992, Respondent Prudential Securities Incorporated withdrew its cross-claim against Respondent D.H. Blair & Co., Inc. by stipulation executed by the parties representatives.

On November 11, 1992, the panel resolved several outstanding Motions which had been forwarded to them with opposing parties' Responses. Based upon review, the Panel determined that:

1. Claimant's Motion to Amend to Join Gary Boccio was granted, without prejudice to Boccio's right to seek dismissal or other relief by an appropriate motion filed on or before November 30, 1992;
2. Respondent Steinmetz's Motion to Dismiss was denied;
3. Respondent Conway's Motion to Dismiss was denied;
4. Respondent D.H. Blair's Motion to Dismiss was denied;
5. Respondents Prudential, Bruno and Mills Request for Dismissal was denied;

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6. Respondent Paragon's Motion to Dismiss was granted:

7. Respondent DiCandio's Request for Leave to Amend was granted. The panel deferred ruling on DiCandio's Request to Dismiss pending further response from Cosimano, and took the Motion under advisement.

On January 8, 1993, Respondents Prudential Securities Incorporated, Donna Mills, Anthony Bruno and D.H. Blair & Co., Inc. acknowledged settlement of issues between the Claimant and themselves. Therefore, no further action was taken regarding these parties.

On January 11, 1993, Respondents Prudential, Mills and Bruno withdrew their cross-claims against all other Respondents.

At hearing on January 11, 1993, Claimant filed a Motion to Add an Additional Party. The panel determined that this Motion would be denied.

Respondent DiCandio's Motion to Dismiss which the panel took under advisement is hereby denied in its entirety.

On February 4, 1993, Respondent Markowski's Motion to File a Brief or Memorandum of Law and Respondent Steinmetz's Motion to Reopen the Record, as well as all Responses, were forwarded to the Panel for determination. Upon review, the Panel determined that the Motions would be denied and that the Record would be closed.

Upon review of Respondent Markowski's Motion for Dismissal, Motion to Strike Punitive Damage Claim and Motion to Strike Redundant and Surplusage of Claim and all responses thereto, the panel determined that the Motions would be denied.

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.

#### AWARD

After considering the pleading, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Michael J. Markowski is liable for and shall pay to the Claimant Patricia M. Cosimano, as Trustee of the Elchicon and Associates Pension Trust,

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the sum of \$350.00;

2. In addition, Respondent Michael J. Markowski is liable for and shall pay to Claimant Patricia M. Cosimano, as Trustee of the Elchison and Associates Pension Trust, the sum of \$150.00 as reimbursement of the non-refundable claim filing fee:

3. The claims asserted against Respondents Joseph DiCandio, Joseph Conway, John Steinmetz, Thomas Renna and Gary Boccio are hereby dismissed with prejudice and denied in their entirety;

4. The claim for punitive damages is hereby dismissed and denied in its entirety;

5. Pursuant to the Panel's ruling of November 11, 1992, Respondent Paragon Capital Corporation's Motion to Dismiss is hereby granted, and Respondent Paragon Capital Corporation is dismissed with prejudice;

6. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

#### OTHER COSTS

Any and all telephone conference costs incurred by the NASD in connection with the hearing held in Albuquerque, New Mexico on January 11 and 12, 1993 shall be assessed against the following individuals in the following percentages:

Respondent Joseph Conway	40%
Respondent Gary Boccio	40%
Respondent Thomas Renna	10%
Respondent Joseph DiCandio	10%

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Four (4) hearing sessions x \$500.00 per hearing session = \$2,000.00.

The National Association of Securities Dealers, Inc. shall retain the \$150.00 claim filing fee and refund the \$500.00 hearing session deposit previously deposited by the Claimant, Patricia M.

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Cosimano, as Trustee of the Elchison and Associates Pension Trust. Respondent Michael J. Markowski is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

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

Concurring Arbitrators' Signatures

Name:

Date:

Clinton W. Marrs  
Clinton W. Marrs, Esq.  
Public Arbitrator  
Chairperson

MAY 12, 1993

Douglas A. Barr  
Douglas A. Barr, Esq.  
Public Arbitrator

Bernard E. Brummell  
Bernard E. Brummell  
Industry Arbitrator

Date of Service on Parties: 5-19-93

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Cosimano, as Trustee of the Elchison and Associates Pension Trust. Respondent Michael J. Markowski is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

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

Concurring Arbitrators' Signatures

Name:

Date:

Clinton W. Marrs, Esq.  
Public Arbitrator  
Chairperson

  
Douglas A. Barr, Esq.  
Public Arbitrator

Bernard E. Brummell  
Industry Arbitrator

Date of Service on Parties:

5-19-93

5/17/93

Cosimano, as Trustee of the Elchison and Associates Pension Trust. Respondent Michael J. Markowski is liable for and shall pay to the NASD forum fees in the sum of \$2,000.00.

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

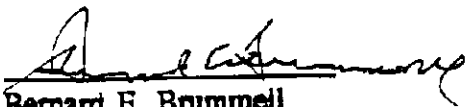
Concurring Arbitrators' Signatures

Name:

Date:

\_\_\_\_\_  
Clinton W. Marrs. Esq.  
Public Arbitrator  
Chairperson

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Douglas A. Barr. Esq.  
Public Arbitrator

  
Bernard E. Brummell  
Industry Arbitrator

\_\_\_\_\_  
5/13/93

Date of Service on Parties:

5-19-93