

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Juan Rodriguez Ochoa;  
Amelia Gracia de Rodriguez;  
Juan Rodriguez, Jr.

92-02084

Name of Respondents

PaineWebber Incorporated;  
Michael A. Chmiel

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**REPRESENTATION**

For Claimants: Juan Rodriguez Ochoa, Amelia Gracia de Rodriguez and Juan Rodriguez, Jr. were represented by Thomas G. Bousquet, Esq. and Barbara Parsons, Esq. of Bousquet & Parsons, located in Houston, Texas.

For Respondents: PaineWebber Incorporated and Michael A. Chmiel were represented by Patricia E. Cowart, Esq. of PaineWebber Incorporated, Miami, Florida.

**CASE INFORMATION**

Statement of Claim filed: June 22, 1992.

Claimants' Submission Agreement signed on: July 30, 1992.

Statement of Answer filed by Respondents PaineWebber Incorporated and Michael A. Chmiel on: September 25, 1992.

Respondent PaineWebber Incorporated's Submission Agreement signed on: October 13, 1992.

Respondent Michael A. Chmiel's Submission Agreement signed on: August 18, 1992.

### **HEARING INFORMATION**

Pre-Hearing Conference: January 8, 1993 for One (1) session before One arbitrator.  
Hearing Dates/Sessions: June 22, 1993 for Two (2) sessions;  
June 23, 1993 for Two (2) sessions.  
  
Hearing Location: Houston, Texas.

### **CASE SUMMARY**

Claimants Juan Rodriguez Ochoa, Amelia Gracia de Rodriguez and Juan Rodriguez, Jr. ("Rodríguezes") alleged that Respondent Michael A. Chmiel ("Chmiel"), while employed by or acting as an agent for Respondent PaineWebber Incorporated ("PaineWebber"), churned their account and misrepresented Respondents' services. The Rodríguezes specifically alleged that:

1. On or about September 2, 1988, the Rodríguezes entered into a written customer agreement with PaineWebber. Chmiel began employment with PaineWebber at that time and transferred Claimants' accounts to PaineWebber;
2. In 1988 and 1989, Respondents began trading in high risk investments without Claimants' knowledge or consent. In addition, Respondents' began churning Claimants' account. The Rodríguezes trusted and relied on the Respondents to properly handle their account because they are citizens of Mexico and unfamiliar with stock trading practices in the United States;
3. In the middle of 1989, Claimants noticed the value of their account decreasing in a Bull Market, but were assured that everything was fine when they attempted to talk to Respondents. When Claimants requested that the Respondents minimize or discontinue high risk investments, the Respondents advised "trust me"; and
4. As the value of the account continued to decrease in early 1991, the Claimants attempted to close their account, but Respondents insisted that they wait with more promises and representations that the account value would grow. In late 1991, Claimants closed their account and realized the extent of the damage.

Based upon the above allegations, the Rodríguezes asserted claims for violation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code, Section 17.41 et seq. ("DTPA"); violation of the State and Federal Securities Acts; breach of express and implied warranties; breach of fiduciary duty; negligence; misrepresentation; common law fraud; infliction of severe

emotional distress; and gross negligence.

Respondents denied the material allegations of the Statement of Claim, alleging that:

1. The Rodriguezes met Chmiel in late 1986 or early 1987 when he was employed with Merrill Lynch. The Rodriguezes explained that they were Mexican citizens who owned a Mexican textile company and had considerable money invested in the United States. The Claimants were concerned with declining interest rates and wanted to reinvest their assets in investments that were designed to give them a higher return. The Rodriguezes opened an account and invested in a variety of mutual funds and stocks;
2. When Chmiel became employed with PaineWebber, the Claimants transferred their account. The Claimants' account agreement stated that they had substantial net worth, assets and annual income, and that their primary investment objective was "capital gains";
3. The Rodriguezes were particularly interested in generating a higher rate of return than they could achieve in fixed income investments and equities in Mexico (earning approximately 20% per annum in 1988) and to avoid possible Mexico tax ramifications. Chmiel explained that to meet this rate, additional risks would have to be taken. The Rodriguezes indicated that they were willing to accept those risks and asked Chmiel to recommend the investments to accomplish these goals. Chmiel did not guarantee profit;
4. The Rodriguezes received all their trade confirmations slips and monthly statements of account. Chmiel's branch manager corresponded with the Rodriguezes twice concerning activity in their account, yet never received a complaint about the account until it was closed in September of 1991. When the account was closed, the Rodriguezes claimed they were liquidating investments because they needed funds, not because they were dissatisfied with PaineWebber; and
5. The losses suffered occurred from unforeseen economic and world events, including the "mini crash" and junk bond debacle during the fall of 1989 and the invasion of Kuwait by Iraq in the summer of 1990. In addition, the Rodriguezes repeatedly emphasized their desire to recoup their losses through additional trading and must bear the consequences of their actions.

In addition, the Respondents asserted the following affirmative defenses:

1. Claimants failed to state a claim for which relief can be granted;

2. The claims are barred, in whole or in part, by the applicable statutes of limitations and by the doctrines of waiver, estoppel and ratification;
3. The Respondents acted in good faith and did not knowingly or intentionally violate any of the laws alleged;
4. The claims are barred because Claimants did not act with reasonable diligence in connection with the purchase and sales of securities in their account;
5. Claimants failed to mitigate their damages;
6. The alleged losses were proximately caused by the Claimants own conduct or negligence in relation to the transactions complained of by them, and not by any misconduct of the Respondents; and
7. The alleged statement or omissions made did not relate to material facts.

#### **RELIEF REQUESTED**

Claimants requested entry of an award against Respondents for actual damages in the sum of at least \$750,000.00; treble damages under the DTPA in the sum of \$2,000.00; additional damages under the DTPA in the sum of \$1,500,000.00; exemplary damages for gross negligence and willful acts in the sum of \$2,250,000.00; for attorneys' fees in the sum of \$500,000.00 or 50% of the award, whichever is greater; costs; prejudgment and post-judgment interest; and for a finding that the Respondents acted knowingly.

Respondents requested an award in their favor and against Claimants, together with costs incurred in the defense of this matter, including a reasonable attorneys' fee as allowed under applicable law.

#### **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.

### **AWARD**

After considering the pleading, 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. Respondents PaineWebber Incorporated and Michael A. Chmiel are jointly and severally liable for and shall pay to Claimants Juan Rodriguez Ochoa, Amelia Gracia de Rodriguez and Juan Rodriguez, Jr. the sum of \$163,000.00;
2. In addition, Respondent Michael A. Chmiel is liable for and shall pay to Claimants Juan Rodriguez Ochoa, Amelia Gracia de Rodriguez and Juan Rodriguez, Jr. the sum of \$60,000.00;
3. Furthermore, Respondents PaineWebber Incorporated and Michael Chmiel are jointly and severally liable for and, shall pay to Claimants Juan Rodriguez Ochoa and Juan Rodriguez, Jr. the sum of \$35,000.00 as attorneys' fees. In determining to award attorneys' fees, the panel considered the arguments of the parties, as well as the Tex. Rev. Civ. Prac. & Rem. Code Section 38.001 and Section 27.01 of the Tex. Bus. & Com. Code, and determined that authority existed for an award of attorneys' fees in favor of the Claimants;
4. The claims for damages pursuant to the Texas Deceptive Trade Practices Act and exemplary damages are hereby dismissed and denied in their entirety; and
5. All other costs of arbitration shall be borne by the party incurring the cost, except for those specifically enumerated herein.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) prehearing conference session with arbitrator x \$300.00 per session = \$300.00; Four (4) hearing sessions x \$1,000.00 per session = \$4,000.00; Total Forum Fees = \$4,300.00.

The National Association of Securities Dealers, Inc. shall retain the non-refundable claim filing fee of \$250.00 and refund the \$1,000.00 hearing session deposit previously deposited by the Claimants Juan Rodriguez Ochoa, Amelia Gracia de Rodriguez and Juan Rodriguez, Jr. Respondents PaineWebber

Incorporated and Michael A. Chmiel are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$4,300.00.

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

Concurring Arbitrators' Signatures

Name

Date

Douglas F. Pierce, Esq.  
Douglas F. Pierce, Esq.  
Public Arbitrator  
Chairperson

September 13, 1993

Leonard S. Alpert  
Leonard S. Alpert  
Public Arbitrator

September 13, 1993

Robert M. Birenbaum  
Robert M. Birenbaum  
Industry Arbitrator

September 22, 1993

For NASD Use Only

Date of Service on Parties: 9-24-93