

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Sam Rodio Construction, Inc.;
Cellular Construction Management, Inc.;
and Douglas Bird

92-03827

Name of Respondents

PaineWebber Incorporated;
Patrick M. Mendenhall

REPRESENTATION

For Claimants: Sam Rodio Construction, Inc. ("Rodio"), Cellular Construction Management, Inc. ("Cellular") and Douglas Bird ("Bird") were represented by Reid McInvale, Esq. of Houston Texas.

For Respondents: PaineWebber Incorporated ("PaineWebber") and Patrick M. Mendenhall ("Mendenhall") were represented by Joseph A. Vallo, Esq. of PaineWebber Incorporated, Weehawken, New Jersey.

CASE INFORMATION

Statement of Claim filed: November 11, 1992.

Claimant Rodio's Submission Agreement signed on: November 4, 1992 by Samuel M. Rodio and Carol L. Rodio, President and Vice President respectively of Sam Rodio Construction, Inc. Claimant Cellular's Submission Agreement signed on: November 4, 1992 by Carol L. Rodio and Samuel M. Rodio, President and Vice President respectively of Cellular Construction Management, Inc.

Claimant Bird's Submission Agreement signed on: October 21, 1992.

Answer and Affirmative Defenses filed by Respondents PaineWebber and Mendenhall on: January 28, 1993.

Respondent PaineWebber's Submission Agreement signed on: January 27, 1993 by Patricia E.

Cowart, Corporate Vice President, PaineWebber Incorporated.
Respondent Mendenhall's Submission Agreement signed on: April 5, 1993.

Claimant Bird's Letter dismissing action against Respondents filed: March 19, 1993.

HEARING INFORMATION

Pre-Hearing Conference: August 2, 1993 for One (1) session before One (1) arbitrator;
August 17, 1993 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: October 6, 1993 for Two (2) sessions;
October 7, 1993 for Two (2) session; and
November 19, 1993 for Two (2) sessions.

Hearing Location: Houston, Texas

CASE SUMMARY

Claimants Rodio and Cellular alleged that Respondent Mendenhall, while employed by or acting as an agent for Respondent PaineWebber, "churned" their accounts in order to generate commissions and high mark-ups. The allegations included that more than 50% of the trading in the Rodio account was same or one day trades, purchasing over 47 different stocks from May, 1991 to June, 1992. In addition, Rodio and Cellular alleged that Mendenhall controlled and traded the account as a discretionary account without the required trading authorization, often selecting and executing transactions without first receiving approval from the Claimants. Claimant Bird alleged that Respondents failed to execute an order.

Based upon the above allegations, Claimants asserted claims for violation of the Federal securities laws; violation of the Texas Securities Act; violation of New York statutes; violation of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"); violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); breach of fiduciary duty; common law fraud; negligence; and breach of the duty of good faith and fair dealing. In addition, claims under respondeat superior, failure to supervise and agency were asserted against Respondent PaineWebber.

Respondent PaineWebber and Mendenhall denied the material allegations of the Statement of Claim, alleging that:

1. The Rodio and Cellular accounts were opened with speculation as the number one priority, and the trading patterns and unsolicited orders in speculative issues confirmed these objectives;

2. The trading must be evaluated in light of all the facts and account objectives. Rodio and Cellular elected to trade the syndicate calendar which involved short term buying and selling of selected Initial Public Offerings and Secondary Public Offerings, holding the trade for a short period of time (typically one day) and then sold for a small profit, which limited a trader's downside;
3. Mendenhall did not exercise discretion over the accounts and each trade was authorized prior to its execution. Mr. Rodio was in daily contact with Mendenhall at home and at work, often calling long distance when he was out of town. The Claimants never complained of the alleged unauthorized transactions to PaineWebber;
4. The trades made were suitable given the Claimants' financial information; and
5. Bird's sell order at \$7.00 was not executed because of the nature of the order and he declined to enter a market order. He chose to leave the shares in his account and failed to mitigate his damages.

In addition, Respondents asserted several affirmative defenses, among them the following:

1. Claimants failed to state a claim against Respondents for which relief can be granted;
2. The claims are barred pursuant to the doctrines of waiver, ratification, estoppel, and laches;
3. Respondents acted in good faith and did not knowingly violate any of the laws alleged;
4. Claimants did not act with reasonable diligence in connection with the purchase and sale of securities in the accounts and failed to mitigate damages;
5. The alleged losses were proximately caused by the Claimants' own negligence;
6. Any damages were caused or contributed to by persons, conditions or events beyond the control of Respondents; and
7. PaineWebber maintained an adequate and reasonable system of supervision.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents PaineWebber and Mendenhall of a

sum not to exceed \$500,000.00 in compensatory damages representing capital loss, commissions paid, service fees paid, margin interest payments, lost investment opportunities, interest and other sums lost due to Respondents actions; punitive damages in a sum deemed appropriate by the Panel, or alternatively, treble compensatory damages pursuant to the DTPA; pre- and post judgment interest; reasonable attorneys' fees and costs; and for such other relief they would show themselves entitled to receive, not to exceed \$499,999.99.

Respondents requested that the Claims be dismissed in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

By letter dated March 12, 1993, Claimant Bird dismissed his action against Respondents.

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 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 of Claimants Sam Rodio Construction, Inc. and Cellular Construction Management, Inc. is hereby dismissed with prejudice and denied in its entirety;
2. Pursuant to the Claimant's letter of March 12, 1993, the claim asserted by Claimant Douglas Bird is hereby dismissed with prejudice;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. All relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Pre-Hearing conferences with an arbitrator x \$300.00 per conference = \$600.00; Six (6) hearing sessions x \$750.00 per session = \$4,500.00; Total fees = \$5,100.00.

The National Association of Securities Dealers, Inc. shall retain the non-refundable filing fee

of \$200.00 and refund the hearing session deposit of \$1,050.00 previously deposited by the Claimants. Respondents PaineWebber Incorporated and Patrick M. Mendenhall are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$5,100.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Martha Failing, Esq.
Martha Failing, Esq.
Public Arbitrator
Chairperson

January 24, 1994

/s/ Charlotte F. Simpson
Charlotte F. Simpson
Public Arbitrator

January 24, 1994

/s/ John M. Greer
John M. Greer
Industry Arbitrator

February 3, 1994

For NASD Use Only

Date of Service of Award: 2-4-94