

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

John K. Murray

93-00668

Name of Respondents

PaineWebber Incorporated;
Frank Bagrier

REPRESENTATION

For Claimant: John K. Murray ("Murray") was represented by Mark L. Aschermann, Esq. of Houston, Texas.

For Respondents: PaineWebber Incorporated ("PaineWebber") and Frank Bagrier ("Bagrier") were represented by Joseph A. Vallo, Esq. of PaineWebber Incorporated, Miami, Florida.

CASE INFORMATION

Statement of Claim filed: February 23, 1993.

Claimant's Submission Agreement signed on: February 17, 1993.

Statement of Answer filed by Respondents PaineWebber and Bagrier on: June 25, 1993.

Respondent PaineWebber's Submission Agreement signed on: June 25, 1993 by Joseph A. Vallo, Corporate Vice President, PaineWebber Incorporated.

Respondent Bagrier's Submission Agreement signed on: June 24, 1993.

Claimant's Trial Brief filed on: January 25, 1994.

Respondents' Trial Brief filed on: January 21, 1994.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: January 26, 1994 for Two (2) sessions;
March 24, 1994 for One (1) session.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimant Murray alleged that Respondent Bagrier, while employed by or acting as an agent for Respondent PaineWebber, induced Murray to invest in stocks and stock options which were unsuitable given Murray's investment experience. Murray specifically alleged that:

1. On or about September 26, 1988, Murray opened an account with Bagrier at PaineWebber. The funds used to open the account were received from the settlement of a personal injury lawsuit;
2. At the time the account was opened, Murray had no previous investment experience. His formal education was completed in the 9th grade and his occupation was as a musician. Murray's direction to Bagrier was that his investments be in safe and not speculative investments;
3. In December of 1989, Bagrier persuaded Murray to open a margin account and begin trading stock options. In March, 1990, Murray signed a option disclosure agreement which was completed by Bagrier or his staff and contained incorrect information regarding Murray's trading and investment experience;
4. Bagrier did not explain that these investments were unsuitable for his portfolio or that option trading was extremely risky. The account statements were confusing to Murray and were never explained. This was compounded because many of the transactions were short term and did not allow Murray to comprehend or assess the profitability of the transaction;
5. Bagrier exceeded his authority and invested Murray's money in speculative securities, churned the account and mishandled the account. Bagrier continually reassured Murray that his account was in good shape and was being handled as directed. Instead, the account was handled in an inept manner in order to generate commissions.

Based upon the above allegations, Murray asserted causes of action for negligence; gross negligence; breach of fiduciary duty; violation of the state securities laws; common law fraud; violation of Chapter 27 of the Texas Business and Commerce Code; violation of the Texas Deceptive Trade Practices Act, Texas Business & Commerce Code, Section 17.46, et seq.; and violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

Respondents denied the material allegations of the statement of claim, alleging that:

1. Although Murray was initially an unsophisticated, inexperienced investor, he quickly became knowledgeable through the assistance of his brother-in-law and Bagrier, and became increasingly more independent in his decisions. In addition, Murray began reading about investing, including the investment theories of William O'Neill, publisher of *Investor's Business Daily*;
2. Eventually, Murray was independently directing the trading in his account and increased the use of margin in his account. Murray began calling Bagrier's sales assistants and placing orders directly. Bagrier would send stock charts to Murray, often upon his request, and would discuss the information in the charts; and
3. Bagrier professionally and properly handled Murray's account. All trades were discussed prior to execution and Murray made the final decision for each transaction in his account.

Respondents asserted several affirmative defenses, including the following:

1. Murray received written documentation which summarized the activity in his account, was aware of the activity, and indicated his approval. Therefore, Murray was precluded from recovery on the grounds of estoppel;
2. Murray is barred from bringing this action on the grounds of laches, ratification and the statute of limitations;
3. Murray failed to state a claim upon which relief can be granted;
4. The alleged losses were proximately caused by Murray's own conduct and negligence; and
5. Murray failed to mitigate damages and assumed the risk of his investing in the market.

RELIEF REQUESTED

Claimant Murray requested entry of an award for actual damages of approximately \$41,000.00; punitive and exemplary damages; statutory penalties and damages; interest and attorneys' fees; and for such other relief that he showed himself entitled.

Respondents requested that Murray's claim for relief be denied in its entirety, that Respondents' fees and costs be charged against Murray, and for such further relief as the Panel deemed proper.

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 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. Respondents PaineWebber Incorporated and Frank Bagrier are jointly and severally liable for and shall pay to the Claimant, John K. Murray, the sum of \$14,294.97 in actual damages;
2. The claims for punitive and statutory damages are hereby dismissed with prejudice and denied in their entirety;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. Any relief request 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: Three (3) sessions x \$400.00 per hearing session = \$1,200.00.

The National Association of Securities Dealers, Inc. shall retain the \$120.00 claim filing fee and refund the \$400.00 hearing session deposit previously deposited by the Claimant, John K. Murray. Respondents PaineWebber Incorporated and Frank Bagrier are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$1,200.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Mark A. Banks-Golub, Esq.
Mark A. Banks-Golub, Esq.
Public Arbitrator
Chairperson

June 13, 1994

/s/ William M. Sandeen
William M. Sandeen
Public Arbitrator

June 8, 1994

/s/ David J. Schnepf
David J. Schnepf
Industry Arbitrator

June 9, 1994

For NASD Use Only

Date of Service of Award: 6-20-94