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N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

\* Emanuel and Company  
Paragon Capital Corporation

93-00991

Name of Respondent

Oscar Gruss & Son, Inc.

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REPRESENTATION

For Claimant Paragon Capital Corporation: Michelle D. Wessel of Paragon Capital Corporation, New York, New York.

For Claimant Emanuel and Company: Mark J. Astarita, Esq., New York, New York.

For Respondent Oscar Gruss & Son, Inc.: Robert S. Churchill, Esq. of Gerstein & Churchill, P.C., New York, New York.

CASE INFORMATION

Statement of Claim filed by Paragon Capital Corporation ("Paragon") on: May 14, 1993.

Revised Statement of Claim file by Paragon on: September 9, 1993.

Statement of Claim filed by Emanuel and Company ("Emanuel") on: June 1, 1993.

Amended Statement of Claim filed by Emanuel on: July 15, 1993.

Second Amended Statement of Claim filed by Emanuel on: July 27, 1993.

Claimant Paragon's Submission Agreement signed on: May 27, 1993

Claimant Emanuel's Submission Agreement signed on: March 8, 1993.

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Statement of Answer in response to Claimant Emanuel's Statement of Claim filed by Respondent Oscar Gruss & Son, Inc. ("Oscar Gruss") on: May 13, 1993.

Motion to Dismiss Claimant Emanuel's Statement of Claim, Amended Statement of Claim and Second Amended Statement of Claim filed on August 3, 1993.

Answer to Claimant Emanuel's Second Amended Statement of Claim filed on: February 2, 1994.

Respondent Oscar Gruss' Submission Agreement filed in response to Emanuel's Statement of Claim signed on May 13, 1993.

Statement of Answer in response to Claimant Paragon's Statement of Claim filed by Oscar Gruss on: June 30, 1993.

Answer to Claimant Paragon's Revised Statement of Claim filed by Oscar Gruss on: September 24, 1993.

Respondent Oscar Gruss' Submission Agreement filed in response to Paragon's Statement of Claim signed on: June 30, 1993

### **HEARING INFORMATION**

Hearing Dates / Sessions:      January 21, 1994 / 2 Sessions.  
   March 3, 1994 / 2 Sessions.  
   March 4, 1994 / 2 Sessions.  
   April 19, 1994 / 2 Sessions.  
   March 9, 1995 / 2 Sessions  
   March 10, 1995 / 2 Sessions

Hearing Location:      Offices of the National Association of Securities Dealers located in New York City, New York.

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### CASE SUMMARY

Claimant Paragon alleged that on November 2, 1993 Respondent sold to Paragon, on a when issued basis, 5,000 shares of Orion Pictures Corp. common ("Orion") at a price of \$1 per share for a total price of \$5,000. Claimant Paragon further alleged that the Orion shares went "regular way" on February 3, 1993 and that the trade settlement date was February 9, 1993. Claimant Paragon then alleged that Claimant failed and refused to deliver the Orion stock despite Paragon's demand for delivery.

Claimant Emanuel alleged that Respondent sold to Emanuel, in a series of transactions from October to November 1992, a total of 42,000 shares of Orion, on a when issued basis, for a total price of \$42,281. Claimant Emanuel further alleged that the Orion shares went "regular way" on February 3, 1993 and that the settlement date was February 9, 1993. Claimant Emanuel next alleged that Respondent failed and refused to deliver the Orion shares to Emanuel despite demand therefor.

Respondent maintained that the Claimants and Respondent had entered into when, as, and if issued transactions in Orion at prices per share of \$1.00 with Paragon and between \$.092 and \$1.10 with Emanuel. Respondent further maintained that Orion had been operating under Chapter 11 of the United States Bankruptcy Code and that on October 20, 1992 the Bankruptcy Court confirmed Orion's Modified Third Amended Joint Consolidated Plan of Reorganization ("Plan"). Respondent also maintained that as part of the Plan, it was intended and agreed by all parties that 50 million new shares would be issued by Orion at the approximate market price of \$1.00 per share. Respondent maintained that the parties to the Plan agreed it would be in Orion's best interest to be listed on NASDAQ and that NASDAQ required that the new Orion shares have a market price of \$2.50 per share. Respondent further maintained that the parties to the Plan then changed the number of shares to be issued by Orion from 50 million shares to 20 million shares to meet the \$2.50 per share price required by NASDAQ and to maintain the total value of Orion's new shares at \$50 million. Respondent maintained that, upon learning of the change, market makers adjusted the market price per share for Orion from approximately \$1.00 per share to approximately \$2.50 per share. Respondent further maintained that the market price of Orion at the settlement date of the when issued transaction was \$2.75 per share. In addition, Respondent maintained that, except for Claimants, Respondent contacted the brokers it had contracted with and the parties agreed to adjust their contracts to reflect the change in Orion's share price. Respondent also maintained that the number of shares to be issued to Orion's bond holders was adjusted so Orion's bond holders would receive 40% of the equity of the reorganized company, just as they would have under the original Plan.

Respondent asserted the following affirmative defenses: (1) Claimants failed to state a statement of claim upon which relief could be granted; (2) The transactions as set forth clearly indicate that there was a "mutual mistake of fact" between Claimants and Respondent; (3) Claimants would be unjustly enriched; (4) Claimants failed, in whole or in part to mitigate the

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purported damages set forth in the Statements of Claim.

**RELIEF REQUESTED**

Claimant Emanuel requested:

1. An order directing Respondent to deliver 42,900 shares of Orion common stock as contracted.
2. Interest.
3. Attorney costs and any fees.

Claimant Paragon requested:

1. An award against Respondent in the amount of the current market value or 5,000 shares of Orion.
2. Interest from February 9, 1993.
3. Costs and disbursements.
4. Such other and further relief as the arbitrators deem proper.

Respondent requested:

1. A dismissal of Claimants' Statements of Claim in their entirety
2. Interest.
3. Arbitration costs
4. Attorneys' fees.
5. Such other and further relief as the arbitrators deem just and proper.

**OTHER ISSUES CONSIDERED & DECIDED**

Claimant Paragon Moved to Consolidate the Statement of Claim submitted by Paragon with the Statement of Claim filed by Emanuel. The Director of Arbitration granted Claimant Paragon's Motion to Consolidate pursuant to Section 25(d)(1) of the NASD code of arbitration procedure.

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### AWARD

After considering the pleadings, 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 is liable and shall pay to Claimant Emanuel the sum of \$85,800.
2. Respondent is liable and shall pay to Claimant Paragon the sum of \$10,000.
3. All other claims are denied.
4. Each party shall bear its own respective costs and attorneys' fees.

### FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

12 sessions X \$600 = \$7,200 minus hearing session deposit paid by Claimant Emanuel of \$600 and hearing session deposit paid by Claimant Paragon of \$300 = \$6,300 net due.

Forum fees Assessed Against:

1. Claimant Emanuel is assessed the sum of \$1,800 which represents 25% of the total forum fees due, less \$600 hearing session deposit paid by Emanuel, leaving \$1,200 due. Claimant Emanuel is liable and shall pay to the NASD the sum of \$1,200.
2. Claimant Paragon is assessed the sum of \$1,800 which represents 25% of the total forum fees due, less \$300 hearing session deposit paid by Paragon, leaving \$1,500 due. Claimant Emanuel is liable and shall pay to the NASD the sum of \$1,500.
3. Respondent Oscar Gruss is assessed the sum of \$3,600 which represents 50% of the total forum fees due. Respondent Oscar Gruss is liable and shall pay to the NASD the sum of \$3,600.

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

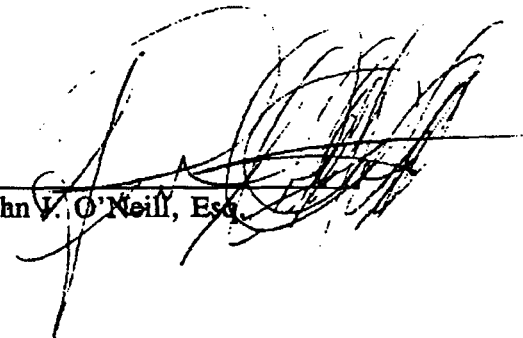
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Concurring Arbitrators' Signatures

Name

Industry Chairman

  
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John V. O'Neill, Esq.

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Name

Industry Panelist

\_\_\_\_\_  
Andrew Cote', Esq.

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Name

Industry Panelist

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Leon Goldsholl

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Date of Decision: June 12, 1995

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