

9502198

**NASD AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.**

In the Matter of the Arbitration Between

**Name of Claimants**

Michael D. Combs and  
Blanche B. Combs

and

93-01454

**Name of Respondents**

PaineWebber, Inc. and  
Robert O'Herlihy

**REPRESENTATION OF PARTIES**

Michael D. Combs and Blanche B. Combs ("Claimants") were represented by William K. Flynn, Esq., Strauss & Troy, Cincinnati, Ohio.

PaineWebber, Inc. and Robert O'Herlihy ("Respondents") were represented by Alice Jump, Esq., PaineWebber, Inc., Weehawken, New Jersey.

**CASE INFORMATION**

The Statement of Claim was filed on or about April 13, 1993. Submission Agreement of Claimants Michael D. Combs and Blanche B. Combs was signed on April 9, 1993.

Statement of Answer was filed by Respondents PaineWebber, Inc. and Robert O'Herlihy on or about July 7, 1993. Submission Agreement of Respondent PaineWebber, Inc. was signed on July 7, 1993 by Joseph A. Vallo.

**HEARING INFORMATION**

The hearing was held on Thursday, September 8, 1994 for two (2) sessions and Friday, September 9, 1994 for two (2) sessions in Cincinnati, Ohio for a total of four (4) sessions.

### **CASE SUMMARY**

Claimant alleged that Respondent Robert O'Herlihy engaged in unauthorized trading, excessive trading, unsuitable investments and lack of supervision. Claimants alleged that Respondents engaged in violations of §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, engaged in violations of State Securities Laws, engaged in breach of contract, engaged in fraud, engaged in violations of the NASD Rules of Fair Practice, were negligent, breached their fiduciary duty to the Claimants, violated the Kentucky Consumer Protection Laws, and that Respondent PaineWebber, Inc. failed to properly supervise Respondent Robert O'Herlihy. Specifically, Claimants alleged that Mr. O'Herlihy ignored their specific instructions and pursued a manipulative course of excessive, unauthorized, unsuitable margin transactions, and engaged in margin transactions without their knowledge or authorization.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that Michael Combs was an experienced investor who directed and authorized the trading activity in the accounts. In addition, Respondents stated that Mr. Combs completely understood the trading in the accounts. Respondents also stated that Mr. O'Herlihy had countless hours of conversations with the Claimants regarding the investments in their accounts and fully explained and discussed all transactions in the accounts prior to the execution of the trades. Affirmative defenses including but not limited to the following were asserted: ratification; the claims are barred by laches and statutes of limitation; contributory negligence; failure to mitigate; and assumption of the risk.

### **RELIEF REQUESTED**

Claimants requested an award in the amount of at least \$98,840 to restore them to the position they would have been in had the fraudulent transaction not have been solicited, punitive damages of \$500,000, the costs of this action, reasonable attorneys' and expert witness fees, and such other relief as the arbitration panel deems appropriate.

Respondents requested that the demand for relief of Claimants be dismissed in its entirety with costs, including the fees and costs of these proceedings, to be charged against Claimants and for such other and further relief as the panel may deem just and proper.

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent Robert O'Herlihy did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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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 original(s) 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, Inc. and Robert O'Herlihy shall be and hereby are jointly and severally liable for and shall pay to the Claimants Michael D. Combs and Blanche B. Combs the sum of Twenty eight thousand dollars (\$28,000).
2. Interest at the rate of 6% per annum is awarded on the above stated sum from and inclusive of November 1, 1989 to and inclusive of the date this award is paid in full.
3. Respondents PaineWebber, Inc. and Robert O'Herlihy shall be and hereby are jointly and severally liable for and shall pay to the Claimants Michael D. Combs and Blanche B. Combs the sum of One thousand two hundred fifty dollars (\$1,250) as reimbursement of the filing and forum fees previously paid to the NASD by the Claimants.
4. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.
5. All relief requested not specifically granted herein is hereby denied.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were four (4) sessions x \$1,000 = \$4,000 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$250 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimants Michael D. Combs and Blanche B. Combs. Respondents PaineWebber, Inc. and Robert O'Herlihy shall be and hereby are jointly

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and severally liable for and shall pay to the NASD the sum of \$3,000 as the balance due for forum fees. Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

/s/ Charles D. Underwood, Esq.  
Charles D. Underwood, Esq.  
Public Arbitrator, Presiding Chair

September 22, 1994

/s/ David W. Stanton, Esq.  
David W. Stanton, Esq.  
Public Arbitrator

September 25, 1994

/s/ Scott H. Litwin  
Scott Litwin  
Industry Arbitrator

September 22, 1994