

**NATIONAL ASSOCIATION OF SECURITIES DEALERS
AWARD**

In the Matter of the Arbitration Between

Stephen Nahmias

Claimant

v.

NASD No. 93-2083

PaineWebber, Inc.

Respondent

Representation

For Claimant: Brian Strange, Esq., of Strange & Hoey of Los Angeles, CA

For Respondent: Robert Logan, Esq. and Richard Smiri, Esq. of Keesal Young & Logan of Long Beach, CA

Case Information

Statement of Claim filed: May 25, 1993

Claimant's Submission Agreement signed: May 12, 1993

Statement of Answer filed on: July 28, 1993

Respondent's Submission Agreement signed on: July 29, 1993

Hearing Information

Prehearing Conference Date(s)/Sessions: None

Hearing Date/Sessions: January 26, 1994/two, January 27, 1994/two, March 2, 1994/two

Hearing Location: Los Angeles, CA

Case Summary

Stephen Nahmias submitted the following summary of the issues to be resolved:

- 1) Whether PaineWebber wrongfully refused to transfer Nahmias' clients out of Brian Wing's control when it learned that Wing was slandering Nahmias, as well as destroying his client book and reputation.
- 2) Whether PaineWebber acted wrongfully by encouraging a partnership between Nahmias and Wing, which required Nahmias to continue trading and helping Wing as a junior partner, but then changing its position by telling Nahmias he could not trade or take the clients out of the partnership.
- 3) Whether PaineWebber is liable for the destruction of Nahmias' book by failing to tell Nahmias, when he entered into the "split account" while on disability, that the account would thereafter belong to Wing and that Nahmias could not even contact the client in that account or have control over them until he: (a) came off disability; and (b) had those clients write letters asking that he again be their broker.
- 4) Whether PaineWebber is liable to Nahmias for failing to transfer his personal accounts from Brian Wing's control when PaineWebber knew that Wing was unfit to be the account representative.
- 5) Whether PaineWebber wrongfully refused to defend Nahmias, but defended PaineWebber employee Barry Harberson, when Wing sued both Nahmias and Harberson for allegedly conspiring to interfere with Wing's accounts at PaineWebber.
- 6) The amount of damages suffered by Nahmias. As to the first four issues set forth above, those damages include: (a) the lost value of his client book; (b) emotional distress; and (c) punitive damages. As to the fifth issue, the damages include (a) attorneys' fees and costs; (b) interest; and (c) emotional distress.

Respondent alleged:

Although Stephen Nahmias (hereinafter "Nahmias") has alleged numerous, duplicative legal theories, the gravamen of his claim is that PaineWebber destroyed his book of business. However, Nahmias has not been damaged by PaineWebber. Rather, the alleged loss of the book was caused by two factors for which PaineWebber was not responsible. First, Nahmias suffered from a debilitating illness which, according to his doctors, prevented him from performing the duties of a broker almost continuously after March, 1992. Second, Nahmias chose to enter into a secret, unauthorized contract with broker Brian Wing, whereby Wing would kick back one half of his sign on bonus, and pay Nahmias 100% of the commissions on the book for the first year, and 50% the second year. This attempt to "play Barry (Harberson) for all he was worth" came back to haunt Nahmias when Wing later turned on Nahmias and began disparaging Nahmias in an attempt to get the business for himself. Nahmias should have expected that a person who was willing to help Nahmias cheat

PaineWebber might also cause problems for himself.

Nor is PaineWebber liable to Nahmias for the claimed lost value of the book. Nahmias claims that if he had known that PaineWebber's rules and policies did not allow a broker to service accounts while the broker was on disability, he would not have sold the book to Wing. However, it was Nahmias who chose not to tell PaineWebber about the contract he was putting together with Wing, no doubt because he did not want PaineWebber to know there would be a kickback of one half of the sign on bonus Nahmias was negotiating for Wing. If the contract had been passed on to the PaineWebber legal department while it was still under discussion in the summer of 1992, instead of December, Nahmias would have known exactly where he stood. There is no viable claim for negligence or interference with contract since PaineWebber did not know of the contract. Further, it is grossly speculative as to what Nahmias would have done otherwise. If he had tried to take his book of business to another firm, he would have lost his PaineWebber disability benefits.

Nahmias' sole relief for the claimed loss of his book was his jury verdict against Wing. The secret contract was not enforceable as to PaineWebber, but it was as between Nahmias and Wing. After entering into the secret contract with Wing, Nahmias was no longer the owner of the book of business. Accordingly, any claim for damages relating to the book of business was properly addressed in the Wing v. Nahmias action previously decided in state court, whereby Nahmias received a verdict against Wing on breach of contract for \$37,500. Nahmias can collect that from Wing, but is not entitled to receive it from PaineWebber.

Nahmias has no claim for disability benefits. He has been paid all disability benefits due him. He qualified for the maximum benefit of \$11,111 per month, which he is still receiving.

Nahmias was not prevented from returning to work. In December, 1992, he was told that if he returned to work, all of his previous accounts would be returned to him. He chose to wait before returning to work to see a letter of caution he would be asked to sign. After signing the letter of caution in late December, he chose not to come back to work. This decision apparently was based on health considerations, since he was allegedly too ill in January, 1993 to monitor his own account.

PaineWebber had no duty to defend Nahmias in Wing's lawsuit. Wing's claims arose out of the secret, unauthorized contract Nahmias made with Wing, which allowed Nahmias to "play Barry (Harberson) for all he was worth". When he made that contract for the secret kickback, Nahmias was clearly acting outside the course and scope of his employment, and must bear all the consequences of the contract himself. Nahmias' damage claims for attorneys fees and costs in excess of \$200,000 is unreasonable, and the product of his own choices. He chose to stay in court, as opposed to going to arbitration, which would have been much cheaper. Nahmias should not be heard to claim that if Keesal, Young and Logan had represented him as well as PaineWebber, the claim against him would have gone to arbitration. Nahmias would have had his own separate counsel because of the conflicts of interest, who probably would have made the same decision with Nahmias to pursue his cross-

complaint against Wing in front of a jury. Finally, about \$70,000 of the fees and costs were incurred after the first day of trial, at which time Wing was willing to dismiss the case, but Nahmias pursued his claim for defamation. The fees and costs after the first day of trial clearly were not for PaineWebber's account.

PaineWebber is not liable to Nahmias for the alleged defamation by Wing. In disparaging Nahmias, Wing was acting outside the course and scope of his employment. No broker is ever authorized to disparage another PaineWebber broker to PaineWebber clients. If Nahmias had been dealing in a straight forward manner, Wing probably would never have been hired in the first place. Wing was chosen by Nahmias because he was willing to do the secret kickback. Although PaineWebber is not bound by the jury verdict, Nahmias is collaterally estopped to claim a damage figure in excess of the \$100,000 jury verdict.

Nahmias is not entitled to recover for option related losses. He had market risk on all of his short puts from the time he sold them. Shortly after options were sold, the stocks declined and the options were in the money. Nahmias could have been exercised at any time, and he knew it. Even assuming liability, the measure of damages is simply the difference in price of the stocks put to him between the day they assigned, and the day when he knew of the assignments. This difference was a total of about \$3,500.

PaineWebber treated Nahmias at all times in an exemplary manner. His claims should be dismissed, with costs awarded to PaineWebber.

Relief Requested

Claimant requested:

1. Economic damages in excess of \$2,500,000;
2. Damages to reputation of \$1,000,000;
3. Emotional distress damages of \$1,000,000;
4. Punitive damages of \$1,000,000;
5. Interest;
6. Attorneys' fees and costs.

Other Issues Considered and 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.

Respondent made a Motion to Dismiss at the conclusion of Claimant's case, which was denied by the arbitrators.

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. All claims are dismissed;
2. The claim for punitive damages is dismissed;
3. The parties shall each bear their respective attorney's fees;
4. The parties shall each bear their respective costs.

Other Costs

None.

Forum Fees

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The National Association of Securities Dealers, Inc., shall retain the \$1,000 hearing session deposit previously paid by the claimant. Forum fees are assessed against:

Claimant for \$3,000 (minus the \$1,000 already paid as a hearing deposit) and
Respondent for \$3,000,

calculated as follows: six hearing sessions at \$1,000/hearing session, equals \$6,000, minus \$1,000 already paid by the claimant as a hearing deposit.

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

Arbitration Panel

Name

Public/Industry

Philip Saltz
Rachford Harris
Bernadotte Lester

Industry
Industry
Industry

Concurring Arbitrators' Signatures



Philip Saltz



Rachford Harris

Bernadotte Lester

Date of Decision:

Served 4/13/94