

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Jack L. Conlee and Darien Conlee;
Palmas Tropicales, S.A.

93-02304

Name of Respondents

Oppenheimer & Co., Inc.;
Phillip Connor, III;
Anastasio Carayanis

REPRESENTATION

For Claimants: Jack L. Conlee, Darien Conlee, and Palmas Tropicales, S.A. ("Conlee") were represented by Donald M. Feferman, Esq. of Feferman & Rehler, L.L.P., located in Corpus Christie, Texas.

For Respondent: Oppenheimer & Co., Inc. ("Oppenheimer"); Phillip Connor III ("Connor"); and Anastasio Carayanis ("Carayanis") were represented by John T. McGuire, Esq. of Oppenheimer & Co., Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed: June 10, 1993.

Claimants Jack L. Conlee and Darien Conlee's Submission Agreement signed on: May 27, 1993.

Amended Submission Agreement of Claimants Jack L. Conlee, Darien Conlee, and Palmas Tropicales, S.A. signed on: May 27, 1993 by the individual Claimants and by Jack L. Conlee, President, Palmas Tropicales, S.A.

Statement of Answer filed by Respondents on: July 30, 1993.

Respondent Oppenheimer's Submission Agreement signed on: July 30, 1993 by John T. McGuire, Managing Director, Oppenheimer & Co., Inc.

Respondent Connor's Submission Agreement signed on: August 18, 1993.

Respondent Carayanis' Submission Agreement signed on: August 18, 1993.

Respondents' Motion for Change of Situs filed on: July 30, 1993.

Supplement to Motion for Change of Situs filed on: October 13, 1993.

Claimants' Response to the Motion for Change of Situs filed: October 21, 1993.

Respondents' Reply to the Response to Motion for Change of Situs filed on: October 25, 1993.

Respondent Carayanis' Motion to Dismiss filed on: July 30, 1993.

Response to Carayanis' Motion to Dismiss filed: September 17, 1993.

HEARING INFORMATION

Pre-Hearing Conference: January 7, 1994 for One (1) session before One (1) arbitrator.

Hearing Dates/Sessions: January 25, 1994 for Two (2) sessions;
January 26, 1994 for Three (3) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimants alleged that Respondents Connor and Carayanis, while employed by or acting as agents for Respondent Oppenheimer, misrepresented how they would manage the investments in the Conlees' discretionary trading account, and engaged in the following activities:

1. Purchased high risk securities unsuitable for the Conlees' clearly stated goals and previous history of investment after Connor represented that he would manage the investments in a Competent and conservative manner;
2. Executed over 160 transactions on an annualized basis in discretionary trading in the Conlees' account, turning the equity between 3-1/2 and 4 times on an annualized basis, when Connors had represented that he would execute approximately 20 to 25 transactions per year in the account
3. Charged total costs, fees, and markups that were unconscionably higher than the 0.6% to 0.7% of the value of the account on an annual basis represented by Connor; and

4. Invested over 20% of the Claimants' account in an initial public offering of a company of which Connor's father was the chairman, president, and majority shareholder. Connor falsely represented that Oppenheimer had taken a significant position in the security. A prospectus was not received until several weeks after the purchase of the stock.

Based upon the above allegations, Claimants asserted claims for violation of Title 3, Section 27.01 of the Texas Business and Commerce Code-Fraud in the Sale of Stock and Real Estate; violation of Section 33 of the Texas Securities Act; violation of the Securities Act of 1933, 15 USC, Section 77a-77aa; violation of the Securities Exchange Act of 1934, 15 USC, Section 78a-78dd, and violation of Section 10(b) and Rule 10(b)(5) promulgated thereunder; violation of Title 2, Sections 17.41 et seq. of the Texas Business and Commerce Code, Texas Deceptive Trade Practices-Consumer Protection Act; and violation of the Racketeer Influenced and Corrupt Organizations Act 18 USC Section 1961, et. seq. ("RICO").

Respondents denied the material allegations of the Statement of Claim, alleging that:

1. In April of 1992, Connor telephoned Conlee and made arrangements to meet with him at the Conlee home in Honduras. Connor discussed with Conlee his interest in trading high yield securities, Latin American debt, and special situation growth stocks and emerging market equities and Conlee agreed to such a trading strategy;
2. Connor did not make any of the representations alleged by the Claimants. Instead, Connor specifically informed Conlee that during volatile market periods, trading would increase substantially, while during a relatively stable market, there would be less trading;
3. Even though Conlee granted discretionary authority to Respondents, a substantial number of the trades in the account were done with the prior approval of the Claimants and there was constant communication between the Respondents and Claimants;
4. The Claimants' analysis of the transactions in their account does not constitute a legal basis for a determination of "churning;" and
5. During Connor's visit to Honduras, there was some discussion about the initial public offering in Connor's father's company, but Connor did not solicit Conlee to invest. Rather, Conlee expressed great interest in the investment and authorized the trade. At no time did Connor represent that Oppenheimer had taken a significant position in the security.

In addition, Respondents asserted several affirmative defenses, including the following:

1. Claimants failed to state a claim upon which relief can be granted;
2. The claims are barred by the doctrines of estoppel, waiver, laches, and ratification, and by the applicable statute of limitations;
3. Claimants are barred from recovery by their failure to exercise that degree of diligence required in the handling of their securities transactions;
4. Claimants were fully aware of the risks inherent in the trading strategy and voluntarily assumed that risk;
5. Claimants failed to mitigate their damages; and
6. Claimants received all confirms and monthly statements from Oppenheimer, yet failed to complain of the transactions, and are therefore barred from recovery.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for damages at least equal to the loss in value of their accounts during the period of time the accounts were handled by Respondents estimated to be not less than \$140,000.00, together with the commissions Respondents received from excess trading activity and excess markups on securities; treble damages pursuant to the Racketeer Influenced and Corrupt Organizations Act and the Texas Deceptive Trade Practices-Consumer Protection Act; attorneys' fees and the costs of prosecuting the action.

Respondents requested that Claimants' Statement of Claim be dismissed in its entirety with no award to Claimants.

OTHER ISSUES CONSIDERED & DECIDED

On November 20, 1993, after review of the pleadings filed in regard to the Respondents' Motion for Change of Situs and Respondent Carayanis' Motion to Dismiss, the Panel unanimously determined that the Motions would be denied.

At hearing, upon Motion of Respondents, Palmas Tropicales, S.A. was added as a claimant in this action.

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 and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Oppenheimer & Co., Inc., Phillip Connor III, and Anastasio Carayanis are jointly and severally liable for and shall pay to Claimants Jack L. Conlee, Darien Conlee and Palmas Tropicales, S.A. the sum of \$30,000.00;
2. The claims for treble damages pursuant to the RICO statute and the Texas Deceptive Trade Practices Act are hereby dismissed 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. All relief requests not specifically granted are hereby denied.

OTHER COSTS

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, Respondents Oppenheimer & Co., Inc., Phillip Connor III, and Anastasio Carayanis are jointly and severally liable for and shall pay to the NASD the sum of \$750.00 as adjournment fee for the postponement of the hearing scheduled for December 14, 1993 and December 15, 1993.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) Prehearing session x \$300.00 per session = \$300.00; Five (5) hearing sessions x \$750.00 per session = \$3,750.00; Total Forum Fees = \$4,050.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and refund the \$750.00 hearing session deposit previously deposited by the Claimants. Respondents Oppenheimer & Co., Inc., Phillip Connor III, and Anastasio Carayanis are jointly and severally

liable for and shall pay to the NASD forum fees in the sum of \$4,050.00.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Franklin Anthony Arnold, Esq.
Franklin Anthony Arnold, Esq.
Public Arbitrator
Chairperson

April 21, 1994

/s/ Wayne J. Baxmann
Wayne J. Baxmann
Public Arbitrator

April 21, 1994

/s/ John C. Booth, Jr.
John C. Booth, Jr.
Industry Arbitrator

April 18, 1994

For NASD Use only

Date of Decision: 4/22/94