

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

James E. Zimmer

93-04856

Name of Respondents

PaineWebber Incorporated;
David Grosshans

REPRESENTATION

For Claimant: James E. Zimmer ("Zimmer") was represented by D. Michael Kratchman, Esq. of Southfield, Michigan.

For Respondent: PaineWebber Incorporated ("PaineWebber") was represented by Alice K. Jump, Esq. of PaineWebber Incorporated, Weehawken, New Jersey.

David Grosshans ("Grosshans") did not appear.

CASE INFORMATION

Statement of Claim filed: November 23, 1993.

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

Respondent PaineWebber's Uniform Submission Agreement signed: February 11, 1994 by Paul G. Thomas, Corporate Vice President, PaineWebber, Incorporated.

Respondent PaineWebber's Statement of Answer and Motion to Dismiss filed: February 11, 1994.

HEARING INFORMATION

Pre-Hearing Conference:

None held.

Hearing Date/Sessions:

April 10, 1995 for Two (2) sessions.

Hearing Location:

Southfield, Michigan.

CASE SUMMARY

Claimant Zimmer alleged that Respondent Grosshans, while employed by or acting as an agent for Respondent PaineWebber, induced Zimmer to invest in option trading which was unsuitable given Claimant's background and financial experience. Zimmer specifically alleged that:

1. Zimmer is a high school educated owner of an auto collision repair facility with little investment experience or education. Zimmer spoke to Grosshans briefly when he opened his first securities account at Shearson Lehman Brothers in 1990. Grosshans left Shearson in 1990 and induced Zimmer to open an account at PaineWebber;
2. Zimmer told Grosshans he wanted to invest in liquid, safe securities. Grosshans told Zimmer he would put him in a "faster moving investment system" that would not be expensive and would be like his own account in which he had made a lot of money. Grosshans did not explain that Zimmer would be engaged in risky option trading;
3. The option trading program set up by Respondents was done without proper investigation of its suitability for Zimmer. Grosshans recommended and persuaded Zimmer to permit option trading in his account and to continue to add money to the account to allow further trading;
4. Zimmer placed approximately \$85,000 in the account between March 19, 1990 and March 19, 1991 when the account was closed. In addition, Zimmer was charged approximately \$65,000 in commissions for unsuitable trading;
5. Zimmer would call Grosshans to ask questions about his account statements. Grosshans induced Zimmer to stay with the trading programs and invest more money stating the statements did not show the whole picture of the potential profit in outstanding trades and more money was needed to hold the positions;
6. Zimmer closed his account when he lost his entire investment.

Zimmer asserted claims for violation of the standard of conduct imposed by NASD Rules of Fair Practice and the New York Stock Exchange Rules; common law fraud; violation of the state and federal securities law; breach of fiduciary duty; unsuitability; and violation of the RICO statute, 18 USC Section 1962.

Respondent PaineWebber denied the material allegations of the Statement of Claim, alleging that:

1. In 1990, Zimmer represented to PaineWebber that his net worth was 1.2 million with an annual income of \$150,000. His account was not discretionary and Zimmer acknowledged in writing that he understood the risks involved in commodities trading and that is was;
2. All transactions were authorized by Zimmer, who spoke with Grosshans almost on a daily basis;
3. Zimmer was aware of the commissions generated in the account and once requested a commission discount. The contents of the account statements were not misrepresented to Zimmer and an experienced businessman like Zimmer was capable of understanding them or seeking independent advice;
4. PaineWebber's supervision of the account was adequate and the branch manager regularly reviewed the transactions in the account. Zimmer never complained to PaineWebber regarding the management of the account.

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

1. Zimmer's claims are barred, in whole or in part, by the applicable statute of limitations;
2. Zimmer has failed to state a claim upon which relief can be granted;
3. Zimmer failed to mitigate damages;
4. Zimmer's claims are barred by the doctrines of waiver, estoppel, ratification and laches;
5. Any alleged damages were caused or contributed to by persons, conditions or events beyond the control of PaineWebber;
6. The losses alleged by Zimmer were proximately caused by his own conduct or negligence; and
7. Zimmer is not entitled to attorneys' fees or punitive damages as a matter of law.

RELIEF REQUESTED

Zimmer requested entry of an award against Respondents for a sum in excess of \$85,000.00 as out of pocket loss and/or a sum to compensate Zimmer for his lost benefit of the bargain; interest at 12%; actual attorneys' fees; costs; exemplary and punitive damages as determined by the panel; and RICO damages in an amount determined by the panel.

PaineWebber requested that all claims asserted against it in the Statement of Claim filed in this matter be denied.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Grosshans was unable to be located and properly served with the Statement of Claim or Notice of the Hearing. Therefore, the claims against Respondent David Grosshans are dismissed without prejudice.

At the conclusion of the Claimant's case, Respondent PaineWebber moved for a directed verdict. After hearing argument, the Panel denied the motion.

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. Respondent PaineWebber Incorporated is liable for and shall pay to Claimant James E. Zimmer the sum of \$30,425.00, plus interest at the rate of 6% per annum to accrue from November 23, 1993 until the total sum is paid;
2. The claims for exemplary, punitive and RICO damages are dismissed with prejudice and denied in the entirety;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
4. Any relief not specifically awarded is hereby denied.

OTHER COSTS

The NASD shall retain the \$750.00 postponement fee paid by Respondent PaineWebber Incorporated.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) hearing sessions x \$750.00 per session = \$1,500.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 non-refundable claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimant, James E. Zimmer. The NASD shall refund the \$50.00 overpayment made by Claimant, James E. Zimmer. In addition, Respondent PaineWebber Incorporated is liable for and shall pay to the NASD the sum of \$750.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Marvin I. Horowitz, Esq.
Marvin I. Horowitz, Esq.
Public Arbitrator
Chairperson

June 16, 1995

/s/ Isadore Bernstein
Isadore Bernstein
Public Arbitrator

June 16, 1995

/s/ Harvey Frank
Harvey Frank
Industry Arbitrator

June 13, 1995

For NASD Use Only
Date of Decision: June 16, 1995