

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Name of Claimant**

PaineWebber Incorporated

**Name of Respondent**

Benjamin Miceli

94-01058

**Names of Third Party Respondents**

Joseph Grano  
Martin Salzman  
Terry Atkinson  
James Treadway  
Robert Donato  
Donald Marron  
Paul Guenther  
Thomas Hayden

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**REPRESENTATION**

For Claimant PaineWebber Incorporated ("Claimant") and Third Party Respondents Joseph Grano ("Grano"), Martin Salzman ("Salzman"), Terry Atkinson ("Atkinson"), James Treadway ("Treadway"), Robert Donato ("Donato"), Donald Marron ("Marron"), Paul Guenther ("Guenther") and Thomas Hayden ("Hayden") appeared Alice K. Jump, Esq., Corporate Vice President and Senior Litigation Counsel of PaineWebber Incorporated.

For Respondent Benjamin Miceli ("Respondent") appeared Philip Feintuch, Esq. of the law firm of Feintuch, Porwich & Feintuch located in Jersey City, New Jersey.

**CASE INFORMATION**

Statement of Claim filed: March 17, 1994.

Claimant's Submission Agreement signed on: March 17, 1994.

Statement of Answer, Counterclaim, and Third Party Claim filed by Respondent on: May 11, 1994.

Respondent's Submission Agreement signed on: November 8, 1994.

Joint Statement of Answer and Motion to Dismiss filed by Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden on: June 21, 1994.

Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden did not execute Submission Agreements.

Reply to the Counterclaim and Motion to Dismiss filed by Claimant on: June 21, 1994.

Response to Claimant's Motion to Dismiss filed by Respondent on: August 29, 1994.

#### **HEARING INFORMATION**

Hearing Dates/Sessions:	November 8, 1994	-	2 Sessions
	November 9, 1994	-	2 Sessions
	January 10, 1995	-	1 Session

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.

#### **CASE SUMMARY**

Claimant alleged that Respondent was employed by Claimant as an investment executive and that, in December, 1993, one of Respondent's customers filed a complaint against Respondent, alleging unsuitability and misrepresentation. Claimant further alleged that, during an internal investigation, Respondent admitted that he signed the customer's name on a margin agreement without the customer's knowledge or consent and that, as a result, Claimant settled the dispute with the customer for \$53,964.76.

Claimant alleged that Respondent agreed to pay Claimant for the settlement amount and that, on or about December 29, 1993, Respondent executed and delivered a promissory note to Claimant, reflecting the settlement amount. Claimant also alleged that the terms of the promissory note authorized Claimant to deduct any compensation due to Respondent and apply it to satisfy Respondent's obligation under the promissory note. Claimant further alleged that commissions of \$6,257.00 were credited against Respondent's indebtedness.

Claimant alleged that, on December 29, 1993, Respondent's employment with

Claimant was terminated because of Respondent's violations of firm policy. Claimant further alleged that Respondent breached his agreement with Claimant by failing to make any payments on the note.

Respondent denied that he recommended unsuitable investments or misrepresented any investment to the customer that brought the complaint against him. Furthermore, Respondent denied that he signed the customer's name to a margin agreement. Respondent maintained that Claimant's management did not consult with him before they admitted to the customer that inappropriate investments were made or that inappropriate advice was given. Respondent further maintained that the settlement between Claimant and the customer was gratuitous and without basis.

Respondent maintained that he was wrongfully induced to execute the promissory note and that he executed the documents under duress and threats made by his superiors. Respondent denied that the amount Claimant owed to him was limited to \$6,257.00 and maintained that Claimant wrongfully withheld this sum from him. Respondent further denied that he owed any money to Claimant. In addition, Respondent maintained that the U-5 form submitted by Claimant contained inaccuracies and libelous statements.

For his counterclaim, Respondent alleged that in October, 1993 he began interviewing with other firms, but that he was he was advised by his manager that he was not in favor of Respondent changing jobs. Respondent further alleged that, shortly thereafter, he was advised that one of his clients had lodged a complaint against him. In addition, Respondent alleged that, without consulting with him, Claimant settled the customer's claim, wrongfully and illegally debited Respondent with this amount and then, by force of threats, intimidation and duress, induced Respondent to execute the promissory note.

Respondent alleged that Claimant terminated his employment and filed a U-5 form which contained statements which Claimant and its agents knew were untruthful. Respondent further alleged that, as a result, he was denied licenses in Florida and Massachusetts, which are necessary for him to perform his job. Respondent also alleged that Claimant, through its agents, conspired to discharge Respondent without any basis and to damage his reputation. Furthermore, Respondent maintained that Claimant, through its agents, engaged in a systematic use of the U-5 form to make false and misleading allegations against registered representatives in order to damage them and keep their accounts.

For his third party claim, Respondent alleged that the Third Party Respondents coerced Respondent into executing documents and making admissions that they knew were false. Respondent further alleged that the Third Party Respondents allowed Respondent to be discharged without basis and allowed Respondent's reputation to be damaged by filing a U-5 form, which contained information that was supplied under duress and threats.

In response to the counterclaim and third party claim, Claimant and Third Party Respondents denied all allegations of wrongdoing. As affirmative defenses, Claimant and Third Party Respondents maintained that the counterclaim fails to state a claim upon which relief may be granted, that Claimant and Third Party Respondents acted in good faith and did not knowingly or intentionally violate any laws, that the counterclaim is barred by the doctrines of waiver, estoppel, ratification, unclean hands, laches and by the applicable statutes of limitations.

Claimant and Third Party Respondents maintained that Respondent's alleged damages were proximately caused by his own conduct and negligence and that such damages were caused or contributed to by persons, conditions or events beyond the control of Claimant and the Third Party Respondents. Claimant and Third Party Respondents further maintained that Respondent has no standing to assert the claims at issue and that he is not entitled to punitive damages as a matter of law. In addition, Claimant maintained that the U-5 form is protected by an absolute privilege and, therefore, it can not be the basis of a claim of defamation or interference with economic advantage.

#### **RELIEF REQUESTED**

Claimant requested an award of \$47,706.76, plus interest and costs.

Respondent requested that the Statement of Claim be dismissed in its entirety and that costs be assessed against Claimant. For his counterclaim and third party claim, Respondent requested that Claimant and Third Party Respondents be directed to file an amended U-5 form deleting all information which states or implies that Respondent left the employ of Claimant because of any impropriety on his part, deleting any reference that Respondent admitted that he signed a customer's name and deleting any reference to any agreement Respondent made with Claimant to make full restitution to Claimant for the settlement reached with the customer.

Respondent further requested that Claimant and Third Party Respondents be directed to file documents which are necessary to enable Respondent to become licensed in Florida and Massachusetts. In addition, Claimant requested that an award be entered against Claimant and Third Party Respondents in the amount of \$2,500,000.00.

Claimant and Third Party Respondents requested that the counterclaim and third party claim be dismissed in their entirety and that they be awarded costs and attorney's fees.

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

At the first hearing session conducted on November 8, 1994, the parties affirmatively accepted the composition of the panel of arbitrators. By letter dated

March 17, 1995, the parties were informed that the panel of arbitrators was not composed of a majority of public arbitrators, in accordance with Section 9(a) of the NASD Code of Arbitration Procedure. The parties were given an opportunity to reconduct the hearings with an entirely new panel. The parties, in writing, consented to having an award rendered by the panel that was originally appointed.

The arbitration panel made the following rulings as to Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden, who filed a Joint Statement of Answer in this matter, but failed to execute Submission Agreements:

1. Pursuant to Section 1 of the NASD Code of Arbitration Procedure, the panel found subject matter jurisdiction over this entire controversy and specifically as it related to Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden.
2. The panel found that Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden were persons associated with a member of the NASD, namely, PaineWebber Incorporated, at the time the controversy arose. Consequently, the panel found personal jurisdiction over Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden, pursuant to Section 8(a) of the NASD Code of Arbitration Procedure.
3. In view of (2) above, Third Party Respondents Grano, Salzman, Atkinson, Treadway, Donato, Marron, Guenther and Hayden were each required to execute and file with the NASD a Submission Agreement, pursuant to Section 25(b) of the NASD Code of Arbitration Procedure.

At the hearing in this matter, Respondent withdrew all claims asserted against Third Party Respondent Treadway. In addition, at the opening of the hearing the panel of arbitrators granted the Motion to Dismiss all claims against Third Party Respondents Grano, Atkinson, Donato, Marron and Guenther.

The third party claim brought by Respondent named "Ronald Donato" as a third party respondent. In their Joint Statement of Answer, the Third Party Respondents maintained that no person by the name of "Ronald Donato" neither is nor was employed by Claimant, but that a person by the name of "Robert Donato" is an employee of Claimant. The arbitration panel specifically granted the Motion to Dismiss all claims against Robert Donato.

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, the evidence presented at the hearing and the memoranda of law submitted by the parties, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent be and hereby is liable and shall pay to Claimant the sum of \$47,706.76 plus interest at 9% per annum from December 29, 1993 to the date of payment of the award.
2. All claims asserted against Claimant be and hereby are dismissed in their entirety.
3. All claims asserted against Third Party Respondents Hayden and Salzman be and hereby are dismissed in their entirety.
4. Each party shall bear their respective costs, including attorneys' fees.
5. All other claims are hereby denied.

### **FORUM FEES**

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$500.00 filing fee deposited by Claimant and the \$500.00 filing fee deposited by Respondent and have following forum fees:

$$5 \text{ hearing sessions} \times \$1,000.00 = \$5,000.00$$

The forum fees are assessed against:

1. Claimant be and hereby is liable for the sum \$2,500.00 representing one half of the forum fees assessed. Claimant previously deposited the sum of \$600.00 with the NASD, which shall be applied towards the forum fees assessed. Therefore, Claimant is liable and shall pay to the NASD the sum of \$1,900.00.
2. Respondent be and hereby is liable for the sum of \$2,500.00

representing one half of the forum fees assessed. Respondent previously deposited the sum of \$1,000.00 with the NASD, which shall be applied towards the forum fees assessed. Therefore, Respondent is liable and shall pay to the NASD the sum of \$1,500.00.

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

**ARBITRATORS' SIGNATURES**

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Richard S. Peskin, Esq.  
Industry Chairperson

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John J. O'Neill, Esq.  
Industry Arbitrator

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Jerome H. Levy  
Industry Arbitrator

Date of Decision: March 30, 1995