

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Paul A. Shea and Penne J. Shea

v.

CASE No.
94-01862

Name of Respondents

Paragon Capitol Corporation
Anthony J. Toscano

REPRESENTATION

For Claimants, Paul A. Shea and Penne J. Shea ("Claimants"), Evans J. Carter, Esq. from the law firm of Kassler & Feuer located in Boston, Massachusetts.

For Respondent, Paragon Capital Corporation, ("Paragon"), David S. Smith, Esq., from the law firm of Smith Campbell & Paduano located in New York, New York.

For Respondent, Anthony J. Toscano, ("Toscano"), Joan M. Markey, Esq., attorney at law located in New York, New York.

CASE INFORMATION

Statement of Claim was filed on May 11, 1994.

Claimant's Submission Agreement signed on May 3, 1994.

Statement of Answer was filed by Respondent, Paragon on September 12, 1994.

Respondent, Paragon did not execute a Submission Agreement.

Statement of Answer was filed by Respondent Toscano on August 11, 1995.

Respondent Toscano did not execute a Submission Agreement.

HEARING INFORMATION

Hearing Dates/Sessions: October 23, 1995 - 2 Sessions
 October 24, 1995 - 1 Session

Hearing Location: NASD, Inc. offices located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

Claimants commenced this claim to recover damages against Paragon and Toscano (collectively "Respondents") for losses they incurred as a result of Respondents' "cold call" recommendation that they purchase Biorelease in December, 1993 and February, 1994 which was an unsuitable investment. Claimants among other things allege that Respondents engaged in unfair and/or deceptive business practices; misrepresented that Biorelease was actually a "c" listed security by NASDAQ; and failed to advise Claimants that Biorelease was not recommended as a buy by the clearing agent and market maker.

Respondent Paragon denies liability and denies that it failed to supervise Toscano. Paragon contends that Toscano investigated Biorelease prior to recommending that Claimants purchase it and that Toscano had no way of knowing that it would be delisted. Paragon also contends that it was Claimant Paul Shea who initiated the purchase of the additional shares in February, 1994 when he already knew that Biorelease had a "c" listing in January, 1994. Paragon avers that Claimants failed to state that they made substantial profits on earlier purchases of other stocks before they asked for additional recommendation.

Respondent Toscano denies liability and denies any wrongdoing. Toscano states that he did his due diligence on Biorelease before recommending it to Mr. Shea. Toscano states that although it was a joint account, all of his communications were with Mr. Shea. Toscano also states that he sent Mr. Shea promotional literature about Biorelease within a few days of the purchase. Toscano further states that there was a meeting with management representatives from Biorelease who were quite optimistic about the company and indicated that they expected it to be profitable by mid-1995. Toscano contends that there was no indication that Biorelease would be delisted by NASDAQ. Toscano also contends that as soon as he found out that Biorelease had received a "c" designation, he contacted all of his customers, including Claimant. Toscano further contends that Shea later expressed an interest in purchasing additional shares at 1 5/8 and Toscano told him that he did not think that he could get that price and Shea said that he was willing to pay up to \$2 per share. Toscano contends that the stock was later delisted.

RELIEF REQUESTED

Claimants request an award of \$25,391.50 in compensatory damages and lost profits and an award of \$5,000.00 in attorney's fees.

Paragon requests that the panel render an award in its favor, dismissing all claims against them in their entirety including the claim for attorney's fees as the customer agreement between the parties provides that New York law applies and New York law precludes the award of attorney's fees.

Toscano requests that the claim for damages be denied; that even if Claimants are entitled damages, they are not entitled to lost profits and attorney's fees. Toscano also requests that the costs of this proceeding be assessed against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the award in this matter be executed in counterpart copies and agreed to receive conformed copy of the award while the original remains on file with the NASD.

At the close of Claimants' case Respondents moved to dismiss on the grounds that Claimants failed to make out a *prima facie* case of misrepresentation. After hearing all parties on the motion, this panel

granted Respondents' motion as Claimants failed to prove that Toscano made any material misrepresentation of fact upon which they relied.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. All claims against Respondents are dismissed.
2. All other claims for relief are denied

FORUM FEES

Pursuant to Section 43(c) of the Code of *Arbitration Procedure*, the following Forum Fees are assessed.

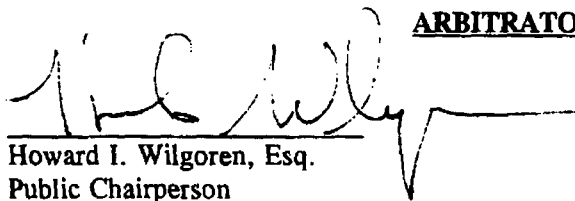
Non-refundable Filing Fees - \$ 120.00
Hearing Session Fees - \$1,200.00 (3 Hearing Sessions @ \$400.00 per session)

Total Fees: \$1,320.00

1. Claimants are assessed \$660.00. Claimants previously paid \$520.00 and owe a balance of \$140.00
2. Respondents are jointly and severally assessed \$600.00 in forum fees.

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

ARBITRATOR'S SIGNATURE



Howard I. Wilgoren, Esq.
Public Chairperson

Brenda R. Katz
Public Panelist

Spring B. Leonard, CFP
Industry Panelist

Date of Decision: March 18, 1996

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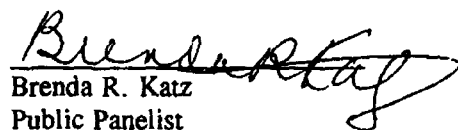
Total Fees: \$1,7200.00

1. Claimants are assessed \$860.00 Claimants previously paid \$5120.00 and owe a balance of \$340.00.
2. Respondents are jointly and severally assessed \$860.00 in forum fees.

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