

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimants

Steel Industries, Inc.; and
Paul A. Sakmar

and

NASD Case Number: 95-01154

Name of Respondents

Kidder, Peabody & Company, Inc.;
PaineWebber, Inc.; and
Michael E. Simmers

REPRESENTATION OF PARTIES

— Claimants Steel Industries, Inc. and Paul A. Sakmar were represented by Roger K. Timm, Esq. of Dykema Gossett located in Detroit, Michigan.

Respondents Kidder, Peabody & Company, Inc., PaineWebber, Inc. and Michael E. Simmers were represented by Richard Kelly, Esq. of Kidder, Peabody & Company, Inc. located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by Claimants Steel Industries, Inc. and Paul A. Sakmar on or about March 6, 1995.

Claimant Steel Industries, Inc.'s Submission Agreement was signed on March 1, 1995 by Roy F. Pisasale, Chief Financial Officer of Steel Industries, Inc.

Claimant Paul A. Sakmar's Submission Agreement was signed on March 1, 1995.

The Statement of Answer was filed with the NASD by Respondents Kidder, Peabody & Company, Inc. and Michael E. Simmers on or about May 9, 1995.

Respondent Kidder, Peabody & Company, Inc.'s Submission Agreement was signed on May 5, 1995 by Richard Kelly, Vice President and Associate General Counsel of Kidder, Peabody & Company, Inc.

Respondent Michael E. Simmers' Submission Agreement was signed on May 5, 1995.

The Motion to Dismiss was filed with the NASD by Respondent PaineWebber, Inc. on or about May 5, 1995.

Claimants' Response to Respondent PaineWebber's Motion to Dismiss was filed on June 23, 1995.

The Statement of Answer was filed with the NASD by Respondent PaineWebber, Inc. on or about February 22, 1996.

The NASD has no record Respondent PaineWebber, Inc. signed a Submission Agreement.

HEARING INFORMATION

The pre-hearing was held on February 15, 1996 for one (1) session.

The hearing was held on May 7, 1996 for two (2) sessions. The hearing location was Southfield, Michigan.

CASE SUMMARY

Claimants Steel Industries, Inc. and Paul A. Sakmar ("Claimants") alleged that Respondent Michael E. Simmers ("Simmers") was a salesperson with Respondent Kidder, Peabody & Company, Inc. ("Kidder") at all times relevant to this claim. Claimants maintained that Respondent Simmers handled investments for Claimants. Claimants asserted that Respondent PaineWebber, Inc. ("PWI") was sued as the apparent successor to Kidder.

Claimants maintained that, in early December of 1994, Claimant Steel Industries, Inc. held 9000 shares of Chiron Corporation ("Chiron") and Claimant Sakmar held 5000 shares of Chiron. Claimants alleged that, in mid December of 1994, Claimants became aware, through Respondent Simmers, that CIBA Biotech Partnership, Inc. ("CIBA") was making a partial tender offer for

shares of Chiron. Claimants asserted that Claimants instructed Respondent Simmers to tender all Claimants' shares according to the terms of the tender offer. Claimants alleged that Claimants were concerned that, after the close of the tender offer, the Chiron stock would decrease in value. Claimants maintained that, in order to maximize the return with respect to the shares not taken in the tender, Claimants sold covered calls of Chiron. Claimants contended that the calls were exercised on January 4, 1995. Claimants alleged that Respondent Simmers represented that the tendered shares would not be affected by the sale of the covered calls. Claimants maintained that, as a result of the sale of options, Claimants tendered fewer shares. Claimants alleged that only 5,095 shares were tendered for Claimant Steel Industries, Inc., and only 3,054 shares were tendered for Claimant Sakmar. Accordingly, Claimants asserted claims including: violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5; New York common law fraud; breach of fiduciary duty under New York common law; and breach of contract.

Respondents Kidder, Peabody & Company, Inc. ("Kidder") and Michael E. Simmers ("Simmers") denied all liability to Claimants in the Statement of Answer. Respondents alleged that this case was nothing more than Claimants' attempt to circumvent SEC Rule 14e-4 which prohibits short tendering in partial tender offers. Respondents maintained Claimants were concerned that the Chiron stock would decline in value, and that Claimants came up with the idea to sell the covered calls, not the broker. Respondents asserted that Respondents did not defraud Claimants or violate the securities laws. Respondents maintained that Respondents were not the Claimants' fiduciaries. Respondents asserted that the Claimants have not suffered any loss. Respondents alleged that Claimants benefited from selling the calls which were later assigned. Respondents maintained that this case did not warrant punitive damages or attorneys' fees.

Respondent PaineWebber, Inc. ("PWI") also denied all liability to Claimants in its Statement of Answer. Respondent PWI maintained that the transaction at issue took place prior to PWI's purchase of substantially all the assets of Kidder, Peabody & Company, Inc. on January 30, 1995. Respondent PWI asserted that none of the trades of which the Claimants complain took place at PWI. Respondent PWI alleged that Claimants did not even maintain an account with PWI until after January 30, 1995. Respondent PWI asserted that PWI cannot be held liable for anything claimed by Claimants in this arbitration.

RELIEF REQUESTED

Claimants requested an award, including punitive or exemplary damages as may be appropriate, in such amount as they are found to be entitled. Claimant Steel Industries, Inc. estimated its actual damages at \$84,728 and sought punitive damages of \$170,000. Claimant Sakmar estimated his actual damages at \$42,280 and sought punitive damages of \$85,000. Claimants further requested interest, costs, attorney fees, and such other relief as may be proper under the circumstances.

Respondents Kidder, Peabody & Company, Inc., PaineWebber, Inc. and Michael E. Simmers requested that the Statement of Claim be dismissed in its entirety and that all costs associated with the arbitration be assessed against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed to receive conformed copies of the award while the original(s) 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. The Statement of Claim is hereby dismissed in its entirety with prejudice;
2. The panel orders the expungement of this arbitration case from the Central Registration Depository ("CRD") of the National Association of Securities Dealers, Inc. ("NASD") for the record of Respondent Michael E. Simmers;
3. Forum fees shall be divided between the parties, as specified below;
4. Other than forum fees which are specified below, the parties shall each bear their own respective costs and attorney's fees; and
5. Any relief not specifically enumerated is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 per pre-hearing session, if any. There were two (2) hearing sessions x \$750 = \$1,500. There was one (1) pre-hearing session x \$300 = \$300 in forum fees. Total forum fees = \$1,800. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the NASD Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain the non-refundable filing fee in the amount of \$200 previously deposited with the NASD by the Claimants. The NASD shall retain the hearing session deposit in the amount of \$750 previously deposited with the NASD by the Claimants. The NASD shall retain the Section 45 Member Surcharge in the amount of \$350 previously deposited by Respondent Kidder, Peabody & Company, Inc. The NASD shall retain the Section 45 Member Surcharge in the amount of \$350 previously deposited with the NASD by Respondent PaineWebber, Inc.

Claimants Steel Industries, Inc. and Paul A. Sakmar are jointly and severally assessed and shall pay forum fees in the amount of \$150. Respondents Kidder, Peabody & Company, Inc., PaineWebber, Inc. and Michael E. Simmers are jointly and severally assessed and shall pay forum fees in the amount of \$900.

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

Concurring Arbitrators' Signatures

\s\ H. Rollin Allen, Esq.

H. Rollin Allen, Esq.

Chairperson

Public Arbitrator

April 10, 1996

Dated:

\s\ George P. Doom

George P. Doom

Panelist

Public Arbitrator

April 10, 1996

Dated:

\s\ Frank G. Bank

Frank G. Bank

Panelist

Industry Arbitrator

April 13, 1996

Dated:

For NASD use only:

Date award served on the parties: April 16, 1996