

NASD REGULATION AWARD

NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Mark Zimmer

95-02684

Name of Respondent

PaineWebber, Inc.

REPRESENTATION

For Claimant, Mark Zimmer ("Claimant"), appeared Brian E. Mass, Esq., of the law firm of Beldock Levine & Hoffman located in New York, New York.

For Respondent, PaineWebber, Inc. ("Respondent"), appeared Frederic L. Lieberman, Esq., of the law firm Jackson Lewis Schnitzler & Krupman located in New York, New York.

CASE INFORMATION

Statement of Claim filed: June 2, 1995

Claimant's Submission Agreement signed on: June 8, 1995

Statement of Answer filed by Respondent on: September 27, 1995

Respondent's Submission Agreement signed on: September 22, 1995

HEARING INFORMATION

Pre-Hearing Conference:	March 8, 1996	-	One Session
	March 21, 1996	-	One Session
Hearing dates/sessions:	June 20, 1996	-	Two Sessions
	December 11, 1996	-	Two Sessions
	December 12, 1996	-	Two Sessions
	January 14, 1997	-	Two Sessions
	January 15, 1997	-	Two Sessions

The hearings were held at the offices of NASD Regulation, Inc., and the City Mid-Day Club located in New York, New York.

CASE SUMMARY

Claimant alleged that he was employed by Respondent as a bond trader from May 26, 1992, through August 5, 1994. Claimant alleged that, prior to that time, from 1985 until May of 1992, he was employed by, and for some period of time was a partner at, the investment firm of Cowen & Co. ("Cowen"). Claimant alleged that, on or about April, 1992, Respondent initiated discussions with him inducing him to leave Cowen and work for Respondent. Claimant asserted that Respondent offered him a sign-on bonus of \$100,000.00; an annual base salary of \$125,000.00 and additional compensation in the form of an annual performance bonus equal to approximately 12% to 15% of the profits he generated. Claimant alleged that Respondent stated they would not put the profit sharing aspect of the performance bonus in writing but that his annual performance bonus would be calculated based on a percentage of trading profits. Claimant further alleged that by letter dated May 7, 1992 (the "Offer Letter"), Respondent confirmed its offer to hire the Claimant as a First Vice President in the Fixed Income Division to act as the Head Trader of the Sinking Fund Desk. Claimant contended that the Offer Letter stated his base salary was to be \$125,000.00; he would receive a sign-on bonus of \$100,000.00 described as an Employee Forgivable Loan ("EFL"); and that he was guaranteed a minimum annual bonus of \$125,000.00, as long as he did not resign or was not terminated for cause. Claimant also contended that Respondent continued to assure him that he would receive an annual bonus equal to a percentage of his trading profits and that the payment of this bonus was not discretionary.

Claimant alleged that he started work for Respondent on May 26, 1992, and shortly thereafter received the \$100,000.00 sign-on bonus. Claimant alleged that the profits he earned during 1992 totalled \$3,153,000.00, exceeding all expectations. Claimant alleged that he was advised that his bonus for 1992 would be \$300,000.00 and that some of the bonus would be paid in shares of restricted PaineWebber stock which would vest over a three year period and would be forfeited if he left Respondent other than by death, disability or retirement. Claimant alleged that when he complained to his superiors that, based on the agreed percentage of his trading profits, his bonus should be \$400,000.00, they agreed but took the position that his sign-on bonus counted against the bonus so that he was only entitled to \$300,000.00. Claimant also alleged that he complained that he had never been advised that any of his performance bonus would be paid in restricted PaineWebber stock. Claimant further alleged that, during 1993, his work entitled him to a bonus of \$490,000.00 in addition to a base salary of \$125,000 for total compensation of \$615,000.00. Claimant alleged that, for 1993, Respondent paid him \$395,500 in cash and awarded him an additional 3,420 shares of restricted PaineWebber stock then valued at approximately \$95,000.00.

Claimant alleged that during 1993 he met with Tim Cronin ("Cronin") the head of all Fixed Income Trading and later with Mat Morahan ("Morahan"), the head of the High Yield Securities Division and they talked to him about transferring to the High Yield Securities Division where he would receive at least \$500,000.00 in compensation. Claimant alleged, that as a result of his meeting with Cronin and Morahan, he agreed to transfer to Morahan's division and started working there on January 1, 1994. Claimant alleged that from January 1, 1994, through August 5, 1994, he performed his duties at Morahan's trading desk and that despite adverse market conditions his trading was more profitable than the other traders in Morahan's division.

Claimant alleged that, in December 1993, he signed up for a long term disability plan under which, beginning in January 1994, deductions from his salary were to be made to pay for the premiums. Claimant alleged that in the spring of 1994, his doctor advised him that he would need a surgical procedure to relieve his severe neck and back pain and that recovery from such surgery would be up to two months with the possibility of long term disability through paralysis. Claimant alleged that he advised his superiors of his likely absence from work for up to two months and the risk of long term disability. Claimant alleged that at various times thereafter Respondent asked him to postpone the surgery because of the importance of his presence at the trading desk. Claimant alleged that on August 3, 1994,

he was terminated without warning and that Respondent took the position that the termination disqualified him from further participation in the long term disability program for which he had been paying premiums. Claimant also alleged that upon Claimant's termination, Respondent refused to pay him any portion of his earned bonus for 1994 and refused to allow the still unvested restricted stock paid as part of his 1992 and 1993 bonuses to vest.

Claimant contended that Respondent breached the express agreement they had with him and he is therefore entitled to recover the greater of: 1) additional compensation equal to 12-15% of the trading profits earned from his trading in 1994; or, 2) a pro-rated portion of the \$500,000.00 guaranteed minimum compensation promised to him when he agreed to transfer to High Yield Securities Division. Claimant alleged that Respondent's payment to him of a substantial bonus for 1992 and 1993 created an implied contract to pay Claimant a substantial bonus as part of his overall compensation. Claimant alleged that Respondent's refusal to pay him any bonus for 1994 constitutes a breach of this implied contract and therefore, he is owed an amount equal to his 1993 bonus pro-rated for the time that Claimant worked for Respondent in 1994. Claimant alleged that the fair and reasonable value of the work he performed for Respondent in 1994 is equal to the pro-rata compensation he received for the same services in 1993. Claimant alleged that he only received \$72,916.66 in compensation for the services rendered in 1994 and that Respondent is therefore justly and duly indebted to him in the amount of \$285,833.04. Claimant further alleged that Respondent wrongfully reduced his bonus in 1992 and therefore owes him \$100,000.00. Claimant also alleged that Respondent's payment of a portion of Claimant's performance bonus for 1992 and 1993 in restricted stock violated the agreement he had made with Respondent when he had agreed to work for them.

Claimant alleged that by terminating him without notice, Respondent knowingly deprived him of the opportunity to undergo needed but risky surgery while covered by the long-term disability insurance program for which he had been paying premiums during 1994. Claimant alleged that in choosing to pay for such disability coverage, and in agreeing at Respondent's request to defer the needed surgery, he relied on Respondent's representations that his employment would continue for an indefinite period. Claimant maintained that he is entitled to the reinstatement of the long-term disability coverage so that he can undergo the needed surgery with the financial protection offered by the insurance.

Claimant alleged that as a result of his neck and back condition, he is a qualified individual with a disability within the meaning of the Americans with Disabilities Act ("ADA"). Claimant alleged that Respondent terminated him because of his disability and that said termination was done with malice and reckless indifference to the federally protected rights of Claimant. Claimant alleged that as a result of Respondent's discrimination, he has suffered deprivation of income and benefits, the termination of his employment, emotional pain, suffering, inconvenience, mental anguish, humiliation and damage to his reputation and career. Claimant also alleged that Respondent has violated the New York Executive Law, Section 290, et seq., by discrimination on the basis of disability or perceived disability. Further, Claimant alleged that Respondent violated the New York City Administrative Code, Section 8108 et seq., by discrimination against him on the basis of disability or perceived disability.

Respondent maintained that Claimant was hired in May 1992, as First Vice President and Head Trader at the Sinking Funds Desk in the Fixed Income Division. Respondent maintained that the terms of Claimant's employment letter were set forth in the Offer Letter and these were an annual salary of \$125,000.00 for 1992; an EFL of \$100,000.00; a guaranteed minimum bonus of \$125,000.00 for 1992; and eligibility to be considered for a 1992 discretionary incentive bonus. Respondent maintained that it undertook no obligations toward the Claimant other than those expressly stated in the offer letter and that Claimant did not receive any guarantee oral or written as to his total compensation for 1992 or any subsequent year. Respondent maintained that, prior to commencing employment, Claimant executed a "Pre-Employment Application" that provided that he was an employee at-will; that his employment and compensation could be terminated at any time; and that only the Director of Human Resources had the authority to enter into an agreement contrary to the foregoing. Respondent maintained that its employee

handbook expressly states that bonuses were discretionary and that an employee had to be employed with Respondent at the time the bonus payment is made.

Respondent maintained that Claimant received his \$100,000.00 EFL when he began his employment and that it was forgiven on February 28, 1993. Respondent maintained that, in 1993, Claimant received his \$125,000.00 salary, his guaranteed bonus of \$165,000.00, a portion of which was paid in the form of common stock pursuant to a restricted stock agreement, bringing his total bonus award to \$290,000.00. Respondent further maintained that it never undertook an obligation to pay Claimant a bonus based on specific percentage of profits. Respondent also maintained that it had the discretion to issue restricted stock as a bonus payment and that the Claimant knew that under the Restricted Stock Agreement that the stock could be forfeited if his employment was terminated before it vested.

Respondent maintained that in 1994 Claimant transferred to the High Yield Securities Desk because it had a much better outlook in 1994 than the Sinking Funds Desk. Respondent maintained that it did not make any written or oral compensation guarantee to the Claimant. Respondent maintained that 1994 was a difficult year for the financial industry and it was forced to reduce staff and that sixteen employees in the Capital markets Department, which included the High Yield Securities Desk, were laid off between July 29 and August 8, 1994. Respondent maintained that Morahan, manager of the High Yield Securities Desk, was instructed to eliminate one trader and that Claimant was eliminated because he was the one with the least seniority and expertise. Respondent further maintained that the decision to remove Claimant was not related to Claimant's physical problems. Respondent also maintained that members of the High Yield Desk are not evaluated on the basis of profits their individual trades generate; and that Claimant's eight month tenure at the desk did not provide a sufficient basis to determine that Claimant was a more effective trader than his more experienced colleagues.

Respondent maintained that Claimant did tell Morahan that he might need surgery but he never told him that he was prepared to set a date for the surgery. Respondent maintained they never requested that Claimant defer any necessary medical procedure. Respondent further maintained that Claimant was not entitled to a discretionary bonus in 1994 because, under the terms of the bonus plan, Claimant had to be employed by Respondent the time the bonus was awarded. Respondent also maintained that participation in Respondent's Long Term Disability Plan was limited to active employees and Claimant's employment was terminated on August 5, 1994.

Respondent maintained that Claimant failed to mitigate his damages by using reasonable diligence to seek and obtain comparable employment elsewhere. Respondent further maintained that Claimant's causes of action for violation of the ADA, the New York Human Rights law, and the New York City Human Rights law must be dismissed because Claimant has claimed total disability. Respondent maintained that under the ADA a party must be capable of performing essential job functions as required by those statutes.

RELIEF REQUESTED

Claimant, Mark Zimmer, requested compensation due under his express and implied contracts of employment for services performed from January 1, 1994, through August 5, 1994, in an amount not less than \$218,583.34; judgment against Respondent for the value of services performed from January 1, 1994, through August 5, 1994; \$100,000.00 as reimbursement of his 1992 start-up bonus; delivery of the shares of stock awarded to Claimant as part of his 1992 and 1993 compensation which have not been delivered; reinstatement to Respondent's long term disability program; reasonable attorney fees; judgement against Respondent for back pay and loss of employment benefits from August 5, 1994, plus interest. In addition, Claimant requested injunctive relief reinstating him to his previous employment position with Respondent reinstating any benefits Claimant had attained through such gainful employment;

that Respondent be permanently enjoined from further prohibited discrimination against Claimant; punitive damages; attorney's fees, including litigation expenses and costs; and, such other relief as the arbitrators deem just and proper.

Respondent, PaineWebber, Inc., requested that all claim be dismissed in their entirety; costs and reasonable attorney's fees; costs of the arbitration; and, for such further relief as is proper.

OTHER ISSUES CONSIDERED AND DECIDED

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. All claims asserted by Mark Zimmer against PaineWebber, Inc. are dismissed in their entirety;
2. The parties shall bear their respective cost, including attorney's fees; and,
3. All other requests for relief are denied.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee previously deposited by the Claimant and have assessed the following forum fees:

Pre-Hearing Fees:	\$ 600.00	(2 Sessions x \$300.00)
Hearing Session Fees:	\$7500.00	(10 Sessions x \$750.00)
Total Forum Fees:	\$8100.00	

Claimant, Mark Zimmer, is assessed \$4,050.00 representing one-half of the total forum fees due, less \$750.00 previously deposited, leaving \$3,300.00. Therefore, Claimant, Mark Zimmer, is liable and shall pay to NASD Regulation, Inc. the sum of \$3,300.00.

Respondent, PaineWebber, Inc., is assessed \$4,050.00 representing one-half of the forum fees due. Therefore, Respondent, PaineWebber, Inc. is liable shall pay to NASD Regulation, Inc. the sum of \$4,050.00.

Fees are payable to NASD Regulation, Inc.

ARBITRATORS' SIGNATURES

I, Michel J. Landron, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above reference matter.

Michel J. Landron, Esq.

I, Michael P. Golden, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above referenced matter.

Michael P. Golden

I, Ernest Fanwick, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my ~~award~~ decision in the above referenced matter.



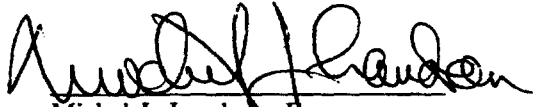
Ernest Fanwick, Esq.

Date of Decision:

May 14, 1997

ARBITRATORS' SIGNATURES

I, **Michel J. Landron, Esq.**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above reference matter.



Michel J. Landron, Esq.

I, **Michael P. Golden**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above referenced matter.

Michael P. Golden

I, **Ernest Fanwick, Esq.**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Ernest Fanwick, Esq.

Date of Decision:

May 14, 1997

ARBITRATORS' SIGNATURES

I, **Michel J. Landron, Esq.**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above reference matter.

Michel J. Landron, Esq.

I, **Michael P. Golden**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my decision in the above referenced matter.



Michael P. Golden

I, **Ernest Fanwick, Esq.**, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Ernest Fanwick, Esq.

Date of Decision: May 14, 1997