

NASD REGULATION, INC.

In the Matter of the Arbitration BetweenName of Claimant

PaineWebber, Inc.

vs.

Case No.

95-03271

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Securities Dealers, Inc.

1996

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Name of RespondentRobert D. Sherwin

REPRESENTATION

For Claimant, PaineWebber, Inc. ("PW"), Steven L. Manchell, Esq. and Bradford Hermanson, Esq., from the firm of Choate, Hall, & Stewart, located in Boston, Massachusetts.

For Respondent, Robert D. Sherwin, ("Sherwin"), William A. Jacobson, Esq. from the firm of Kaplan & Jacobson, Inc., located in Providence, Rhode Island.

CASE INFORMATION

Statement of Claim was filed on July 6, 1995.

PW's Submission Agreement was signed on June 27, 1995.

PW's Reply to Counterclaim was filed on November 10, 1995.

Respondent Robert D. Sherwin Statement of Answer and Counterclaim was filed on September 18, 1995.

Respondent's Submission Agreement was signed on September 18, 1995.

HEARING INFORMATION

Hearing Dates/Sessions: September 9, 1996 - 1 session
 September 10, 1996 - 2 sessions
 September 11, 1996 - 2 sessions
 September 26, 1996 - 2 sessions
 September 27, 1996 - 2 sessions

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

CASE SUMMARY

- ~ Claimant PW initiated this claim to recover monies given to employee Robert Sherwin in the form of an Employee Forgivable Loan ("EFL") in connection with his employment with PW. Claimant PW alleges that this EFL was to be forgiven by PW in four equal annual installments starting from January 30, 1996 and ending on January 30, 1999, provided that certain conditions were met. PW states that Sherwin was given this EFL as an inducement to long term employment but that Sherwin's employment ended prior to a forgiveness date. PW also states that a demand for payment was made but Sherwin has not repaid the loan.

Respondent Sherwin denied liability to PW for the loan and interposed two counterclaims. The first counterclaim was for breach of contract by PW in a failed attempt to hire Sherwin in 1993. The second counterclaim was for wrongful termination based upon unsubstantiated charges of a single unauthorized trade.

Claimant PW denied liability. PW contends that Sherwin's termination was for cause because he committed an unauthorized trade in a customer's account.

RELIEF REQUESTED

PW requested an award of \$203,832.50 in compensatory damages plus interest, attorney's fees and costs. PW also requested that the counterclaims be dismissed.

Sherwin requested that PW's claim be denied. Sherwin also requested \$1,902,922 plus 12% interest at Rhode Island statutory rate, costs and reasonable attorney's fees on both counterclaims. Sherwin further requested such other and further relief as the arbitrators deems just and proper.

The Respondent further requested that the panel order that PW amend the Respondent's Form U5 to state as the reason for termination the following language: "Robert Sherwin was terminated without cause based upon accusations of misconduct which were not supported by credible evidence".

PANEL DISCUSSION

Sherwin's employment with PW ended on April 19, 1995. Under the terms of the note, if Sherwin voluntarily resigned, or was terminated for cause, Sherwin would be obligated to pay the amount of the note not forgiven by the stated length of employment. If, on the other hand, Sherwin's termination by PW was made "other than for cause", the principal amount would be forgiven.

PW alleged and produced witnesses and documents to try to establish that Mr. Sherwin in the days prior to his termination had committed an unauthorized trade in the account of client Dr. Fitzell. The evidence showed that on April 12, 1995, Sherwin as an account executive had a particularly active day, with 70 or so transactions to place orders for two syndicate items and other transactions. Claimant called Mr. Robert Gulla, Branch Office Manager ("BOM"), who testified that on Monday, April 17, 1995, he received a phone call from Dr. Fitzell who stated that he had received a confirmation/prospectus on 400 shares of Amerigas Partners, with a trade date of April 12. Gulla testified that Fitzell stated he did not authorize this transaction. Gulla testified that he called Sherwin into his office and confronted him about the charge, that Sherwin claimed he had tried to call the client in advance of the trade, but did not reach him, and left a message on his answering machine, and that Gulla pointed out that this constituted an unauthorized trade. Gulla testified that Sherwin later that day, and in the next day's telephone conference with compliance officer Ms. Lemondola, changed his story and stated that he had filled out the order ticket in error, and had meant the 400 Amerigas shares to be added to the account of a different client. James Botvin. Gulla testified that Sherwin now stated he had discovered the error on Friday, April 14, 1996 (Good Friday, a legal holiday), and had attempted to contact Dr. Fitzell, but Dr. Fitzell was not home, and his answering machine was out of order. PW offered as evidence the original trade ticket (PE 10), and the carbonless copy of said ticket (PE 11). Following Mr. Gulla's Monday confrontation with Mr. Sherwin about this trade, Mr. Gulla signed a trade correction form (PE 16) which canceled the trade from Fitzell's account and placed it into the account of Mr. Botvin. Mr. Gulla testified that he did not call Mr. Botvin to ascertain whether he authorized this purchase before entering the trade correction. He testified that in hindsight he should have "busted" the trade and placed the questioned trade in the error

account. Later, Ms. Lemondola would testify that that would have been the proper procedure if the BOM had suspected that an unauthorized trade had occurred. PW counsel brought out during testimony, and it was obvious, that the trade ticket had been filled out in a sloppy fashion, with over-writing on the quantity block and on the account number blocks. Testimony was heard that the wire operator had over-written the account number in red ink on the original ticket to place the trade correctly into the account of Botvin. A heated issue was raised when the original ticket was compared with the carbonless copy. On the carbonless, or yellow copy, the client name "Fitzell" was crossed off the name "Botvin" was present in the lower right corner, circled twice. It was submitted this name "Botvin" was printed in carbonless form, as if to represent an imprint or the original or white copy, but that the white copy had no such "original" imprint of the name "Botvin".

It was offered by counsel for PW that Sherwin could have altered the yellow ticket in a panicked attempt to conceal his misbehavior. Respondent's counsel countered that Mr. Gulla himself could have altered this ticket while in his possession, or that the imprint could have been caused innocently by the placement and writing on a "post-it" not attached to the ticket in the course of the correction process.

PW called Dr. Fitzell as a witness. Dr. Fitzell could not remember the trade of Amerigas in question and did not testify that Sherwin had committed an unauthorized trade with respect to this or any other security. Fitzell testified that he call Gulla on April 17 to complain about the six of his margin indebtedness. His testimony was silent on the issue of unauthorized trading.

PW called Ms. Lemondola as a witness who testified via telephone conference from PW in New Jersey under oath. Lemondola testified that on April 18, she was a party to a conference call where Sherwin was present in Gulla's office. This meeting was called so that Mr. Lemondola could question Sherwin about the circumstances of the questioned trade. Following this conversation, Sherwin was asked to leave the room, she stated, and then Gulla stated to her that Sherwin had changed his story. Ms. Lemondola testified under cross examination that she never heard two different versions from Sherwin. Lemondola testified that she discussed with Gulla the PW early dispute resolution program as it would apply to Sherwin and requested him to clear out his office. Sherwin was permitted to make copies of his client accounts.

Evidence was offered that on Friday, April 21, two days later, that Sherwin filed suit in a Rhode Island court and obtained an injunction prohibiting PW from classifying his termination as "for cause" which was argued would prevent him from obtaining employment as an account executive. Later the evidence submitted showed that this form U5 stated "permitted to resign" as the type of termination. The evidence showed that Sherwin was within weeks hire by Dean, Witter, & Co., as a broker, but that before this time his account records of a client base of hundreds of clients and as much of \$70 million in assets were distributed to remaining brokers in Gulla's office who contracted these clients with letters and phone call; in an attempt to retain their business with PW.

The Respondent's counsel offered documentary evidence and witnesses, as well as cross examination of Claimant witnesses to rebut the allegation that the Respondent had committed an unauthorized trade with client Fitzell. Respondent Sherwin testified that he never intended the Amerigas trade to end up in Dr. Fitzell's account, but in the account of a client James Botvin. Sherwin testified that when he reviewed a commission run of the days activity of April 12 he noticed that Fitzell not Botvin had received the shares and that he attempted to call Dr. Fitzell to advise him of the error. Sherwin testified that on Friday April 14, he was in the office, although a legal holiday, and prepared the trade correction form for the BOM's signature on Monday. He further testified that on Monday he spoke to Mr. Gulla who advised him that Fitzell had called regarding his receiving a confirm for Amerigas which he did not

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order, and that he was concerned about the level of margin in his account. Sherwin testified he explained to Gulla that the trade occurred as a mistake and Gulla authorized a trade correction to place the trade into Botvin's account.

The next day, Sherwin testified, he was called into Gulla's office for a conference call with Ms. Lemondola and he provided his explanation of the error. He testified that his version of the events was consistent with the version he communicated with Gulla the previous day.

Respondent called James Botvin who testified that he has had a long personal and business relationship with Sherwin and that he remembered the trade in question. He testified that his trading behavior typically includes syndicate items and generally more aggressive ideas. He said he remembered Amerigas because it was explained to him to be a conservative income idea, that he was reluctant at first, but then agreed to buy 400 shares for on of his accounts. Botvin testified that neither Mr. Gulla nor any other PW employee other than Sherwin called him regarding the trade, specifically, that Mr. Gulla never called him to verify his desire to purchase the security. Botvin's account at the time of the trade, it was offered, had sufficient cash to cover the purchase.

Respondent offered evidence to establish a possible motive for Mr. Gulla to act so quickly to terminate Sherwin who was considered a high producer. In 1993, Sherwin, then at Kidder Peabody, it was offered was recruited by PW to join their firm by the then Providence, Rhode Island manager Mr. Tenaglia.

Much negotiating culminated in the signing of a document by Sherwin and Tenaglia that was submitted by Respondent to be a definitive and binding contract to employ Sherwin. The evidence showed that this attempt to hire Sherwin was advised against by the PW Compliance Department, which included Ms. Lemondola at the time. The Regional Sales manager, Mr. Jerry Lichstein, had the authority to over-tulle Compliance and hire Sherwin, Tenaglia testified, but chose not to do so. During the period Sherwin's hiring was being considered, Sherwin testified he submitted numerous documents to explain the circumstances of the seven customer complaints that had been brought against him. Sherwin and his counsel offered evidence that six of these complaints were the result of a single investment security highly recommended by Kidder, the First Executive Corp. Preferred Stock. It was offered that this security was A rated and suitable for income accounts at the time, but the company went bankrupt, and the shares became virtually worthless. Evidence was offered that Kidder was named in a class action by FEXC shareholders and advised its brokers that it would assume responsibility and pay all settlements of actions taken against brokers who solicited this security. Of the six actions taken against Sherwin, Kidder paid all but \$4000.00 which was paid by Sherwin to one client. The seventh complaint which involved a bond fund was withdrawn.

Despite the explanation of these complaints, Mr. Tenaglia testified he had to advise Sherwin in early July 1993, that PW could not hire him at this time because of the difficulty that would be encountered in transferring his broker license, especially in the Rhode Island jurisdiction. Tenaglia testified that he and Sherwin mutually agreed to postpone the hiring deal pending an effort being made by Sherwin to clear up his record. Tenaglia testified that Sherwin never accused him or PW of breaching the contract to hire until this case was filed.

The evidence of PW's earlier attempt to hire Sherwin was argued by Respondent as evidence as well that PW well and exhaustively knew of Sherwin's compliance record. The evidence showed that PW acquired Kidder in 1995. Evidence was offered that Sherwin received offers of employment from other firms, specifically Merrill Lynch & Co. as did other Kidder brokers. Testimony was heard that as an inducement for Kidder brokers to remain with the combined firm, employee forgivable loans were offered to selected brokers. Sherwin was one of these brokers who chose to remain at the combined firm as a

result of this inducement and not move to another firm, Sherwin testified. The same Compliance Department and Regional Management, that ruled against Sherwin in 1993, it was argued, apparently decided it wanted Sherwin to remain in 1995.

Evidence as offered by the Respondent that as part of the mass transfer of registration of Kidder brokers to PW, that Sherwin's file required great scrutiny because of his history of complaints. Sherwin testified that he inadvertently traded several times with Massachusetts clients while his registration was, because of a PW error, allowed to lapse. Once he discovered he was not registered in Massachusetts, he placed no additional trades there, he said. Sherwin testified that when he discovered his registration lapsed he "hit the roof" with PW and made numerous phone calls and sent letters to the highest levels of PW management in the weeks prior to his being terminated.

With this backdrop, the Respondent argued, Mr. Gulla received the phone call from client Fitzell and Monday morning and by permitting Sherwin to do a trade correction, believed the trade was an error and not unauthorized. What prompted Gulla to change his mind, it was submitted, was the fax he received later that day outlining the requirements for special supervision he would be required to implement for Sherwin to obtain registration. Mr. Gulla testified that he felt uncomfortable with the duties of special supervision generally and stated "It's my ticket", (if the broker acted badly while on supervision).

The next day, April 18, was the day Sherwin was fired after the conference call with Lemondola. There was no evidence presented that Sherwin had ever been accused of an unauthorized trade ever before in his career. Lemondola and Gulla testified that one unauthorized trade by a broker would not in every case require termination.

OTHER ISSUES CONSIDERED & DECIDED

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

Both parties submitted a Motion to Compel Discovery and responses to same. The chair made a six page ruling concerning the scope of discovery prior to the hearing.

PW made a motion at the hearing to dismiss Sherwin's second counterclaim on the grounds that Rhode Island law does not recognize a cause of action for wrongful discharge where the employee was an employee at will. The panel deferred its ruling on this motion until the close of the hearing. Said motion is denied.

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:

PW's claims asserted against Respondent Sherwin are denied with prejudice.

Sherwin's first counterclaim is denied with prejudice.

Sherwin's second counterclaim is granted. PW is liable to Sherwin in the amounts as enumerated below :

- | | |
|-------------------------------|--------------|
| 1. Lost Deferred Compensation | \$138,505.00 |
|-------------------------------|--------------|

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2.	Lost commissions for 1995, including interest at 12%	\$153,151.00
3.	Lost General Electric Stock Options + interest @ 12%	\$ 51,477.00
4.	Attorneys fees - no award	0.00
5.	Punitive Damages - one half of actual damages	\$171,566.50
	Total Fees	\$514,699.50

Interest shall begin to accrue at the rate of 12% annually from the date of the award on any unpaid balance due.

Each party shall pay one half of the forum fees.

Authority for punitive damages: *Mastrobuono v. Sherson Lehman Hutton, Inc.*, 115 S. Ct. 12 12 (1995).

IT IS ORDERED THAT: The Claimant, PaineWebber, Inc. shall submit a form U5 entry to modify and correct the previous entry concerning Robert Sherwin's termination. The language shall read as follows: "This entry corrects the preceding entry. Robert Sherwin was terminated from PaineWebber without cause based upon an accusation of an intentional unauthorized trade that was found to be unsupported by credible evidence".

FORUM FEES

Pursuant to Section 43(c) of the *Code of Arbitration Procedure*, the following Forum Fees are assessed and be borne equally by the parties.

Non-refundable Filing Fee:	\$500.00
Non- refundable Counterclaim:	\$500.00
Hearing Session Fees:	\$9,000.00 (9 hearing sessions @ \$1,000.00 per session)
Total Fees:	\$10,000.00

1. PW is assessed \$5,000.00. PW previously paid \$1,250.00 and owes a balance of \$3,750.00.
2. Sherwin is assessed \$5,000.00. Sherwin previously paid \$1,000.00 and owes a balance of \$4,000.00.
3. PW requested and was granted a postponement of the hearing scheduled for June 18 and 19, 1996. A \$750.00 was assessed and has been paid.

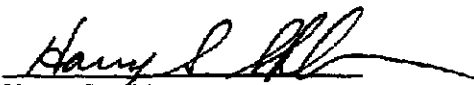
Fees are payable to the NASD Regulation, inc.

ARBITRATION PANEL

Peter M. Bizinkauskas, Esq.
Harry S. Sklar
Sharon L. Monroe

Industry Chairperson
Industry Panelist
Industry Panelist

Concurring Arbitrator's Signature


Harry S. Sklar

Date of Decision: November 15, 1996

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2.	Lost commissions for 1995, including interest at 12%	\$153,151.00
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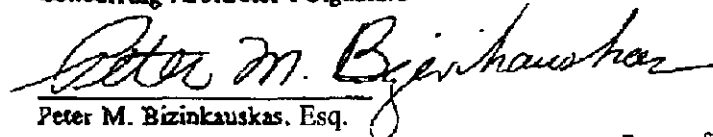
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