

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Michael C. Brenner,

Claimant,

v.

No. 95-04424

PaineWebber Incorporated;
William VanHoegarden,

Respondents.

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REPRESENTATION OF PARTIES

For Claimant: Michael C. Brenner ("Brenner") was represented by Mark Hellner, Esq. of Chicago, Illinois.

For Respondents: PaineWebber Incorporated ("PaineWebber") was represented by Stephanie Morse-Shamosh, Esq. of PaineWebber Incorporated located in Weehawken, New Jersey.

CASE INFORMATION

Claimant's Statement of Claim was filed on: September 18, 1995.

Claimant's Submission Agreement was signed: September 18, 1995.

Claimant's Dismissal Without Prejudice of Respondent VanHoegarden filed: February 13, 1996.

Respondent PaineWebber's Statement of Answer was filed on: December 22, 1995.

Respondent PaineWebber did not submit a properly executed Submission Agreement.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: August 13, 1996 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant Brenner alleged that Respondent PaineWebber breached its duty to Claimant by failing to execute his instructions to sell 6,250 shares of NexGen Microsystems, Inc. Series E restricted stock ("NexGen") on or about May 26, 1995, when shares of NexGen were being traded at about \$32 per share. As a result, Respondent's subsequent sale of the same shares on June 5, 1995 at the price of \$21.65 a share caused Brenner a loss of over \$10.35 per share, which resulted in a total loss of \$64,687.50. In addition, Respondent failed to settle the June 5, 1995 transaction until over 2 months later, which caused Brenner the loss of interest and investment opportunities.

PaineWebber denied the allegations set forth in the Statement of Claim, asserting that Brenner was not legally eligible to sell his restricted NexGen shares until June 5, 1995 because he did not become the beneficial owner of the shares in question until the offering closed and the required three year holding period had expired. PaineWebber further alleged that Brenner knew or should have known, based on documents he received and was required to sign, that he did not own his NexGen shares until closing and that they were not eligible for sale until three years later. PaineWebber further asserted that Brenner's June 5, 1995 transaction was settled in mid-August 1995 due to administrative delays caused by NexGen and their transfer agent and that these delays were not a result of any wrongdoing by Respondent. In addition, Brenner received an interest adjustment of \$1,226.32 on August 17, 1995 covering the period from settlement date of June 10, 1995 to August 11, 1995.

Respondent made the following affirmative defenses: (1) Claimant has failed to state a claim upon which relief may be granted; (2) Claimant approved, authorized, participated in and ratified the acts and transactions complained of and is, therefore, precluded from recovery; (3) Claimant's damages, if any, were caused or contributed to by persons, conditions or events beyond the control of Respondent; (4) Respondent and its officers, agents and employees in discharging their duties, if any, acted in good faith and exercised that degree of care, diligence and skill which prudent men would exercise in similar circumstances; and (5) Claimant's claims are barred by the doctrines of waiver, estoppel and ratification.

RELIEF REQUESTED

Claimant Brenner requested an award in the amount of \$64,687.50 for actual damages plus interest at the rate of 7½% per annum for 24 months equal to the amount of \$2,089.74 due to the late settlement of the June 5, 1995 transaction; and attorney's fees and costs. At hearing, the Claimant withdrew the request for interest.

Respondent PaineWebber, Inc. requested that the claims asserted against it in the Statement of Claim be dismissed in their entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

By letter dated February 13, 1996, Claimant Michael C. Brenner and Respondent PaineWebber, Inc. agreed to dismiss Respondent William VanHoegarden from this proceeding without prejudice.

Respondent PaineWebber, Inc. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 NASD Regulation, Inc. Office of Dispute Resolution.

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 dismissed with prejudice and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to § 10332(c) of the NASD Code of Arbitration Procedure, the following Forum fees are assessed: Two (2) hearing sessions x \$500 per session = \$1,000.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Michael C. Brenner.

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Respondent PaineWebber Incorporated is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution additional forum fees in the amount of \$500.00.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Respondent PaineWebber Incorporated is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the member surcharge fee in the amount of \$300.00.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

/s/ Lee H. Goodman
Lee H. Goodman
Public Arbitrator, Presiding Chair

August 29, 1996

/s/ David A. Youngerman, Esq.
David A. Youngerman, Esq.
Public Arbitrator

August 30, 1996

/s/ Kelley R. Beach
Kelley R. Beach
Industry Arbitrator

August 29, 1996

For NASD Use Only
Date served: August 30, 1996