

## **AWARD**

### **NASD REGULATION, INC. OFFICE OF DISPUTE RESOLUTION**

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In the Matter of Arbitration Between

N. Peter Schenk,

Claimant,

and

No. 95-05153

PaineWebber Incorporated

Respondent.

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### **REPRESENTATION OF PARTIES**

For Claimant: N. Peter Schenk ("Schenk") was represented by Alexander T. Moore, Esq. of Edward T. Joyce & Associates, P.C., located in Chicago, Illinois.

For Respondent: PaineWebber Incorporated ("PaineWebber") was represented by L. Andrew Brehm, Esq. of Schuyler, Roche & Zwirner, located in Chicago, Illinois.

### **CASE INFORMATION**

Claimant's Statement of Claim was filed on: October 23, 1995.

Claimant's Submission Agreement was signed on: October 26, 1995.

Respondent's Statement of Answer was filed on: January 29, 1996.

Respondent did not submit a properly executed Submission Agreement.

### **HEARING INFORMATION**

Pre-hearing Conferences: January 30, 1997 for one (1) session.

The hearing was held on: February 4, 1997 for two (2) sessions;  
February 5, 1997 for two (2) sessions;  
April 16, 1997 for two (2) sessions;  
April 21, 1997 for two (2) sessions;  
April 22, 1997 for two (2) sessions;  
April 29, 1997 for two (2) sessions;  
April 30, 1997 for two (2) sessions;  
June 5, 1997 for two (2) sessions; and  
June 6, 1997 for one (1) session.

The hearing was held in Chicago, Illinois.

### **CASE SUMMARY**

Schenk brought this action to recover damages which allegedly resulted from the wrongful termination of his employment with PaineWebber. According to Schenk, he accepted PaineWebber's offer of employment for the position of Vice President on October 23, 1990, which included a salary of \$50,000 per year, a discretionary bonus for managing the Chicago office of PaineWebber's Fixed Income Division and \$75,000 per year as a draw or advance against production. On February 10, 1992, all employees in the Chicago office of PaineWebber's Fixed Income Division were notified verbally and by interoffice memorandum that as of January 1, 1992 commissions would be paid out at the rate of 100% of total commission dollars earned. Schenk alleged that in 1992 he earned commission of approximately \$800,000, but PaineWebber refused to pay him \$200,000 of the commissions due. Schenk further asserted that PaineWebber refused to pay him the \$50,000.00 in salary that he earned in 1992 and the \$12,500.00 in salary that he earned in the first quarter of 1993.

In addition, PaineWebber terminated Schenk on December 16, 1994. Schenk alleged that PaineWebber retained younger employees with less seniority than him to perform the same duties and responsibilities and to cover the accounts he was covering. Based upon these allegations, Schenk asserted claims of age discrimination and breach of contract.

PaineWebber denied the material allegations set forth in the Statement of Claim. PaineWebber alleged that when it acquired Kidder, Peabody & Co., it hired a larger producer who serviced the key account of Kemper Financial Services ("Kemper") that was also covered by Schenk. As a result, Schenk was terminated. Furthermore, PaineWebber asserted that approximately one-third of the 1992 commissions from the Kemper account were paid to Craig Smithson ("Smithson"), a managing director who was instrumental in the maintenance of PaineWebber's relationship with Kemper. Smithson worked with the Kemper account before Schenk was hired and assigned to the account. PaineWebber contended that Schenk and Smithson agreed that Schenk would receive two-thirds of the Kemper account commissions and that Smithson would receive one-third. PaineWebber also argued that it agreed to compensate Schenk for managing the department in 1991, not for 1992 or the first quarter of 1993.

PaineWebber asserted the following affirmative defenses: (1) the Statement of Claim fails to state a claim upon which relief may be granted; (2) Schenk was an at will employee of PaineWebber; (3) Schenk's termination was not due in any way to his age; (4) Schenk failed to make a timely objection to the split with Smithson of the commissions generated from the Kemper account in 1992 (because Schenk had agreed to that split); and (5) due to his acquiescence in a split of 1992 commissions with Smithson, Schenk has waived any claim against PaineWebber with respect to that transaction.

### **RELIEF REQUESTED**

Schenk requested an award for reinstatement to his former job position or to a comparable position with respect to pay and responsibilities or, in the alternative, reimbursement of all pay, employee benefits and retirement benefits to which Schenk would have been entitled had he continued to be employed by PaineWebber until he attained the age of 75; lost back pay, employee benefits and retirement benefits; compensatory damages in the amount of \$262,500; interest on Schenk's damages since PaineWebber's breach of its contract with Schenk; costs of this action; and attorney's fees.

PaineWebber requested that the claims asserted against it be denied and dismissed in their entirety and that it be awarded its costs and attorneys' fees.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

PaineWebber 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 §10201 of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

During the hearing in this matter, PaineWebber moved to dismiss Schenk's age discrimination claim at the close of Schenk's presentation of evidence. After consideration of the arguments presented by the parties, the panel granted the motion and Schenk's age discrimination claim was dismissed with prejudice.

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 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. Respondent PaineWebber Incorporated is liable for and shall pay to Claimant N. Peter Schenk compensatory damages in the amount of \$260,373.00;
2. The parties shall bear their own costs of arbitration, including attorney's fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied with prejudice.

#### **FORUM FEES**

Pursuant to §10205 of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: One (1) pre-hearing conference x \$300.00 = \$300.00; Seventeen (17) hearing sessions x \$1,000.00 = \$17,000.00; Total forum fees = \$17,300.00.

Pursuant to §10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500.00 and shall retain as forum fees the hearing session deposit in the amount of \$1,000.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant N. Peter Schenk. Respondent PaineWebber Incorporated is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution forum fees in the amount of \$16,300.00 (\$17,300 total forum fees - \$1,000 hearing session deposit by N. Peter Schenk and retained by the Office

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of Dispute Resolution).

Pursuant to §10333 of the Code, PaineWebber Incorporated is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$500.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the postponement fees in the amount of \$1,000.00 paid by Respondent PaineWebber Incorporated.

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

Concurring Arbitrators' Signatures

/s/ Bradford S. Allen, Esquire  
Bradford S. Allen, Esquire  
Chairperson  
Public Arbitrator

July 14, 1997  
Dated:

/s/ Paul H. Thomas  
Paul H. Thomas  
Public Arbitrator

July 11, 1997  
Dated:

/s/ Ruth Hannenberg  
Ruth Hannenberg  
Industry Arbitrator

July 14, 1997  
Dated:

For NASD use only:

Date Award was served on the parties: July 18, 1997