

NASD REGULATION AWARD
NATIONAL ASSOCIATION OF SECURITIES DEALERS

Name of Claimant

Cary Steven Sprung

96-00699

Name of Respondent

PaineWebber, Inc.

REPRESENTATION

For claimant Cary Steven Sprung ("claimant") appeared Sheldon Eisenberger, Esq. of The Law Office of Sheldon Eisenberger located in New York, New York.

For respondent PaineWebber ("respondent") appeared Joel M. Leifer, Esq. of the law firm of Joel M. Leifer & Associates located in New York, New York.

CASE INFORMATION

Statement of Claim was filed on February 7, 1995. Claimant's Submission Agreement was signed on February 8, 1995.

Statement of Answer, Motion to Dismiss, and Counterclaim was filed on April 13, 1995. Respondent's Submission Agreement was signed on April 13, 1995.

Claimant's Statement in Reply to Respondent's Counterclaim was filed on April 27, 1995.

Respondent's Supplemental Counterclaim was filed on October 4, 1996.

Claimant's Statement in Reply to Respondent's Supplemental Counterclaims was filed on December 18, 1996.

HEARING INFORMATION

Pre-hearing conference:	January 17 , 1996	-	One Arbitrator
	April 23, 1996	-	Panel

	October 15, 1996	-	One Arbitrator
Hearing Sessions/Dates:	June 10, 1996	-	Two Sessions
	June 11, 1996	-	Two Sessions
	July 10, 1996	-	Two Sessions
	July 11, 1996	-	Two Sessions
	September 25, 1996	-	Two Sessions
	September 26, 1996	-	Two Sessions
	October 16, 1996	-	Two Sessions
	October 17, 1996	-	Two Sessions
	January 7, 1997	-	Two Sessions
	January 8, 1997	-	Two Sessions
	February 5, 1997	-	Two Sessions

The hearings conducted on June 10, 1996, June 11, 1996, October 16, 1996 and October 17, 1996 were held at the offices of NASD Regulation, Inc. located in New York, New York. The hearings conducted on July 10, 1996, July 11, 1996 and February 5, 1997 were held at the City Midday Club located at 140 Broadway, New York, New York. The hearings conducted on September 25, 1996, September 26, 1996, January 7, 1997 and January 8, 1997 were held at the Club Quarters Hotel located at 52 William Street, New York, New York.

CASE SUMMARY

Claimant alleged that he became employed by respondent on January 25, 1994. Claimant further alleged that, at the time he accepted respondent's offer of employment, three of his major clients already had funds managed by respondent. Claimant asserted that respondent knew that these were among his accounts and that these clients had internal rules which precluded a single brokerage firm from managing or trading funds in more than one area or through more than one broker. Claimant maintained that, as a result, these clients did not transfer their accounts after he became employed by respondent.

Claimant alleged that, on December 20, 1994, on behalf of a customer, he entered an order with respondent's over-the-counter trading desk to purchase 10,000 shares of stock with a limit of 12-1/8. Claimant further alleged that on December 20, 1994, the stock traded at a low of 11-3/4 and a high of 12-1/8 and that, although respondent was a market maker in the stock, respondent did not report an execution on his customer's order and the trade was placed again prior to the start of trading on December 21, 1994. Claimant alleged that at 12:45 pm, on December 21, 1994, he was informed by the over-the-counter trader that 5,000 shares at 12-1/8 were purchased and that at 1:00 pm he was informed by his sales assistant that the second 5,000 shares were purchased at 12-1/8. Claimant contended that, at those times and thereafter, the stock was traded about 11-3/4 and below.

Claimant asserted that he reported these facts to respondent's Manager of Administration and to a Senior Vice President, but that later that day he was told that the trade would stand. Claimant alleged that one week later, after one year of exemplary employment and without any prior notice, he was terminated on December 28, 1994.

Claimant alleged that he did not commit any act that would constitute cause for termination and that respondent did not fulfill the requirements necessary for terminating him for cause. Claimant further alleged that, because he was terminated other than for cause, the entire principal amount of loan from respondent was forgiven in accordance with its terms. Claimant asserted that he was wrongfully terminated in retaliation for demanding that respondent cancel an improper transaction and disclose its own wrongful acts and the wrongful acts of one of its employees to the proper authorities. Claimant further asserted that, after terminating him, respondent filed a Form U-5 on which it falsely stated that he was discharged for conduct unbecoming a PaineWebber Investment Executive and that he has been damaged by this filing.

Respondent maintained that Sprung was hired in January 1994 as an at-will employee and that, in conjunction with his employment, claimant signed a promissory note (the "Note") for a loan in the amount of \$694,697.00. Respondent further maintained that the Note provided that the loan would be forgiven in four equal annual installments, but that, if claimant terminated his employment for any reason, whether voluntarily or involuntarily, the unpaid principal would not be forgiven.

Respondent contended that, in December 1994, claimant became involved in a dispute with the over-the-counter trading desk and that it determined that claimant should be terminated for conduct unbecoming a PaineWebber investment executive. Respondent further contended that because claimant was terminated before any portion of the Note was forgiven, the entire balance became immediately due and payable.

Respondent further contended that claimant's defamation claim should be dismissed in its entirety because, under New York law, statements made on a Form U-5 were subject to an absolute privilege.

In reply to the counterclaim, claimant maintained that the terms of the Note provided that the principal amount was forgivable if his employment was terminated by respondent other than for cause and if, on or before the date his employment was terminated, the Note was not declared by respondent to be immediately due and payable. Claimant further maintained that, because the Note had not been accelerated prior to his termination, the indebtedness was forgiven by respondent's termination of him.

In its Supplemental Counterclaim, respondent alleged that claimant knowingly and fraudulently misrepresented his gross production and net compensation for the year ended December 31, 1993 and that such fraudulent misrepresentations were material in its decision to hire claimant and grant him an employee forgivable loan. Respondent also alleged that but for claimant's fraudulent misrepresentations, it would not have hired claimant or granted him a loan. Respondent contended that claimant's material misrepresentation regarding his production satisfied the termination for cause definition in the Note and immediately accelerated the Note as payable and due.

Claimant denied that he knowingly and fraudulently misrepresented his gross production and net compensation for the year ended December 31, 1993 and denied furnishing materially inaccurate information regarding his production by inflating his gross production and net compensation.

RELIEF REQUESTED

Claimant requested the following relief:

- a. On the First Claim, an order declaring the forgiveness of the principal due under the Note in the amount of \$694,697.00 and the cancellation thereof;
- b. On the Second Claim, an award of compensatory damages representing the amount of commissions that he would have earned absent the wrongful termination, plus interest at the legal rate;
- c. On the Third Claim, an award of damages representing the lost commissions he would have earned in 1994 and on an ongoing basis had respondent not concealed the conflict that existed between them with respect to his three major accounts;
- d. On the Fourth Claim, an award of compensatory damages to remedy the injury caused by the filing of the false Form U-5;
- e. On the Fifth Claim, an order requiring respondent to withdraw the false Form U-5 and substituting therefor one reflecting that his discharge was for reasons other than for "cause";
- f. On the Second, Third and Fourth Claims, punitive damages in an amount to be determined at the hearing;
- g. On each claim, an award of attorneys' fees and the costs and disbursements of the arbitration; and
- h. Such other and further relief as the arbitrators deem just and proper.

At the hearing, claimant requested damages of \$1,262,025.00 and attorneys' fees and costs of \$137,496.49. Claimant further requested that respondent's counterclaims be dismissed with prejudice and that he be awarded the costs and attorneys' fees he incurred in this proceeding.

Respondent requested that the claim be dismissed with prejudice and, on the Counterclaim, that it be awarded a sum of \$694,697.00, plus costs and attorneys' fees as called for in the Note. On the First Supplemental Counterclaim, respondent requested that it be awarded the sum of \$694,697.00, plus interest, costs, attorneys' fees and punitive damages as a result of claimant's fraudulent inducement. On the Second Supplemental Counterclaim, respondent requested \$694,697.00, plus interest, costs and attorneys' fees as a result of claimant's breach of the terms of the Note.

OTHER ISSUES CONSIDERED AND DECIDED

At the hearing on June 10, 1996, claimant requested that the panel of arbitrators be reconstituted and that a majority of public arbitrators be appointed to this matter pursuant to Rule 10202(a)

(formerly Section 9(a)) of the Code of Arbitration Procedure. The panel considered this request and determined that claimant had waived any right to object to the composition of the panel and that the panel would remain as constituted with three industry arbitrators.

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.

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. On claimant's Second Claim, respondent be and hereby is liable and shall pay claimant the sum of \$50,000.00 in compensatory damages, with interest to accrue at the New York State statutory rate currently in effect for civil judgments beginning five business days after service of the award on the parties by NASD Regulation.
2. On claimant's Third Claim, respondent be and hereby is liable and shall pay claimant the sum of \$10,000.00 in compensatory damages, with interest to accrue at the New York State statutory rate currently in effect for civil judgments beginning five business days after service of the award on the parties by NASD Regulation.
3. On claimant's Fifth Claim, the panel hereby directs that the Form U-5 of Cary Sprung, as filed, be withdrawn and that a Form U-5 be refiled by respondent reflecting that claimant was terminated: *"Due to inability to reconcile basic disagreements concerning the relationship between branch management and claimant, including but not limited to, the quality of the services performed by the OTC trading desk for retail brokers."*
4. Claimant's First and Fourth Claims are hereby denied.
5. On respondent's Second Supplemental Counterclaim, claimant be and hereby is liable and shall repay respondent the sum of \$694,697.00, with interest to accrue at the New York State statutory rate currently in effect for civil judgments beginning five business days after service of the award on the parties by NASD Regulation.
6. Respondent's Counterclaim and First Supplemental Counterclaim are hereby denied.
7. Claimant's request for punitive damages and attorneys' fees is hereby denied.

8. Respondent's request for punitive damages and attorneys' fees is hereby denied.
9. Each party shall bear their own costs.
10. All other claims are hereby denied.

FORUM FEES

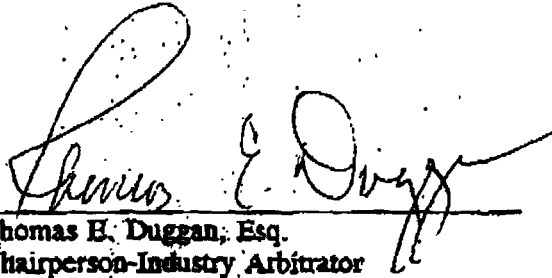
Pursuant to Rule 10205(c) (formerly Section 44(c)) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 filing fee previously deposited by claimant and the \$500.00 filing fee previously deposited by respondent and have assessed the following forum fees:

2 pre-hearing conferences (one arbitrator) x \$300.00	= \$ 600.00
1 pre-hearing conference (panel) x \$1,000.00	= \$ 1,000.00
22 hearing sessions x \$1,000.00	= <u>\$22,000.00</u>
Total amount of forum fees	= \$23,600.00

1. Claimant be and hereby is liable for the sum of \$14,160.00, representing sixty percent of the total amount of forum fees assessed. Claimant previously deposited \$1,000.00 and, therefore, claimant is liable and shall pay the balance of \$13,160.00 to NASD Regulation.
2. Respondent be and hereby is liable for the sum of \$9,440.00, representing forty percent of the total amount of forum fees assessed. Respondent previously deposited \$1,000.00 and, therefore, respondent is liable and shall pay the balance of \$8,440.00 to NASD Regulation.

Fees are payable to the NASD Regulation, Inc.

Arbitrators' Signatures

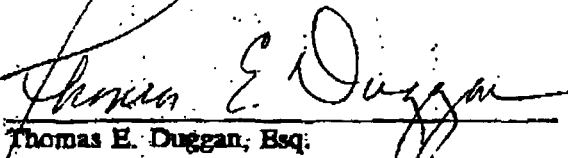

Thomas E. Duggan, Esq.
Chairperson-Industry Arbitrator

Frank G. Piazza
Industry Arbitrator

Walter A. Kapuscinski
Industry Arbitrator

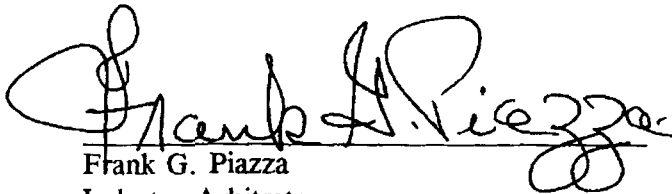
Date of decision: March 31, 1997

I, Thomas E. Duggan, 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.


Thomas E. Duggan, Esq.

Arbitrators' Signatures

Thomas E. Duggan, Esq.
Chairperson-Industry Arbitrator

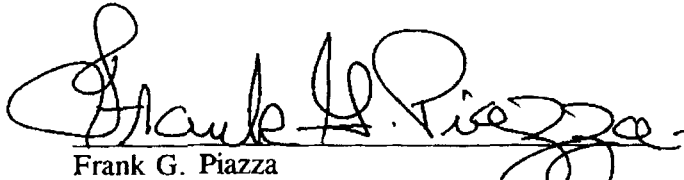


Frank G. Piazza
Industry Arbitrator

Walter A. Kapuscinski
Industry Arbitrator

Date of decision: March 31, 1997

I, **Frank G. Piazza**, 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.




Frank G. Piazza

Arbitrators' Signatures

Thomas E. Duggan, Esq.
Chairperson-Industry Arbitrator

Frank G. Piazza
Industry Arbitrator



Walter A. Kapuscinski
Industry Arbitrator

Date of decision: March 31, 1997

I, Walter A. Kapuscinski, 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.



Walter A. Kapuscinski