

**N.A.S.D. AWARD****NATIONAL ASSOCIATION OF SECURITIES DEALERS**

In the Matter of the Arbitration Between

Name of Claimant

PaineWebber Incorporated

NASD CASE NO. 96-05699

Name of Respondent

Barry M. Plotkin

**REPRESENTATION**

For Claimant: Patricia E. Cowart, Esq., Senior Associate General Counsel of PaineWebber Incorporated.

For Respondent: Delmer C. Gowing III, Esq. of Delmer C. Gowing III, P.A.

**CASE INFORMATION**

Statement of Claim filed on December 23, 1996. Claimant's Submission Agreement signed on December 18, 1996 by Stephanie Morse-Shamosh, First Vice President of PaineWebber Incorporated ("PaineWebber").

Answer to Statement of Claim, Affirmative Defenses and Counterclaim filed by Respondent on February 14, 1997. Respondent's Submission Agreement signed on February 12, 1997.

PaineWebber's Answer to Respondent's Counterclaim filed on March 17, 1997.

**HEARING INFORMATION**

On April 28, 1997, a telephonic pre-hearing conference lasting one (1) session was conducted with the arbitration panel. On October 21, 1997, October 22, 1997 and January 9, 1998, in Fort Lauderdale, Florida, hearings lasting four (4) sessions were conducted.

**CASE SUMMARY**

Claimant alleged that on or about January 28, 1994, it employed Respondent Barry Plotkin ("Plotkin") as an Investment Executive in its North Palm Beach, Florida office. Claimant alleged that in connection with Plotkin's employment, on or about February 16, 1994, it advanced Plotkin the sum of \$108,739.00. Claimant further alleged that on October 13, 1995, Plotkin resigned voluntarily from PaineWebber. Claimant alleged that as a result, it demanded payment of the net principal amount of \$76,459.58 due under the note, which Plotkin refused to repay.

Respondent alleged that PaineWebber misrepresented a material fact to him, to wit that there would be no problem in Respondent transferring from Merrill Lynch to PaineWebber and that Merrill Lynch would

not take legal action. Respondent asserted that he relied on this material fact and left his employment at Merrill Lynch to accept the offer of employment at PaineWebber. Respondent further alleged that as a result of a federal court injunction obtained by Merrill Lynch against Plotkin, he was unable to perform his duties as a registered representative for PaineWebber until several weeks later, thereby losing several of his key clients. Respondent asserted that the promissory note which he executed is therefore null and void, and as such he owes no monies to PaineWebber. Respondent further asserted a counterclaim in the amount of \$150,000.00 as reimbursement for the work lost by him as a result of the misrepresentation by PaineWebber.

PaineWebber denied the allegations of Respondent's counterclaim. Claimant asserted that at the time of Respondent's move to Dean Witter, Plotkin did not claim that he had any grievance with PaineWebber, but rather told his manager that everything was fine and said that he was leaving because of a unique opportunity at Dean Witter.

#### RELIEF REQUESTED

Claimant requested entry of an award in its favor against Respondent in the amount of \$76,459.58 plus interest due under the terms of the note and attorneys' fees as provided by the note, and asked that all costs be assessed against the Respondent. Claimant also requested that Respondent's counterclaim be dismissed in its entirety.

Respondent requested that Claimant's Statement of Claim be dismissed and that costs and attorneys' fees be paid by Claimant. Respondent also requested an award on his counterclaim in the amount of \$150,000.00 plus attorney's fees.

#### OTHER ISSUES CONSIDERED & 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 NASD Regulation, Inc.

During the pendency of the proceedings, the Chairperson of the Panel, James B. May, Esq., was reclassified by NASD Regulation, Inc. as a "public" arbitrator. The parties were advised of said reclassification by letter dated December 4, 1997 and no objections to the composition of the Panel were made by the parties as a result thereof.

During the evidentiary hearing, the parties agreed that the Arbitrators have the authority to award attorneys' fees and further agreed to submit the issue of entitlement to attorneys' fees, in the stipulated amount of \$10,000.00, to the Panel for determination.

#### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post-hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is found liable, and shall pay to Claimant \$76,459.58 plus pre-judgment interest in the amount of \$16,907.92 for a total due to Claimant in the sum of \$93,367.50.
2. Respondent is found liable, and shall further pay to Claimant attorneys' fees in the stipulated amount of \$10,000.00.

3. Respondent's counterclaim is dismissed in its entirety.
4. All other claims for relief, including Respondent's request for attorneys' fees, are denied.

#### FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure (the "Code"), the Panel has assessed forum fees in the amount of \$3,750.00 (4 sessions x \$750.00 per session, plus one pre-hearing conference with the Panel x \$750.00) as follows:

1. Respondent is hereby assessed the sum of \$3,750.00 for which NASD Regulation, Inc. shall retain the \$600.00 hearing session deposit previously paid by Claimant in partial satisfaction thereof, leaving a balance due in the amount of \$3,150.00.
2. Respondent is liable and shall pay to NASD Regulation, Inc. the sum of \$500.00 representing the counterclaim filing fee due and owing pursuant to Rule 10205(a) of the Code.
3. NASD Regulation, Inc. shall retain the \$500.00 claim filing fee and the \$300.00 member surcharge previously paid by Claimant.

Fees are payable to National Association of Securities Dealers Regulation, Inc.

Concurring Arbitrators' Signatures  
Name

Public/Industry

\_\_\_\_\_/s/\_\_\_\_\_  
James B. May, Esq.  
Chairperson

Public

\_\_\_\_\_/s/\_\_\_\_\_  
Ronald W. Cornew

Industry

\_\_\_\_\_/s/\_\_\_\_\_  
John C. Schenck

Industry

Date of Decision: March 6, 1998