

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In The Matter of The Arbitration Between

W. Donald Burnett and  
D. Elaine Burnett

Claimants

Award

vs.

NASD #88-00176

PaineWebber, Inc. and  
Robert Bernard

Respondent

SUMMARY OF ISSUES

Claimants filed this action on January 20, 1988 against Respondents and alleged fraud, negligent misrepresentations, breach of fiduciary duty and constructive fraud. Specifically, Claimants alleged that in October 1985 they deposited \$100,000.00 into their account at PaineWebber to purchase GNMA's on margin, pursuant to the advice and recommendation of their account executive Robert Bernard and that Respondents misrepresented, failed to disclose, or concealed the following: that the purchase of GNMA's on margin made the investment highly leveraged and therefore subject to considerable risk; that the possibility of a margin call made the GNMA's unsuitable because of Claimants lack of liquidity; that the Respondents did not disclose that while they earned no commission income on the GNMA transactions that there was a functional equivalent in mark-up as a principal trade; and that Respondents did not disclose that there was an industry-wide custom and practice to discount the mark-up on a principal trade for the volume of GNMA's purchased by Claimants, and in fact failed to give such discounts to Claimants.

Respondents maintained that the investment strategy in which Claimants now complain of was initiated in October 1985 at which time Claimants deposited \$100,000.00 into their account which was used as margin to purchase \$792,435.82 worth of GNMA's and that the proceeds of this GNMA investment, in the form of interest and return of principal, were either paid to the Claimants or reinvested in additional GNMA's. Respondents maintained that the strategy worked successfully over the next 18 months resulting in net interest earned in excess of \$50,000.00 on Claimants original \$100,000.00 investment, and that throughout this period Claimant W. Donald Burnett and Respondent Robert Bernard were in frequent communication about the GNMA investment strategy and that Claimants had a clear understanding of the use and risks of leverage in the investment program and that PaineWebber bought and sold GNMA's on a principal basis. Respondents further maintained that Respondent Bernard advised and

recommended to Mr. Burnett in April 1987 that he cash in his GNMA profits and adopt a different investment strategy, which Claimants declined to do. Respondents specifically denied that the sales charge on the GNMA transactions were excessive, that the investments were unsuitable for the claimants or that they were liquid in the event of a margin call, or that Respondents made any misrepresentations to the Claimants regarding their account.

#### DAMAGES AND RELIEF REQUESTED

Claimants requested damages in the amount of \$60,941.04 for trading losses and \$59,078.55 for commissions paid, as amended at the hearing. Claimants further requested an award of unspecified punitive damages, costs and attorneys' fees. Respondents requested dismissal of the claims and costs.

#### DAMAGES AND RELIEF AWARDED

On June 27 and 28, 1989 in a four session hearing held in San Diego, California, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants W. Donald Burnett and D. Elaine Burnett on January 13, 1988 and by Respondents PaineWebber, Jackson & Curtis, Inc., on March 11, 1988 and Robert Bernard on March 22, 1988. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. Each and every claim against Respondents PaineWebber, Inc., and Robert Bernard are hereby dismissed.
2. The parties shall each bear their respective costs including attorneys' fees.
3. Pursuant to Section 43 of the National Association of Securities Dealers, Inc. (NASD) Code of Arbitration Procedure, the NASD shall retain the \$750.00 filing fee previously deposited by the Claimant.

OTHER ISSUES

claimants amended their claim at the hearing to include the allegations of churning and unsuitability as part of the common law claim for breach of fiduciary duty. Specifically, Claimants alleged that the investments were unsuitable in the context of their overall circumstances, and that commissions attributable to excessive trading in disregard of their investment objectives were recoverable under a theory of churning.

The parties stipulated to the execution and service of copies of the signed counterpart awards.

ARBITRATORS CONCURRING

DATE SERVED: 08/02/89

Harvey C. Flodin

Harley H. Barchelder

Myron S. Shelley

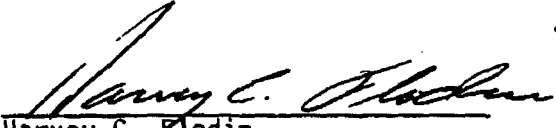
OTHER ISSUES

Claimants amended their claim at the hearing to include the allegations of churning and unsuitability as part of the common law claim for breach of fiduciary duty. Specifically, Claimants alleged that the investments were unsuitable in the context of their overall circumstances, and that commissions attributable to excessive trading in disregard of their investment objectives were recoverable under a theory of churning.

The parties stipulated to the execution and service of copies of the signed counterpart awards.

ARBITRATORS CONCURRING

DATE SERVED: 08/02/89

  
Harvey C. Flodin

\_\_\_\_\_  
Hadley H. Batchelder

\_\_\_\_\_  
Myron S. Shelley

OTHER ISSUES

claimants amended their claim at the hearing to include the allegations of churning and unsuitability as part of the common law claim for breach of fiduciary duty. Specifically, Claimants alleged that the investments were unsuitable in the context of their overall circumstances, and that commissions attributable to excessive trading in disregard of their investment objectives were recoverable under a theory of churning.

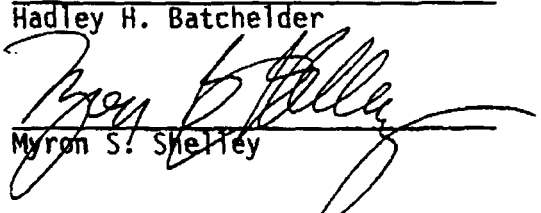
The parties stipulated to the execution and service of copies of the signed counterpart awards.

ARBITRATORS CONCURRING

DATE SERVED: 08/02/89

\_\_\_\_\_  
Harvey C. Flodin

\_\_\_\_\_  
Hadley H. Batchelder

  
\_\_\_\_\_  
Myron S. Shelley