

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Floyd B. Rhoades, Jr.

Audrey Rhoades

## Claimants

**vs.**

William T. Powell

Merrill Lynch, Pierce Fenner & Smith, Inc.

PaineWebber, Inc.

Jordan Ball

Hollis Anderson

## Respondents

AWARD

NASD NO. 88-01098

## SUMMARY OF ISSUES

This case was filed with the National Association of Securities Dealers, Inc. ("NASD") on April 7, 1988. Claimants alleged the following: 1) Violation of Section 10b of the Securities Exchange Act (SEA) of 1934 and Securities and Exchange Commission Rule 10B-5; 2) Violation of Section 17(a) of the Securities Act of 1933; 3) Rescission of customer agreements under Section 29(b) of the SEA of 1934; 4) Violation of civil Racketeer Influenced and Corrupt Organizations (RICO) provisions against respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. (MLPFS), Anderson and Powell; 5) Violation of civil RICO provision against respondents PaineWebber, Ball and Powell; 6) Violation of California Corporations Code Section 25401; 7) Intentional misrepresentation; 8) Negligent misrepresentation; 9) Breach of Fiduciary Duty; 10) Breach of Covenant of Good Faith & Fair Dealing; 11) Rescission of claimants' agreement to establish margin accounts and every transaction initiated and consummated with respect to the margin accounts, including the options, limited partnerships and stock.

Respondents PaineWebber and Ball denied claimants' allegations and asserted that claimants were knowledgeable investors and asserted the following affirmative defenses: 1) Failure to state a claim upon which relief can be granted on one or more counts; 2) Claimants barred by doctrines of waiver, estoppel and ratification; 3) Failure to mitigate damages; 4) Facts do not support an award of punitive damages; 5) Comparative negligence or gross negligence attributed to claimants; 6) Respondents acted in good faith and exercised

due diligence and reasonable care in supervision of Powell and Powell's alleged acts were beyond scope of his authority as an employee of PaineWebber; 7) Any liability is passive, vicarious and secondary compared with respondent Powell; 8) Claimants did not rely, on any alleged statements or omissions; 9) Any alleged statements or omissions did not cause any damages; 10) Lack of requisite scienter; 11) claimants authorized some or all of transactions; 11) Laches; 12) Claimants not entitled to attorneys' fees and have burden to establish damages as to each respondent.

— Respondent Powell denied claimants' allegations, asserted that claimants were sophisticated and knowledgeable investors and full disclosure was made on all transactions.

Respondent MLPFS and Anderson denied claimants allegations, asserted that claimants were sophisticated, experienced investors, well-informed of all activity in their account and made all investment decisions.

#### DAMAGES AND RELIEF REQUESTED

Claimants requested the following as amended in their arbitration brief:

1. Trading losses of \$131,503.00;
  2. Return of Commission in sum of \$55,993.00;
  3. Unsuitable investment placement of \$104,900.00;
  4. Net interest of \$5,116.00;
  5. Limited Partnership Units investment of \$95,224.00;
  6. Insurance premiums lost of \$24,897.80;
  7. Pre-judgment Interest on all of the above sums;
  8. Treble damage under RICO provisions;
  8. Punitive damages from respondent MLPFS and PaineWebber;
- and
9. Any further relief deemed appropriate.

#### DAMAGES AND RELIEF AWARDED

On March 6, 7, July 9, 10, 11, 12, 13, August 1, 2 and

September 11, and 13, 1990, the undersigned arbitrators heard the controversy, in 21 sessions, between the parties as set forth in submissions to arbitration signed by Claimants on March 29, 1988 and by respondents MLPFS on September 1, 1988, PaineWebber on July 14, 1988 and Ball on July 15, 1988. Respondents Powell and Anderson did not file submission agreements but filed Answers and appeared at the arbitration and submitted to NASD jurisdiction at the first hearing session. Respondents Powell and Anderson are further under NASD jurisdiction in accordance with Section 12 and 29 of the NASD Code of Arbitration Procedure and by stipulation of the parties filed August 11, 1987 in the United States District Court, Eastern District of California. The hearing was conducted in San Francisco, California. 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. Respondent MLPFS is solely liable for and shall pay to claimants the sum of \$96,952.60 in compensatory damages.

2. Respondent PaineWebber is solely liable for and shall pay to claimants the sum of \$59,968.40 in compensatory damages.

3. Respondent Powell is solely liable for and shall pay to claimants the sum of \$20,000.00 in compensatory damages for breach of fiduciary duty.

4. All claims against respondent Anderson are dismissed.

5. All claims against respondent Ball are dismissed.

6. The claim for punitive damages is dismissed.

7. The parties shall each bear their respective costs including attorneys' fees.

8. In accordance with Section 43 of the NASD Code of Arbitration Procedure, the NASD shall retain the \$750.00 filing fee previously deposited by the Claimants as an assessment of forum fees by the arbitrators, and the arbitrators assess an additional \$250.00 for the balance of the initial deposit of \$1,000.00 payable to the NASD.

9. Also, in accordance with Section 43, the arbitrators assess forum fees as follows:

a) Against MLPFS, \$10,000.00 payable to the NASD;  
and

b) Against PaineWebber, \$8,000.00 payable to the NASD.

ARBITRATORS CONCURRING

DATE SERVED: 09/13/90

  
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Frank Bosl