

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Dorothy, Kathryn & Gary Bussing

90-02732

Name of Respondent(s)

PaineWebber Incorporated
Kent Kelley

REPRESENTATION

Claimants Dorothy J. Bussing, Kathryn Bussing and Gary Bussing were represented by James M. Ziegler, Esq. and Scott A. Britton-Mehlisch, Esq. of Humphrey, Farrington & McClain, P.C., Independence, Missouri.

Respondent PaineWebber Incorporated was represented by Garry J. Stegeland, Esq. of PaineWebber, Inc., Weehawken, New Jersey.

Respondent Kent Kelley was represented by Ronald D. Lee, Esq. and Keith E. Drill, Esq. of Koenigsdorf & Wyrsh, P.C., Kansas City, Missouri.

CASE INFORMATION

Statement of Claim filed: October 2, 1990

Claimants Dorothy J. Bussing, Kathryn Bussing and Gary Bussing's Submission Agreements signed on: September 21, 1990

Statement of Answer filed by Respondent PaineWebber Incorporated on: November 19, 1990

Respondent PaineWebber Incorporated's Submission Agreement signed by Garry J. Stegeland on: January 31, 1991

Statement of Answer filed by Respondent Kent Kelley on: October 31, 1990
Respondent Kent Kelley's Submission Agreement signed on: January 3, 1991

HEARING INFORMATION

Hearing Dates/Sessions: July 10, 1991 for two (2) sessions
July 11, 1991 for two (2) sessions

Hearing Location: Kansas City, Missouri

CASE SUMMARY

Claimants Dorothy J. Bussing, Kathryn Bussing and Gary Bussing alleged that Respondent Kent Kelley ("Kelley"), while employed by or acting as an agent for Respondent PaineWebber Incorporated ("PaineWebber"), failed to execute 38 stock index option transactions while affirmatively misrepresenting to Claimants that: 1) the trades were made; 2) due to the nature of the account, Claimants would not receive confirmation slips and the transactions would not appear on the monthly statements; and 3) the account was profitable. Pursuant to the above allegations, Claimants asserted liability for common law fraud; breach of fiduciary duty; violation of the "Blue Sky" laws; violations of Federal Securities laws; and breach of contract.

Respondent PaineWebber Incorporated denied the material allegations of the Statement of Claim, alleging that PaineWebber was not involved in any fraudulent activity. In addition, PaineWebber asserted the following affirmative defenses:

1. The claims were barred by the applicable statute of limitations;
2. The claimants failed to state a claim upon which relief can be granted;
3. The alleged transactions did not occur and PaineWebber is not liable for nonexistent profits resulting from imaginary transactions;
4. The claims are barred by the doctrines of estoppel, waiver, ratification, laches and failure to mitigate damages;
5. The claims are barred by the applicable statute of frauds;
6. If Kelley made any of the representations, those representations were not authorized by PaineWebber, were outside the scope of his employment and, therefore, PaineWebber should not be held liable for them;
7. PaineWebber did not commit willful misconduct and was not grossly negligent; therefore, the claims are barred by the contract;
8. The claimants were not purchasers of securities for purposes of the federal securities laws and therefore claims under the securities laws are barred;
9. PaineWebber is entitled to a setoff for any money paid to Claimants by Kelley and for any money withdrawn by Claimants; and
10. The claims for punitive damages must be dismissed as they cannot be awarded under applicable law.

Respondent Kent Kelley denied the material allegations of the Statement of Claim, alleging that he entered into no oral agreements with Claimants. In addition, Kelley asserted the following affirmative defenses:

1. The claims are barred by the applicable statute of limitations;
2. The claims are barred by the doctrines of laches, waiver, estoppel, ratification and contributory negligence;
3. The Claimants failed to mitigate their damages;
4. The Statement of Claim fails to state any claim upon which relief can be granted;
5. The claims are barred by the Statute of Frauds;
6. The claimants were not purchasers of securities for purposes of the Federal Securities Law;
7. Kelley was entitled to a setoff for any monies he paid to Claimants and/or withdrawn from their accounts; and
8. Punitive damages may not be awarded.

On July 10, 1991, at the hearing, Claimants voluntarily withdrew with prejudice their claims against Respondent Kent Kelley. In addition, prior to the presentation of closing arguments, Claimants voluntarily withdrew their claims for punitive damages.

RELIEF REQUESTED

Claimants Dorothy J. Bussing, Kathryn Bussing and Gary Bussing requested entry of an award against Respondents in the sum of \$53,828.00 plus interest at the statutory rate, punitive damages, costs and expenses.

Respondent PaineWebber Incorporated requested that the Statement of Claim be dismissed and denied in its entirety and that costs and reasonable attorneys' fees be assessed against the Claimants.

Respondent Kent Kelley requested that the Statement of Claim be dismissed and denied in its entirety and that he be awarded his attorneys' fees and costs.

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. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file

with the NASD.

2. Respondent PaineWebber Incorporated is liable for and shall pay to Claimants Gary Bussing and Kathryn Bussing the sum of Ten Thousand (\$10,000.00) Dollars;
3. The claim of Dorothy J. Bussing is hereby dismissed and denied in its entirety;
4. Each party shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.


The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$150.00 and the hearing session deposit of \$500.00 previously deposited with the NASD by the Claimants Dorothy Bussing, Kathryn Bussing and Gary Bussing. In addition, Claimants Kathryn Bussing and Gary Bussing are liable for and shall pay to the NASD additional forum fees in the amount of \$1,500.00.

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

BY THE ARBITRATION PANEL

DATED:

Daniel L. Fowler, Esq.
Presiding Chair
Public Arbitrator



Matthew G. Haverly, Esq.
Public Arbitrator

Richard Sturgeon
Industry Arbitrator

9-7-91

with the NASD.

2. Respondent PaineWebber Incorporated is liable for and shall pay to Claimants Gary Bussing and Kathryn Bussing the sum of Ten Thousand (\$10,000.00) Dollars;

3. The claim of Dorothy J. Bussing is hereby dismissed and denied in its entirety;

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

BY THE ARBITRATION PANEL

DATED:

Daniel L. Fowler
Daniel L. Fowler, Esq.
Presiding Chair
Public Arbitrator

Aug. 14, 1991

Matthew C. Haverly, Esq.
Matthew C. Haverly, Esq.
Public Arbitrator

Richard Sturgeon
Richard Sturgeon
Industry Arbitrator