

N.A.S.D. AMENDED AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between )

Name of Claimant(s) )

William H. Fergus )

Case No. 91-00463

Name of Respondent(s) )

PaineWebber, Inc. )

Drexel Burnham Lambert, Inc. )

John Ashby )

REPRESENTATION

For Claimant, William H. Fergus, as Trustee on behalf of the William H. Fergus, M.D., P.A. Defined Benefit Pension Plan ("DBP") and the William H. Fergus, M.D., P.A. Target Pension Plan ("TFP") ("Fergus"): Robert W. Pearce, Esq. of Lerner & Pearce, P.A.

For Respondents, PaineWebber, Inc. ("PW") and John Ashby ("Ashby"), for the period of time the accounts were at PW: Steven M. Greenbaum, Esq. of PW.

For Respondent, Drexel Burnham Lambert, Inc. ("DEL"): Ronald Shindler of Fowler White Burnett, et al.

For Respondent, Ashby, for the period of time the accounts were at Drexel: pro se.

CASE INFORMATION

Statement of Claim filed: February 12, 1991. Claimant's Submission Agreement signed: March 21, 1991.

Respondents, PW and Ashby's, Statement of Answer filed: June 24, 1991. Respondents' Submission Agreements signed: June 25, 1991 by Ashby, and by Patricia Cowart on behalf of PW on May 2, 1991.

Respondent, DEL's, Statement of Answer filed May 12, 1992. Respondent, DEL, did not file a properly executed Submission Agreement as required by Section 25 of the Code. (See paragraph 3 of Other Issues.)

HEARING INFORMATION

On June 16, 17, 18 and 24, 1992, in Fort Lauderdale, Florida, hearings lasting 9 (nine) sessions were conducted.

### CASE SUMMARY

Claimant alleged that the DBP and TPP ("Plans") were established by Fergus to provide retirement benefits for Fergus and his employees; Fergus was inexperienced and unsophisticated in securities investments; the investment goals of the Plans were conservative safe investments; Respondents, through Ashby, made misrepresentations of and omitted to state material facts; Respondents, through Ashby, controlled the accounts at both Drexel and PW for the Plans; that Respondents churned the accounts; Respondents recommended and executed securities transactions that were unsuitable; and, that Respondents' actions constituted violation of Sections 517.301, 812.014 and 772.10, Florida Statutes, Title 29, USC Section 1101, et. seq., fraud, breach of fiduciary duty, negligence and failure to supervise.

Respondents, PW and Ashby, denied all allegations of wrongdoing and alleged that Fergus' investment objectives were aggressive growth and speculation; that Fergus was aware of all risks; that the trading was the same as at DBL without complaint from Fergus although Fergus suffered considerable losses in the 1987 crash.

PW and Ashby alleged the affirmative defenses of failure to state a claim; no recovery in tort; bar by statute of limitations; ratification, estoppel and waiver; good faith and no intent; failure to use reasonable diligence; failure to mitigate; authorization; Claimant's own negligence precludes recovery; laches; no proximate cause; no statement or omission to state material facts; damages caused by person or events beyond the control of Respondents; and, the parties contractually bound to follow NY law and punitives not available.

Respondent, DBL, denied all allegations of wrongdoing and alleged that Claimant's investment objective was aggressive growth and speculation; that Ashby was not a fiduciary and did not control the accounts; all transactions were approved by Claimant; and, Claimant was constantly aware of the activity and status of the accounts.

DBL alleged the affirmative defenses of failure to state a claim; bar by statute of limitations; assumption of risks; failure to use reasonable diligence; failure to mitigate damages; losses caused by market conditions; bar by approval, ratification and affirmance; losses caused by negligence and culpable conduct of Claimant; and, failure to seasonably complain or disaffirm transactions.

### RELIEF REQUESTED

Claimant requested from DBL and Ashby, jointly and severally, damages of \$424,431.00, punitives of \$406,235.00, attorney's fees, costs and expenses for the DBP; damages of \$96,273.00, punitives of \$96,507.00, attorney's fees, costs and expenses for the TPP. Claimant requested from PW and Ashby, jointly and severally, damages of \$162,437.00, punitives of \$204,321.00, attorney's fees, costs and expenses for the DBP; damages of \$47,775.00, punitives of \$63,840.00, attorneys fees, costs and expenses for the TPP.

Respondents requested dismissal, costs, and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

1. At the beginning of the hearing on June 16, 1992, the Panel noted that neither FW nor Ashby were present. Counsel for Claimant informed the Panel that there were tentative settlements with those parties. On June 17, 1992, FW was dismissed by Claimant pursuant to a settlement and a Stipulation for Entry of Award against Ashby was received by NASD staff counsel for the Panel to incorporate into this Award after its deliberations on the issue of liability.
2. The remaining 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, these parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.
3. While DEL did not file a duly executed Submission Agreement as required by Section 25 of the Code, DEL submitted to arbitration through its counsel at the beginning of the hearing and this Panel has jurisdiction.
4. At the beginning of the hearing on June 16, 1992, the following motions were decided by this Panel;
  - a. Motion to Amend Claim was granted with no objection by DEL and the Second Amended Claim was received;
  - b. Motion for Summary Judgment was denied;
  - c. Motion to Strike Motion for Summary Judgment was denied; and,
  - d. Motion to Bar Answer of Ashby was found moot based on settlement.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, along with the Stipulation For Entry of Arbitration Award, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The undersigned Panel hereby consents to the attached Stipulation For Entry of Arbitration Award, signed by Counsel for Claimant and by John Ashby, and incorporates said Stipulation by reference into this Award.
2. Respondent, DEL, is found liable and shall pay to the Claimant the amount of \$127,000.00 in damages.
3. Respondent, DEL, is also found liable and shall pay to the Claimant the further amount of \$15,000.00 for attorney's fees pursuant to Section 517.211, Florida Statutes.

4. Respondent, DEL, is further to pay interest at the legal rate of 12% per annum from the date of the original award-until payment of the award.
5. Claimant's requests for pre-award interest, costs and punitive damages are denied.
6. Respondent, DEL's, requests for attorney's fees and costs are denied.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$9,000.00 (nine sessions x \$1,000.00). Respondent, DEL, is hereby assessed \$9,000.00, \$1,000.00 of which shall be paid directly to Claimant, and \$8,000.00 of which shall be paid to the National Association of Securities Dealers, Inc.

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

Concurring Arbitrators' Signatures

/s/  
Casey W. Mills, Esq.

Public

/s/  
Steven Goerke, Esq.

Public

/s/  
Gry D. Drake

Industry

Date of Decision: September 21, 1992

ORIGINAL

BEFORE THE  
NATIONAL ASSOCIATION OF SECURITIES DEALERS

CASE NO. 91-00463

In the Matter of the Arbitration Between:  
WILLIAM H. FERGUS, as Trustee on  
behalf of the William H. Fergus, M.D.,  
P.A. Defined Benefit Pension Plan; and  
WILLIAM H. FERGUS, as Trustee on  
behalf of the William H. Fergus, M.D.,  
P.A., Target Pension Plan,

Claimant,

vs.

PAINE WEBBER, INC., DREXEL BURNHAM  
LAMBERT, INC., and JOHN ASHBY,

Respondents.

---

STIPULATION FOR ENTRY OF ARBITRATION AWARD

COME NOW, Claimants, WILLIAM H. FERGUS ("Fergus"), as trustee on behalf of the William H. Fergus, M.D., P.A., Defined Benefit Pension Plan, and the William H. Fergus, M.D., P.A., Target Pension Plan, by and through their undersigned counsel, and Respondent JOHN ASHBY, and hereby STIPULATE, as a settlement of all claims in this arbitration proceeding against JOHN ASHBY, solely, to the entry of an Arbitration Award against JOHN ASHBY, and in favor of the Claimants, as follows:

1. Simultaneous with the execution of this Stipulation, John Ashby shall execute, in favor of the Claimants, a Promissory Note in the form attached hereto as Exhibit A.

2. Upon payment of said Promissory Note in full, the Claimants shall execute a General Release in favor of John Ashby, which shall release John Ashby of all claims brought in this arbitration, in the form attached hereto as Exhibit B.

JUN-16-92 DE 09:54 JDL/LENNER PEARCE  
3. Simultaneous with the execution of this Stipulation, John Ashby shall execute a General Release in favor of the Claimants, in the form attached hereto as Exhibit C.

4. The settlement shall have no effect upon the Claimants' arbitration proceeding against Drexel Burnham Lambert, Inc., and shall be subject to the approval of the arbitrators and the entry of an Arbitration Award in accordance with this Stipulation.

5. This Stipulation and the Award are subject to Section 41 of the National Association of Securities Dealers, Inc. ("NASD") Code of Arbitration Procedure, and the resolution of the NASD Board of Governors, Paragraph 3744, Failure To Act Under Provisions of Code of Arbitration Procedure, and John Ashby acknowledges that failure to honor the Award may subject him to NASD sanctions.

6. John Ashby acknowledges and agrees that in the event of default of payment of the Promissory Note, that the Claimants may confirm the Arbitration Award to Judgment in any court of competent jurisdiction, including, but not limited to, the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida; and that the prevailing party shall be entitled to a Judgment for damages, including attorneys' fees and costs.

LENNER & PEARCE, P.A.  
Counsel for Claimants  
2888 East Oakland Park Boulevard  
Fort Lauderdale, FL 33306  
305/563-8111

  
ROBERT WAYNE PEARCE

  
JOHN ASHBY

PROMISSORY NOTE\$ 25,000.00June 16, 1992

FOR VALUE RECEIVED, the undersigned promises to PAY TO THE ORDER OF

WILLIAM H. FERGUS, as Trustee on behalf of the William H. Fergus, M.D., P.A. Defined Benefit Pension Plan; and WILLIAM H. FERGUS, as Trustee on behalf of the William H. Fergus, M.D., P.A., Target Pension Plan,

The principal sum of Twenty-Five Thousand (\$25,000.00) payable in lawful money of the United States of America, on an installment basis as follows:

The first installment, in the amount of \$5,000.00, shall be paid on or before January 1, 1993. Thereafter, the balance of the note shall be paid in equal quarterly installments of \$1,250.00, commencing on April 1, 1993, until paid in full.

If any installment of principal is not paid when due, or upon any default in the performance of any of the covenants or agreements of this Note or the obligation represented hereby, the whole indebtedness remaining unpaid, shall, at the option of the holder, become immediately due, payable and collectible, and while in default, this note shall bear interest at the rate of 18 per cent per annum. Each maker and endorser severally waives, demand protest and notice of maturity, non-payment or protest and all requirements necessary to hold each of them liable as makers and endorsers. Each maker and endorser further agrees, jointly and severally, to pay costs of collection, including reasonable attorneys fees in the event the principal of this Note or any payment on the principal or any interest thereon is not paid at the respective maturity thereof, or in case it becomes necessary to protect the security hereof, whether suit be brought or not.

Payable at:

Dr. William Fergus, Trustee  
330 South State Road 7  
Suite D  
Plantation, Florida 33317

  
\_\_\_\_\_  
JOHN ASHBY

or such other places as shall be designated by the holder of this Note, in writing.

GENERAL RELEASE

## KNOW ALL MEN BY THESE PRESENTS:

That JOHN ASHBY, first party, for and in consideration of the sum of TEN DOLLARS (\$10.00) or other valuable consideration, received from or on behalf of WILLIAM H. FERGUS, as Trustee on behalf of the William H. Fergus, M.D., P.A. Defined Benefit Pension Plan, and WILLIAM H. FERGUS, as Trustee on behalf of the William H. Fergus, M.D., P.A., Target Pension Plan, and WILLIAM H. FERGUS and ALLISON FERGUS, individually and collectively the second party, the receipt whereof is hereby acknowledged,

(Wherever used herein the terms "first party" and "second party" shall include singular and plural, all officers, directors, employees and agents of corporation, heirs, personal representatives and legal representatives and assigns of individuals, and the successors and assigns of corporations wherever the context so admits or requires.)

HEREBY remises, releases, acquits, satisfies and forever discharges the said second party, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity, which said first party ever had, now has or which any successor, heir or assign of said first party hereafter can, shall or may have against said second party, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of these presents, including, but not limited to, any and all matters arising from the Arbitration known as WILLIAM H. FERGUS, etc., et al., Claimant, vs. PAINE WEBBER, INC., DREXEL BURNHAM LAMBERT, INC., and JOHN ASHBY, NASD Case No. 91-00463.

16 IN WITNESS WHEREOF, I have hereunto set my hand and seal this  
th day of June, 1992.

Signed, sealed and delivered  
in the presence of:

Barbara Krasinski  
WITNESS

John E. Ashby  
JOHN ASHBY



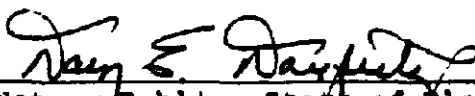
STATE OF FLORIDA       )  
                                  ) ss:  
COUNTY OF BROWARD     )

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgements, personally appeared JOHN ASHBY, to me known to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 16 day of June, 1992.

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA  
MY COMMISSION EXP. DEC. 17, 1992  
BONDED THRU GENERAL REG. 1989.

  
Notary Public, State of Florida

THIS DOCUMENT WAS PREPARED BY:  
Lerner & Pearce, P.A.  
2888 East Oakland Park Boulevard  
Fort Lauderdale, Florida 33306  
Telephone: (305) 563-8111