

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

B.F. Kelley, Jr., individually and as Trustee
under the Will of Ben F. Kelley,
deceased, and Mildred L. Kelley

91-03187

Name of Respondents

PaineWebber, Inc. and
William B. Michaels, Jr.

REPRESENTATION

For Claimants: James M. Sturdivant, Esq. and Timothy Carney, Esq. of Gable & Gotwals, Tulsa, Oklahoma.

For Respondent PaineWebber, Inc: Edward Werner, Esq. and Patrick J. Howley, Esq. of PaineWebber, Inc., Weehawken, New Jersey. For Respondent William B. Michaels, Jr.: Joel L. Wohlgemuth, Esq. and William W. O'Connor, Esq. of Norman & Wohlgemuth, Tulsa, Oklahoma.

CASE INFORMATION

Statement of Claim filed: October 9, 1991. Reply to Counterclaim of Respondent William B. Michaels Jr. filed: January 27, 1992.

Claimant B.F. Kelley, Jr.'s Submission Agreement signed on: November 9, 1991. Claimant Mildred L. Kelley's Submission Agreement signed in: October 1991.

Statement of Answer, Set Off and Counterclaim filed by Respondent, William B. Michaels, Jr. on: January 23, 1992.

Statement of Answer filed by Respondent PaineWebber, Inc. on: January 27, 1992. Amended Answer filed by Respondent PaineWebber, Inc. on: February 5, 1992.

Respondent, William B. Michaels, Jr.'s Submission Agreement signed on: December 12, 1991.

Respondent PaineWebber, Inc.'s Submission Agreement signed on: January 22, 1992.

HEARING INFORMATION

Pre-Hearing Conference: June 25, 1992 for one (1) session with arbitrators.

Hearing Dates/Sessions: June 30, 1992 for two (2) sessions,
July 1, 1992 for two (2) sessions,
July 10, 1992 for three (3) sessions,
July 11, 1992 for two (2) sessions,
July 20, 1992 for three (3) sessions.

Hearing Location: Oklahoma City, Oklahoma.

CASE SUMMARY

Claimant B.F. Kelley, Jr. individually and as Trustee under the will of Ben F. Kelley, deceased, and Mildred L. Kelley ("Claimants") set forth the following claims for relief in their Statement of Claim: (1) Breach of Fiduciary Duty against Respondent William B. Michaels ("Michaels"), (2) Breach of Fiduciary Duty against Respondent PaineWebber, Inc. ("PaineWebber"), (3) churning, (4) fraud, (5) Rule 10(b)(5) of the Securities and Exchange Commission, (6) suitability violations, (7) negligence, in recommending the purchase of FNMA Warrants, (8) Failure to Supervise, and (9) Fees and Costs.

Claimants alleged that, without authority, Michaels sold 2,582 shares of the PaineWebber Master Growth Fund which netted \$31,805 to the account after an exit fee of an unknown amount was charged by PaineWebber. Claimants also alleged that PaineWebber misrepresented to Michaels' customers the reason for his termination. Claimants alleged that Michaels caused 52 purchase transactions for Federal National Mortgage Association shares and 38 sale transactions of the same security. Claimants alleged that these purchase and sales were to generate excessive and unnecessary commissions. Claimants alleged that Michaels caused six purchase transactions for Americus AT & T shares to be effected and eight sale transactions of the same security, and eight purchase transactions for Dell Computer Company shares, to generate commissions.

Claimants further alleged that at Merrill Lynch, between October 1989 and May 1991, Claimants suffered portfolio losses due to illegal churning activities of Michaels in the amount of \$220,000.00 in both accounts. Claimants alleged that they have complained to Merrill Lynch and have reached a negotiated compromise and settlement of their claims against Merrill Lynch.

Respondent PaineWebber denied violating any fiduciary duty, denied churning Claimant's accounts, denied violating rule 10(b)(5), denied recommending unsuitable investments, denied acting negligently and denied failing to supervise Michaels. PaineWebber alleged that neither exemplary

damages nor punitive damages are properly awardable in an arbitration setting, nor have the Claimants plead the elements necessary for the awarding of such damages.

PaineWebber, in their Amended Answer, submitted a Profit and Loss Analysis for the accounts in question. PaineWebber alleged that Claimants made a profit of \$86,830.32 while their accounts were maintained at PaineWebber.

Respondent Michaels generally denied the allegations set forth in the Statement of Claim. Michaels set forth the following affirmative defenses in his Answer: set-off in the amount of \$290,000.00 should the Panel conclude that the Claimants are entitled to any relief because Claimants already received \$290,000.00 in settlement money from Merrill Lynch; breach of the terms of the Customer Agreements because Claimants commenced two state court actions against Michaels; failure to state a claim upon which relief can be granted; failure to comply with their obligation to mitigate their damages; assumption of risk; laches, waiver, estoppel and ratification; doctrine of in pari delicto; Statute of Limitations; contributory negligence; absence of a private right of action for alleged violations of rules of the NYSE, ASE, or NASD; Michaels acted in the utmost good faith; Michaels is not liable for the acts or omissions of PaineWebber or Merrill Lynch;

Michaels, in his counterclaim, alleged that as a result of Claimants breaching the Customer Agreement wherein the parties agreed to arbitrate all disputes, Michaels incurred costs for defending the two state court actions, and alleged that he is entitled to costs and expenses incurred. Claimants, in their Reply to the Counterclaim, alleged that Michaels agreed he could waive the right to arbitrate and submit the matter to the courts of the State of Oklahoma.

RELIEF REQUESTED

Claimants requested actual damages in the amount of \$30,000.00, interest as allowed by law, punitive damages, legal fees, and costs against PaineWebber and Michaels. Claimants also requested portfolio losses in the amount of \$220,000.00 for damages at Merrill Lynch, and lost opportunity damages of \$72,725.00.

Respondent PaineWebber requested that the allegations against PaineWebber for damages incurred in liquidating securities for transfer to Merrill Lynch, be dismissed in their entirety. Respondent Michaels requested that he be granted judgment against the Claimants and that Claimants be ordered to pay all of Michael's costs associated with the defense of this claim, plus \$5,217.50, costs and fees for Claimant's breach of contract.

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 the NASD.

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 Panel finds in favor of the Claimants and against the Respondent Michaels on the First Claim for Relief;
2. The Panel finds in favor of the Claimants and against the Respondent PaineWebber on the Second Claim for Relief;
3. The Panel finds in favor of the Claimants and against the Respondent Michaels on the Third Claim for Relief;
4. The Panel finds in favor of the Claimants and against the Respondent Michaels (directly) and against the Respondent PaineWebber (vicariously) on the Fourth Claim for Relief;
5. The Panel finds in favor of the Claimants and against both Respondents on the Fifth Claim for Relief;
6. The Panel finds in favor of the Claimants and against both Respondents on the Sixth Claim for Relief;
7. The Panel finds in favor of the Claimants and against both Respondents on the Seventh Claim for Relief;
8. The Panel finds in favor of the Claimants and against the Respondent PaineWebber on the Eighth Claim for Relief;
9. The Panel finds in favor of the Claimants, as to costs, but denies attorney's fees, on the Ninth Claim for Relief (see: Forum Fees);
10. The Panel finds in favor of Respondent Michaels and against the Claimants on Michaels' counterclaim;
11. The Panel further recommends to the NASD that it review Respondent Michaels' conduct in this case to determine whether any disciplinary action is warranted (see attached: Disciplinary Referral);

The Panel has determined the amounts of damages to be awarded in this case are as follows:

1. Against the Respondent PaineWebber:

- (a) Actual damages in the amount of \$14,257.40. This represents the exit fees charged on the Claimants' mutual funds at the time of sale in late September 1989. Of this amount, \$9,750.86 constitutes damages awarded to the trust account and \$4,506.54 constitutes damages awarded to the joint account.
- (b) Actual damages in the amount of \$5,955.44. This represents the commissions paid by the Claimants during the time that the trust account was churned by the Respondent Michaels while he was employed by the Respondent PaineWebber.
- (c) Punitive damages in the amount of \$50,000.00.

2. Against the Respondent Michaels:

- (a) Actual damages in the amount of \$292,750.00. This represents portfolio losses of \$220,000.00 sustained by both accounts during the time they were churned by the Respondent Michaels while he was employed by Merrill Lynch, plus lost opportunity damages of \$72,750.00.
- (b) Punitive damages against the Respondent Michaels in the amount of \$505,217.50. The Chairman dissents from this part of the award. (See Chairman Dennis S. Boxer Concurring in Part and Dissenting in Part Below);

3. Against the Claimants, based on Respondent Michaels's counterclaim:

- (a) Actual damages in the amount of \$5,217.50.

- 4. The Panel grants the Respondent Michaels' Motion for Set Off against Claimants in the amount of \$290,000.00. This represents the settlement proceeds that the Claimants received from Merrill Lynch. The Panel directs that the sum of \$290,000.00 be applied to reduce the damages that the Claimants have been awarded against the Respondent Michaels.
- 5. The Panel awards costs against both Respondents, jointly and severally, in the amount of \$4,704.82.
- 6. The Panel also grants the Claimants Motion for an award of Attorney's Fees against Respondent PaineWebber only for the fees incurred in compelling PaineWebber to comply with the Claimants' proper discovery requests. The Panel awards the Claimants the amount of \$705.00 for this item.

7. The Panel denies the Claimant's request for prevailing party attorney's fees, for the arbitration hearing based on the American Rule. The Panel can find no statutory authority supporting an award of attorney's fees in a case of this kind.

**CHAIRMAN DENNIS S. BONEUR
CONCURRING IN PART AND DISSENTING IN PART**

I concur with the majority on all of its findings except for one issue.

I must dissent from the amount of punitive damages awarded by the majority against the Respondent Michaels. The amount of \$200,000.00 would be an adequate amount of punitive damages to be awarded against Respondent Michaels and for that reason I cannot agree with the majority's finding.

FORUM FEES

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

12 sessions X \$750.00 = \$9,000.00 minus hearing session deposit of \$750.00 = \$8,250.00 plus \$300.00 for the prehearing conference held with the panel = net \$8,550.00 due.

Forum fees Assessed Against: Respondents PaineWebber, Inc. and William Michaels, Jr. in the amount of \$8,550.00.

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

Panel Members Concurring:

Dated:

September 22, 1992

s/s

Dennis S. Boneur
Dennis Boneur, Esq., Chairperson
Public Arbitrator
(Concurring in Part and Dissenting
from the Amount of punitive damages
awarded by the majority against
Respondent Michaels).

Panel Members Concurring Cont'd:

Dated:

September 25, 1992

s/s

Robert N. Naifeh
Robert N. Naifeh, Esq.
Public Arbitrator

September 21, 1992

s/s

Ann M. Long-Larsen
Anne M. Long-Larsen
Industry Arbitrator

NASD award served on: October 5, 1992

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

B.F. Kelley, Jr., individually and as Trustee
under the Will of Ben F. Kelley,
deceased, and Mildred L. Kelley

DISCIPLINARY REFERRAL
91-03187

Name of Respondents

PaineWebber, Inc. and
William B. Michaels, Jr.

The arbitration panel recommends and asks that the NASD review Respondent William B. Michaels, Jr.'s conduct in the above captioned case to determine whether any disciplinary action is warranted.

The grounds for the disciplinary referral are as follows: unauthorized trading and violation of the suitability standards involving the Claimants in this case.

By the Arbitration Panel:

Dated:

September 22, 1992

s/s

Dennis S. Bonaux
Dennis Bonaux, Esq., Chairperson
Public Arbitrator

September 25, 1992

s/s

Robert N. Naifeh
Robert N. Naifeh, Esq.
Public Arbitrator

September 21, 1992

s/s

Ann M. Long-Larsen
Anne M. Long-Larsen
Industry Arbitrator