

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

Marianne Johansen

91-03544

Name of Respondent(s)

PaineWebber, Inc.  
Mariner Financial Services, Inc.  
Jon Fluetsch

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**REPRESENTATION**

For Claimant Marianne Johansen: Ralph J. Sirlin, Esq. of the law firm of Neosti and Sirlin.

For Respondents      PaineWebber, Inc.: Paul Thomas, Esq.  
Mariner Financial Services Inc.: Frederick K. Hoops, Esq. of the law firm  
of Frederick K. Hoops and Associates, P.C.  
Jon Fleutsch appeared pro se.

**CASE INFORMATION**

Statement of Claim filed: November 11, 1991.

Motion to Bar Respondents' Answer and Defenses: February 26, 1992.

Claimant's Submission Agreement signed on: March 21, 1991.

Statement of Answer, Counterclaim and Cross-Claim filed by Respondent Mariner Financial Services, Inc. on: January 6, 1992.

Respondent Mariner Financial Services, Inc.'s Submission Agreement signed on: January 2, 1992.

Joint Statement of Answer filed by Respondents PaineWebber, Inc. and Jon Fluetsch on: February 20, 1992.

Respondent PaineWebber, Inc.'s Submission Agreement signed on: March 17, 1992.

The Respondent Jon Fluetsch did not sign a Submission Agreement as required pursuant to Section 25 of the Code of Arbitration Procedure.

### **HEARING INFORMATION**

Hearing Date/Sessions: January 21, 1993 / Three Sessions

Hearing Location: Detroit, Michigan

### **CASE SUMMARY**

Claimant alleged that neither she nor her husband understood the risks of the investments at issue or the trading strategy pursued by Respondent Jon Fluetsch while he was employed at Mariner Financial Services, Inc. nor were they capable of reviewing and understanding the monthly statements and instead fully relied on Respondent Fluetsch's representations and professional expertise. Claimant further alleged the investments were inconsistent with Claimant's primary investment objective of safety and the Claimant's investment objective was contrary to the type of investments solicited and traded by Jon Fluetsch. Claimant further alleged Respondents made misrepresentations and omissions of fact and Respondent Jon Fluetsch was never properly trained or supervised to understand the products or strategies available; Respondents breached the fiduciary duty owed to Claimant and Respondent Mariner Financial Services, Inc. failed to properly supervise Respondent Fluetsch.

Respondent PaineWebber, Inc. and Jon Fluetsch maintained there was not "risky" trading while the account was at PaineWebber, Inc. and Claimant received her monthly statements from PaineWebber, Inc. reflecting the minimal balance and absence of trading and Respondent Jon Fluetsch further maintained Claimant was a shrewd and savvy businesswoman and she understood a variety of investment vehicles and markets and investments were recommended on the basis of a long-term plan consistent with the Claimant's investment goals. Respondent Jon Fluetsch further maintained a reasonable effort was expended to fully disclose the risks associated with the Claimant's investments and it was reasonable for him to believe that Claimant understood the risks associated with the investments she selected and against Respondent Jon Fluetsch's advice the Claimant opened a margin account and withdrew funds to pay off a loan obligation. Respondent Jon Fluetsch further maintained an unusual effort was expended in monitoring and communicating the investment and activity and performance of Claimant's account and investment results for the period July, 1984 to November, 1989 indicate a positive return on Claimant's investment dollars and he ceased to have responsibility for the

Claimant's account on November 24, 1989. Respondent Jon Fluetsch further maintained the investment recommendations and trading activity were not commission driven and investment underperformance was caused by unfavorable market action and not by risks associated with unsuitable investments and strict compliance of individual regulations was observed and Respondent Fluetsch did not execute trades in Claimant's account that were unauthorized and the Claimant knew full well the risks she was assuming with the investments she selected to support her extravagant lifestyle. Respondent Jon Fluetsch further asserted the Statute of Limitations as a defense.

Respondent Mariner Financial Services, Inc. maintained it never knew or agreed to having its name placed on Claimant's account and it never made a margin loan to Claimant and Claimant never relied on Mariner Financial Services, Inc. for its expertise or its supervision of Respondent Fluetsch concerning her account and the three mutual fund redemption sales and the single unit investment trust purchase carried out while Fluetsch was associated with Mariner Financial Services, Inc. cost Claimant no commissions, made her money and paid down her margin account at reasonable redemption prices to save her interest and Claimant never contracted with Mariner Financial Services, Inc. through Fluetsch or otherwise to provide Claimant with investment advice or management or even to open a nondiscretionary account. Respondent Mariner Financial Services, Inc. further asserted the Statute of Limitations as a defense. Respondent Mariner Financial Services, Inc. further asserted a counterclaim alleging it incurred approximately \$13,000.00 in costs in the defense of the baseless claims recklessly brought against it and asserted a cross-claim against all other Respondents maintaining it should be exonerated, reimbursed for and held harmless from any and all recoveries that may be ordered against Respondent Mariner Financial Services, Inc. which recoveries were not based on wrongs that the arbitration panel found to have been personally committed by Respondent Mariner Financial Services, Inc. and/or found should ultimately be borne by other Respondents and any and all costs to defend the action beyond Respondent Mariner Financial Services, Inc.'s fair contributory share.

In response to the counterclaim Claimant maintained it is ridiculous and does not merit a response and further maintained the Claimant's claim was filed well within any applicable limitations period.

In response to the cross-claim Respondents PaineWebber, Inc. and Jon Fluetsch maintained it is frivolous and should be dismissed.

#### **RELIEF REQUESTED**

Claimant requested compensatory damages from Respondent Jon Fluetsch in the sum of \$123,171.00; compensatory damages from Respondent Mariner Financial Services, Inc. in the sum of \$54,962.00; attorneys' fees from Respondent Jon Fluetsch in the sum of \$41,057.00 and attorneys' fees from Respondent Mariner Financial Services, Inc. in the sum of \$18,321.00 plus interest and exemplary damages in an amount equal to compensatory damages and a dismissal

of the counterclaim. Claimant entered into a settlement agreement with Respondent PaineWebber, Inc.

Respondent Jon Fluetsch requested a dismissal of all claims against him and an award of appropriate costs and other relief in being forced to defend this claim.

Respondent Mariner Financial Services, Inc. requested damages on its counterclaim, cross-claim; a dismissal of all claims asserted against it plus costs and legal fees sustained to defend itself.

### **OTHER ISSUES**

Claimant asserted a Motion to Bar Respondents' Answer and Defenses for their failure to comply with Section 25 of the Code of Arbitration Procedure which was denied by the panel.

### **AWARD**

After considering the pleadings, the testimony, the evidence presented at the hearing, and post-hearing briefs the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Prior to the commencement of the first hearing session the arbitration panel was informed that the Claimant had entered into a settlement agreement with the Respondent PaineWebber, Inc.
2. All claims against Respondent Mariner Financial Services, Inc. are dismissed because of lack of proofs as to Mariner Financial Services, Inc.
3. The Respondent Mariner Financial Services, Inc.'s counterclaim against the Claimant is dismissed.
4. The Respondent Mariner Financial Services, Inc.'s cross-claims are dismissed.
5. The Respondent Jon Fluetsch be and hereby is liable and shall pay to the Claimant the sum of \$51,943.67.
6. The Respondent Jon Fluetsch be and hereby is liable and shall pay to the Claimant pre-judgement interest from November 11, 1991 until the date of decision and thereafter post-judgement interest shall apply from the date of decision until the date of payment of the award.
7. All pre-judgement and post-judgement interest shall be consistent with the Michigan Court Rules.

8. The Claimant's request for exemplary damages is denied.
9. Each party shall bear its respective costs including attorneys' fees.

**FORUM FEES**

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


3 sessions x \$750.00 = \$2,250.00 less Claimant's hearing session deposit  
(\$750.00) less Respondent Mariner Financial Services, Inc. hearing session deposit  
(\$875.00) = \$625.00 due.

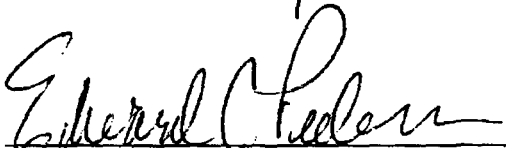
Forum Fees Assessed Against:


The Respondent Jon Fluetsch be and hereby is liable and shall pay to the NASD the sum of \$625.00 to represent forum fees. The NASD shall retain the \$200.00 claim filing fee previously paid by the Claimant and shall retain the \$500.00 claim filing fee previously paid by the Respondent Mariner Financial Services, Inc.

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

**ARBITRATORS' SIGNATURE**

  
Robert Parker, Esq.  
Public Arbitrator 4-30-93

  
Edward C. Pedersen, Esq.  
Public Arbitrator 5-9-93

  
Michele Verlinden  
Industry Arbitrator 5-3-93

Dated by the NASD on: May 13, 1993