

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

PUBLIC

Name of Claimant(s)

Thomas and Mary Louise Maloney

92-02056

Name of Respondent(s)

PaineWebber, Inc.
Paul R. Meese
Thomas P. Kelly

REPRESENTATION

For Claimant Thomas and Mary Louise Maloney: Robert V. Campedel, Esq. of
Doepken Koevican Weiss & Madven.

For Respondents PaineWebber, Inc. and Paul Meese: Robert Sommer, Esq. of
Kirkpatrick & Lockhart.

For Respondent Thomas Kelly: James K. O'Malley, Esq.

CASE INFORMATION

Statement of Claim filed on: June 16, 1992.

Claimant's Submission Agreement signed on: May 31, 1992.

Joint Statement of Answer filed by Respondents PaineWebber, Inc. and Paul
Meese on: October 5, 1992.

Respondent PaineWebber, Inc.'s Submission Agreement signed on: October 1,
1992.

Respondent Paul Meese's Submission Agreement signed on: March 4, 1993.

Statement of Answer filed by Respondent Thomas Kelly on: October 30, 1992.

Respondent Thomas Kelly's Submission Agreement signed on: November 9, 1992.

RELIEF REQUESTED

Claimants requested \$266,702.66 plus attorneys' fees, expense, exemplary damages, interest and costs.

Respondents requested all claims be dismissed.

FORUM FEES

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

6 sessions x \$750.00 + 2 pre-hearing conferences x \$300.00 = \$5,100.00
less \$750.00 hearing session deposit = \$4,530.00 net due.

Forum Fees Assessed Against:

Respondent PaineWebber and Paul Meese be and hereby are liable jointly and severally, and shall pay the NASD the sum of \$2,175.00 to represent forum fees.

Respondent Thomas Kelly be and hereby is liable and shall pay the NASD the sum of \$2,175.00 to represent forum fees.

The NASD shall retain the \$200.00 filing fee and \$750.00 hearing session previously paid Claimant.

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

IN THE MATTER OF THE ARBITRATION

BETWEEN

THOMAS G. MALONEY AND MARY
LOUISE MALONEY

CLAIMANTS

AND

PAINWEBBER, INCORPORATED,
PAUL R. MEESE AND THOMAS P. KELLY,
RESPONDENTS

NATIONAL ASSOCIATION OF
SECURITIES DEALERS
No. : 92-02056

AWARD

intent of a Richard Dunn, who was then residing in Europe, to move to the United States and, more specifically, to purchase a particular home in Upper St. Clair, Pennsylvania.

Dunn was said to be without the immediate funds to purchase the home, but was expected to realize substantial profits in the near future from the overseas sale of a water purification system or plant owned or promoted by Dunn. Accordingly, Dunn sought to have someone fund the immediate purchase of the Upper St. Clair property and, in addition, advance other monies to Dunn. In return, Dunn would, within ninety (90) days, return all sums advanced, including the purchase price of the home, together with twenty percent (20%) of the total sum.

Although Maloney initially resisted the proposal, Maloney and Dunn ultimately entered into an agreement whereby the Claimants would purchase the Upper St. Clair property for the sum of \$259,000.00¹, absorb all closing costs, and advance additional monies to Dunn. In essence, Claimants were to pay to or on behalf of Dunn the amount of Three Hundred Fifty Thousand Dollars (\$350,000.00). In return therefor, it was specified that:

By October 31, 1989, Dunn Shall pay to Maloney the sum of \$350,000.00 plus 20% as well as any other amounts hereinafter set forth²

The Maloney-Dunn agreement was memorialized by a four (4) page writing dated August 18, 1989. The written agreement, in addition to being signed by Mr. and Mrs. Maloney and by Theolynda Dunn, the wife of Richard Dunn, was signed by or bore the seal of Arlene Lowy and R. Alexander Lowy, as guarantors of Dunn's performance.

Upon signing the agreement, the Claimants provided Dun's attorney with cash in the amount of \$2,500.00 and two (2) checks drawn on the Claimants' RMA account with PaineWebber, in the amounts of \$244,900.00 and \$102,600.00.

¹ Of the \$259,000.00 purchase price, Dunn himself had paid, as hand money, \$14,100.00.

² Claimants' Exhibit No. 5, Agreement dated August 18, 1989. The additional amounts consisted of the transfer costs of deeding the property to Dunn from Maloney and the margin interest cost of Maloney, stipulated to be a ten percent (10%) annual rate.

In September, 1989, approximately one (1) month prior to Dunn's scheduled date of performance under the August 18 agreement, Dunn met with Maloney and presented Maloney with information concerning a limestone mining operation. Dunn purportedly represented the value of the operation to be Forty Million Dollars (\$40,000,000) and offered Maloney an opportunity to invest in the mine. Maloney did not immediately accept the offer.

Maloney alleges that after he had declined Dunn's offer, Kelly contacted Maloney and endorsed the investment opportunity as "a fantastic deal". Allegedly, Maloney expressed reservations in view of the fact that payment had not yet been made under the August agreement. To this, Kelly is said to have responded that he "would talk" with Dunn, that Dunn was reliable, and that the limestone investment would "make millions". During the month of October, 1989, Kelly and Maloney purportedly discussed the limestone investment on a nearly daily basis.

Following additional discussion with Dunn, the Claimants entered into an agreement with an entity described as Dunn-Lowy International, Inc. By the terms of that agreement, Claimants advanced Dunn-Lowy the sum of One Hundred Thousand Dollars (\$100,000.00). In consideration therefor, Dunn-Lowy agreed to repay the sum advanced, together with an additional One Hundred Thousand Dollars (\$100,000.00) within ninety (90) days. Moreover, it was provided that "at the time of payment" Dunn-Lowy would execute all documents necessary to transfer to Claimants a twenty percent (20%) interest in mining rights owned by Silver Management, Inc., and recorded in San Bernadino County, California. The mining rights were not more particularly described.

At the time of entering into the Dunn-Lowy Agreement, on or about November 2, 1989, the Claimants had not received any portion of the payment due them under the August 18 agreement with Dunn. The Dunn-Lowy Agreement implicitly acknowledged the non-performance of Dunn under the earlier agreement and provided that the Claimants, by way of additional consideration for the promises of Dunn-Lowy, would extend the closing

date under the August 18 agreement from October 31, 1989 to November 30, 1989. Richard Dunn guaranteed the performance of Dunn-Lowy under the November 2 agreement.

Upon signing the November 2 agreement, the Claimants provided Dunn with a check drawn on their RMA account with PaineWebber in the amount of \$100,000.00.

November 30, 1989 passed without payment being made to the Claimants by Dunn. On or about December 19, 1989, Dunn purportedly advised the Claimants that all monies then due would be paid before the end of the year. The Claimants informed Dunn that payment before January 19, 1990 was essential.³ Payment was not made. The Claimants learned, moreover, that the promised mining rights had not been secured. On or about January 19, 1990, however, the Claimants and Richard Dunn executed a letter agreement which provided, in part:

WHEREAS:

A portion of Mr. and Mrs. Thomas G. Maloney's investment has become due and payable.

WHEREAS:

At the request of Mr. and Mrs. Thomas G. Maloney a payment of no less than \$712,000.00 U.S. will be issued to satisfy the closing requirements of a recent acquisition of the Maloney's.

WHEREAS:

The above mentioned acquisition must be acquired and closed by no later than the close of business February 7, 1990.

Additional communications occurred between the Claimants and Dunn. In short, however, neither Dunn nor Dunn-Lowy performed on the contracts executed with the Claimants, and the Claimants received no part of the promised return from Dunn, Dunn-Lowy or the mining operation.

In or around August, 1990, the Dunns surrendered possession of the Upper St. Clair property, to which the Claimants continued to hold title. Approximately seven (7) months later, the property was sold by the Claimants at the contract sales price of

³ Maloney had contemplated the purchase of another business and anticipated a need for funds.

3268,000.00. The settlement statement reflects actual proceeds to the Claimants, after settlement charges and miscellaneous adjustments, in the amount of \$249,568.82.

It is not disputed that Kelly received two (2) checks drawn on the escrow account of Yaier Y. Lehrer, Esquire, attorney for Richard Dunn. The first of these, in the amount of Forty Thousand Dollars (\$40,000.00) is dated August 22, 1989; the second, in the amount of Ten Thousand Dollars (\$10,000.00), is dated November 3, 1989.⁵ Both checks were transacted on the respective date of issuance and correspond closely in time with the deposit of the Maloney checks into the escrow account upon which the checks were drawn.

Neither is it disputed that, in 1989, Kelly suffered a substantial reduction in income. Meese was aware of Kelly's financial difficulties at the time Kelly became involved in the Dunn-Maloney transactions.

Claimants learned of the payments to Kelly on or about July 11, 1990. Thereafter, on or about July 23, 1990, the Claimants, through their attorney, orally requested that Kelly be removed as account executive of all accounts held for the Claimants or their sons at PaineWebber. That request was promptly met by PaineWebber.

By letter dated October 23, 1990, the Claimants' attorney apprised PaineWebber, through Branch Manager Meese, of "the details of the legal claims" suggested by the Dunn transactions. The parties have been unable to reach any accommodation on those claims.

Claimants allege liability for losses against Kelly, Meese and their employer, PaineWebber. Claimants allege that the Respondents are liable to them based upon Kelly's misrepresentations, fraudulent activities and breach of fiduciary duties which violated the Pennsylvania and Federal Securities laws and Pennsylvania and Federal common law. Claimants allege that respondents Meese and PaineWebber are liable based upon their failure to adequately supervise Kelly and to discover Kelly's activities when they could

⁵ Claimants' Exhibits Nos. 42, 43.

have easily done so, and their failure to inform the Maloneys of material facts about Kelly and his authority.

DISCUSSION

The first observation to be made is that the guilty conduct of Respondent Kelly is evident. Even if the version of events advanced by Kelly were accepted, it is apparent that Kelly contravened standards established by PaineWebber to govern the behavior of its employees and investment executives. Indeed, the mere act of identifying the Maloneys to Dunn as candidates to fund the bridge loan sought by Dunn violated the absolute proscription placed on such conduct under Section 11 of the Sales Practices and Policy Manual which was placed into effect by PaineWebber on or about January 1, 1989. That section provides, in pertinent part:

At no time may an Investment Executive participate in (or introduce to another for the purpose of arranging for) the purchase or sale of any financial product or service, including tax shelters, limited partnerships, securities, direct program, insurance product, or other related products which are not offered by and marketed through the PaineWebber system. Any questions or doubts should be addressed to the Compliance Department.

Copies of the policy manual were distributed to affected PaineWebber personnel immediately prior to or contemporaneous with its adoption. Kelly acknowledged that he had received a copy.

Kelly acknowledged, as well, that he had received, and that Branch Manager Meese had reviewed with him, the Code of Conduct promulgated by PaineWebber. That code prohibits, among other things, employee involvement in certain enumerated extra-curricular activities, unless the employee has first described his proposed involvement in writing to his manager and has obtained written approval for such involvement from the compliance

department. Among the activities which are expressly prohibited, absent consent from the compliance department are:

[Being] engaged in any other business
[Being] employed or compensated by any other person.

Kelly did not alert his manager to the fact of the Dunn-Maloney transactions and certainly did not obtain prior approval for his involvement. If the panel accepts the Claimants' assertion that Kelly was compensated by Dunn for his participation in each transaction -- an assertion which is fully supported by the credible evidence -- then the conclusion must be reached that Kelly acted in direct contravention to the governing Code of Conduct.

Apart from his breach of internally promulgated policy and rules of PaineWebber, Kelly may be said to have violated state and federal securities laws. The panel accepts Claimants' analysis as to the applicability of those external laws to Kelly's conduct. Specifically, Claimants urge that Kelly's failure to disclose the material fact of his personal interest in the Dunn-Maloney transactions, his repeated endorsements of Dunn as a successful, reliable businessman, and his endorsement of both transactions, establish violations by Kelly of 10(b)(5) of the Federal Securities and Exchange Act and § 1-401 of the Pennsylvania Securities Act.

The answer and brief submitted on behalf of Kelly characterize Kelly's involvement in the Dunn-Maloney transactions as incidental and innocent. That characterization is at odds with the weight of the evidence, and, indeed, is to some extent contradicted by Kelly's own testimony. It appears upon examination of the testimony and evidence as a whole that Kelly was not at all aloof from the dealings between Dunn and the Maloneys, but, rather, encouraged those dealings and hoped to benefit personally from any deal struck between Dunn and the Maloneys.

Kelly next contends that even assuming some misconduct on his part, it was not such as would trigger liability under either the Securities and Exchange Act or the

Pennsylvania Securities Act. In this regard, Kelly maintains that neither of the Dunn-Maloney transactions involved the offer, sale or purchase of a security. Kelly and the Claimants agree on the definitional criteria of a security, but obviously, disagree on the result to be reached upon applying those criteria to the Dunn-Maloney transactions.

The panel is persuaded that the Dunn-Maloney transactions marginally satisfy the operative definition of a security. That conclusion is more readily reached, of course, with respect to the second transaction which, although in some aspects resembling a short-term note, also involved promised participation in a mineral rights adventure.⁶

All Respondents urge that the first Dunn-Maloney transaction was the practical equivalent of a typical bank mortgage, albeit one involving an extraordinarily lucrative, immediate return to the lender. Claimants respond, convincingly, that the economic reality of the first transaction is that they relied upon the purported business acumen of Dunn, and the success of his overseas enterprise to provide the promised return on their investment. The real estate to which the Maloneys obtained title secured only a portion of their investment, and, as experience later taught, did not insulate the Maloneys from sizable losses when the European venture described by Kelly-Dunn proved worthless or illusory.

The panel is persuaded of the culpability of Kelly. The panel, further, accepts Claimants' contentions as to the appropriateness of assessing attorneys' fees and punitive damages against Kelly.

The question which is next presented is whether the misconduct of Kelly should result in liability being assessed against Meese or PaineWebber. Claimants allege that Meese and/or PaineWebber may be found liable based upon supervisory requirements existing under or imposed by the NASD, SEC, and federal and state securities laws as well as principles of negligence, *respondeat superior*, apparent authority and breach of fiduciary duty.

⁶ It would be incorrect, however, to view the second transaction as being principally an investment in mining or mineral rights. Mr. Maloney testified that he would have accepted the second deal even without the mining rights. He regarded the opportunity to acquire mining rights as, in his words, "secondary" and "icing on the cake".

Claimants urge that the scope of Kelly's duties as a PaineWebber account executive should be viewed expansively and should certainly be deemed to encompass "providing investment advice".⁷ Accordingly, Claimants maintain that Kelly acted within the scope of his employment while endorsing the Dunn-Maloney transactions, and that PaineWebber should be deemed to be subject to liability upon the theory of *respondeat superior*.

Claimants' contention fails to consider that the misconduct of Kelly which is the source of Claimants' claim was conduct which, although arguably in the nature of providing investment advice, was expressly prohibited by PaineWebber's internal regulations. Further, it is only by the most attenuated bit of reasoning that Kelly's conduct in the Dunn-Maloney dealings can be viewed as having been actuated by a purpose to serve the interests of PaineWebber. Claimants reason that because trading activity in their account was increased in order to cover the amounts invested with Dunn, a benefit was realized by PaineWebber in the form of commissions. Testimony discloses, however, that Kelly's misconduct was not at all prompted by the possibility that trading in the Maloney account might become more active; Kelly looked no farther than the sums already available in the RMA account. Claimants' expert, moreover, testified that PaineWebber's business interests would have been better served had Meese monitored the RMA balances more closely in an effort to preserve funds for investment through PaineWebber.⁸ Thus, Kelly acted contrary not only to the policy and private regulatory code of PaineWebber, but also contrary to the immediate business interests of PaineWebber. Given that, it cannot convincingly be asserted that Kelly's misconduct was accomplished within the scope of his actual authority as an agent, employee or officer of PaineWebber.

Claimants assert, however, that Kelly was clothed with apparent authority to advise clients on investment matters, including outside investments. Although internal policy may have prohibited Kelly's actions, PaineWebber never communicated that interdiction to

⁷ July 30, 1993 letter brief, page 2.

⁸ Mr. Maloney, on cross-examination, acknowledged that the application of the RMA funds to the Dunn deal decreased the level of trading Maloney could otherwise have engaged in.

Claimants, and, it is argued, PaineWebber cannot now rely upon any such internal policy to shield it from liability for acts which seemed to be within Kelly's scope of duties or authority.

Claimants acknowledge that a third party's justifiable reliance upon a supposed agency relationship can reasonably derive only from the conduct or manifestations of the principal and that it is, moreover, incumbent upon the third party to exercise some measure of diligence in ensuring that, in fact, an agent with whom that party is dealing is acting within the scope of his authority. Claimants assert that, having installed Kelly as an account executive and having permitted Kelly to deal exclusively with Claimants, PaineWebber caused Claimants to comprehend Kelly's authority as providing all manner of investment advice to clients and further reasonably concluded that "when they dealt with Kelly, they dealt with PaineWebber".⁹

That analysis would conceivably render a brokerage vicariously liable for any financial commentary by an account executive, regardless of how remote from, or antithetical to, the interests of the brokerage. Minimally, it would seem, Claimants should have made some inquiry to Meese or PaineWebber regarding Kelly's recommendations of the Dunn transactions. Claimants were aware not only that the transactions, as proposed by Kelly, would not benefit PaineWebber but, indeed, that funding of the Dunn deals would likely inhibit trading activity and, thus, be contrary to the interests of PaineWebber.

As importantly, the record is exceedingly clear that Claimants were sophisticated investors, and that at all times prior to this occasion they had viewed Kelly as a mere order-taker, and not as an investment counselor. Indeed, Claimants had even sought a discount from PaineWebber on the very premise that they utilized Kelly merely for execution, not for advice. However strenuously it might be argued on Claimants' behalf that they were laypersons and Kelly was a professional, the fact is that that distinction is fine-lined in this case.

⁹ July 30, 1993 letter brief, page 4.

The panel cannot find that Claimants relied upon Kelly's expertise as an account executive in this matter. Nor can it be found that Claimants anticipated or expected that PaineWebber would stand behind Kelly's involvement. On the contrary, to find that Claimants understood Kelly's conduct to be within the scope of his normal or approved duties as an account executive, or that PaineWebber would ratify or countenance Kelly's involvement, or even that PaineWebber would view the transactions as anything other than suspect, would be to rewrite the facts. It is clear that Claimants appreciated the maverick nature of the Dunn deals. What is all too plainly missing from the record in this case is any real indication that Claimants perceived Kelly's communications regarding the Dunn deals as the recommendations of a PaineWebber account executive. Respondents appear to be correct in their assessment of Claimants' present assertion that they reasonably assumed Kelly to be acting within the scope of his authority as disingenuous. The great weight of the evidence in this case compels the conclusion that these Claimants knew or reasonably should have known that this matter was far beyond the orbit of brokerage accountability.

Claimants contend that Meese and/or PaineWebber may be held accountable in this matter under a controlling person theory. In this regard, Claimants urge that the facts of the agency/employment relationship and of misconduct by the agent/employee are, in themselves, sufficient to state a *prima facie* case against Meese and PaineWebber.

There is some question whether the broad-stroke portrait of a control person offered by Claimants is altogether accurate. It appears that Claimants must also demonstrate, more particularly, that the supposed control person possessed the practical ability to control the specific transactions in question. In the matter-at hand, those transactions are variously alleged to be withdrawals from the RMA account and trading securities.

The panel is persuaded that RMA account activity is not an area which PaineWebber or Meese has historically controlled or has the practical ability to control or which practice within the industry mandates a brokerage make efforts to control or monitor. Although brokerage of monitoring such accounts is not prohibited, Meese credibly asserted that close

monitoring would likely be offensive to clients, many of whom utilize such accounts as personal checking accounts. To the extent that Claimants' expert opined on the monitoring of RMA transactions or withdrawals, he suggested that such would be done, if at all, only pursuant to the interest of the brokerage in preserving funds for investment through the brokerage.

Finally, PaineWebber contends, convincingly, that a brokerage firm which offers check-writing services is considered a bank in connection with such services. There is a significant question, therefore, whether, assuming any duty to more closely monitor the Claimants' account or, indeed, any ability to discover a transaction prior to its accomplishment, PaineWebber or Meese possessed the practical ability to intervene in any transaction which was supported by an adequate account balance.

Claimants argue, in their post-hearing brief, that during the month of August, 1989, and particularly from August 4 through August 25, several sales of stock were made in order to cover the checks to be written to Dunn (Brief, 7). That assertion is not altogether consistent with the testimony of Mr. Maloney, who averred that the sales of stock were not made specifically to fund the Dunn deal, but were made to free up funds "for whatever purpose". It is not at all clear, therefore, that Claimants have correctly predicated their claim upon the sales or trades occurring in their account.

Assuming, however, that such account activity can be viewed as the transaction(s) upon which liability is predicated, PaineWebber can avoid liability only if the record demonstrates that PaineWebber both maintained and diligently enforced an adequate system of internal control. The adequacy of the system as structured by PaineWebber is conceded. Claimants insist, however, that the system was not effectively implemented in this case. More particularly, it is asserted that the high level of securities trading activity in the Maloney account, coupled with the known fact of Kelly's significantly reduced commission earnings should have caused Meese to, at least, place Kelly under closer scrutiny and contact the Maloneys.

The thrust of testimony adduced by Claimants on this aspect of the case, however, suggested that heightened scrutiny by Meese should have been directed toward detecting indications of churning in the accounts serviced by Kelly. Specifically, it was averred that the financial difficulties of Kelly should have alerted Meese to review the accounts which had historically yielded the greatest commissions to Kelly, and to protect those accounts. Testimony indicated that Meese satisfied that duty. Meese was familiar with the Maloney account, and knew the account to have always been active. Meese, therefore, did not find the quantity of activity in August, 1989 or subsequent months to be alarming or, even, atypical. According to Meese, the Maloney account activity remained consistent with a long established pattern of significant, client-directed activity. A scan of the Maloney account revealed no irregularities which would have prompted contact with the customer; there was no marked change in a pattern of activity which had persisted over a substantial number of years. Meese's actions were wholly consonant with the overriding directive recited by Claimants' expert: "Know your client".

Meese, moreover, consulted with Kelly on the matter of his reduced commissions, and determined the cause of such reduction to be the loss of major accounts due to the death of clients or other innocent and inescapable causes. Meese also concluded that Kelly retained the potential to restore himself to his former level of commission income; an assessment which ultimately proved correct.

Claimants assert that they should have been apprised of Kelly's financial difficulties. Certainly, such a measure would have been beyond what is dictated by PaineWebber's internal policies, which Claimants concede to be adequate. Claimants' expert, moreover, conceded, that such communication would have been highly extraordinary, and was not required to satisfy PaineWebber's obligations to its clients.

With respect to participation by account executives in transactions not involving financial products offered by PaineWebber, the Branch Office Manager Supervisory Manual, at §11, p.11.9, dictates the following:

IEs are prohibited from participating in (or introducing clients to third parties for) the purchase or sale of any financial product or service which is not offered by PW. BOMs should carefully review incoming and outgoing correspondence in order to identify unfamiliar tax shelters, partnerships, insurance products, etc., which may indicate a violation of this policy.

The evidence establishes that the Pittsburgh branch office did police incoming and outgoing mail as a component of its overall compliance procedures. No correspondence regarding the Dunn-Maloney transactions was discovered.

Claimants reason that because Kelly averred that he saw nothing wrong with his involvement in the Dunn-Maloney transactions, the educational and implementation efforts of the Pittsburgh Branch Office were obviously deficient. The flaw in that reasoning is that, inconsistently with Claimants' overall position, it accepts Kelly's testimony as accurate.

The panel, in any event, does not find Kelly to be a reliable witness and, further, finds his efforts to distinguish his conduct from the conduct proscribed by PaineWebber policy and rules of conduct to be unconvincing. Kelly's protestation that he saw nothing improper in his activities is a slight basis on which to find the enforcement efforts of PaineWebber deficient.

Having reviewed the record as a whole, the panel cannot conclude in this case that PaineWebber or Meese failed to enforce in a diligent manner the measures put in place under the Branch Office Manager Manual.

Claimants urge that PaineWebber was negligent toward them and did not exercise a standard of care which was consistent with the special relationship existing between a client and a brokerage. Again, the panel cannot agree with Claimants. The negligence argument reiterates, for the most part, Claimants' contention that the activity level in their account should have prompted Meese to contact Claimants, consistent with the recommendations contained in the Branch Office Manager Manual. The Manual, however, directs that a

manager "use experience and common sense in deciding when BOM involvement is appropriate". Meese made an informed decision, based upon knowledge of the Maloney account and based upon an assessment of Kelly as a talented and theretofore reliable account executive who was experiencing a temporary reduction in commissions, that involvement was not warranted. That decision may have been an incorrect one, but it was not a decision which ignored foreseeable risks. The panel cannot conclude that Meese, by failing to contact Claimants, failed to exercise the degree of care warranted by the particular circumstances or that he acted in any respect differently from any similarly situated, prudent and conscientious manager.

Claimants urge, lastly, that PaineWebber breached its fiduciary obligations by failing to disclose to clients either the financial distress of Kelly or internal rules forbidding account executives from involving clients with non-PaineWebber investment vehicles. Either item of information would have prevented Claimants from entering into the Dunn deals, it is asserted. The panel is not fully persuaded that the assertion is correct. Moreover, as indicated above, disclosure to Claimants would have been an extreme measure.

The panel is not unreceptive to Claimants' position that neither the fiduciary obligations of a brokerage nor the scope of enterprise liability should be viewed too restrictively. The panel finds, however, that, the various theories of brokerage liability advanced on behalf of Claimants, however valid, fail to find a basis for application in the facts of this case. Claimants have entered exhaustive testimony, documents and argument, but the facts of the case do not permit the panel to find liability on the part of the brokerage.

AWARD

The panel, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. All claims against Respondent Paul P. Meese are dismissed.

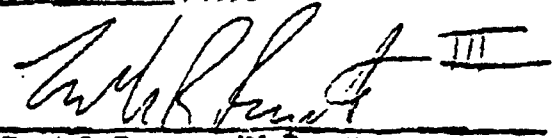
2. All claims against Respondent PaineWebber, Inc., are dismissed.

3. The claims against Respondent Thomas P. Kelly are sustained to the following extent:

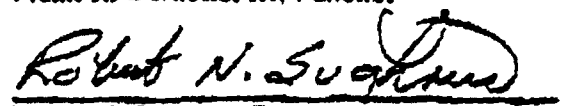
Kelly is found to be liable to Claimants in the amount of \$257,988.00, together with interest in the amount of \$58,044.53, and attorneys' fees in the amount of \$15,117.08, and punitive damages in the amount of \$30,000.00.

4. All parties are otherwise to bear their own costs in this matter.

Dated this _____ day of _____, 1993



Frank R. Burnette, III, Panelist



Robert N. Sughrue, Panelist



Richard W. Disson, Esquire, Chairperson

Date of Decision: November 30, 1993