

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant

Norman H. Schwichtenberg

Mary R. Schwichtenberg

NASD Arbitration
No. 93-03028

Name of Respondent

Painewebber, Inc.

Moe Beren

REPRESENTATION

For Claimants: R. Jeffrey Kelleher, Esq. - California International Law Chambers,
San Diego, California

For Respondents: Scott M. Ratchick, Esq. - Painewebber, Inc., Los Angeles, California

CASE INFORMATION

Statement of Claim filed: August 4, 1993

Claimants' Submission Agreement signed: July 30, 1993

Joint Statement of Answer filed by Respondents: November 24, 1993

Submission Agreement signed by Respondent, Painewebber, Inc., on November 24, 1993

HEARING INFORMATION

Hearing Dates / Sessions: July 6, 1994 - Two Sessions
July 7, 1994 - Two Sessions

Hearing Location: San Diego, California

CASE SUMMARY

In July 1990, Claimants, as trustees of the Schwichtenberg Revocable Family Trust, caused the Trust to open an account at PaineWebber's Tucson office and deposit in it \$1,000,000 to be invested in California high-grade tax-free municipal bonds selected by Respondents and authorized by Claimants with laddered maturities. In January 1992, and again in February 1992, Respondents recommended, and Claimants authorized, one swap (i.e., a sale of a municipal bond position and the use of the proceeds to buy replacement municipal bonds). Except for these two swaps in 1992, there were no purchases or sales of securities in the account prior to March 8, 1993.

In a number of telephone conversations just prior to March 8, 1993, Respondent Beren recommended repeatedly to Claimants that they sell a substantial portion of their \$1,090,000 portfolio and use the proceeds, together with funds borrowed on margin, to purchase similar high-quality bonds with different maturities and interest rates. On March 8, 1993, Respondents executed the recommended transactions in Claimants' account by selling \$790,000 face amount of the \$1,090,000 portfolio and using the proceeds, together with \$31,000 of funds borrowed on margin, to purchase \$900,000 face amount of similar high-quality bonds with different maturities and interest rates (the "March 8 swap transaction") and charged Claimants fees, commissions and mark-ups of \$22,383.20 for their services. Claimants realized capital gains of \$86,096 in connection with the sales and incurred federal and state tax liability of \$29,231. The bonds which were purchased 1) had a face value of \$110,000 greater than the face value of the bonds sold, 2) had a somewhat longer average maturity than the bonds which were sold, 3) being longer-term, were somewhat more volatile in responding to changes in interest rates, 4) generated somewhat less tax-free interest income, and 5) reflected an immediate loss of market value approximately equal to the commissions and fees charged. In May 1993, after several conversations with Beren and the Branch Manager of PaineWebber's Tucson office complaining of the March 8 swap transactions, Claimants closed the account and transferred the assets in it at the time to an account at IDS Financial Services, Inc.

Claimants alleged that they did not specifically authorize the March 8 swap transactions and that such transactions were in fact contrary to an instruction (make no trades in the bond portfolio unless doing so increases both the capital value and the income) which Mr. Schwichtenberg repeatedly gave to Mr. Beren during a period of over two years prior to March 8, 1993. They further alleged that Mrs. Schwichtenberg was opposed to increasing the margin borrowing in the account. Claimants alleged that Respondents took control of their account on March 8, 1993, and that the March 8 swap transactions were excessive and constituted churning. Claimants alleged that the March 8 swap transactions were done mainly for the purpose of generating commissions, fees and other returns to Respondents rather than to advance Claimants' interests, and that this conduct constituted willful, fraudulent, or reckless disregard for the interests of Claimants. Claimants further alleged that Respondent PaineWebber failed to properly supervise Respondent Beren and ratified the March 8 swap transactions.

Respondents denied every allegation of wrongdoing and alleged that, in a telephone call

immediately prior to the March 8 swap transactions. Mr. Schwichtenberg specifically authorized Mr. Beren to execute the March 8 swap transactions. They further alleged that Respondent's purpose in recommending the March 8 swap transactions was to lock in capital appreciation which had occurred due to a drop in interest rates and to avoid the possibility that bonds in the portfolio might be called at prices below the then-current market prices. They alleged that swapping for this purpose was a recognized strategy in the proper management of municipal bond portfolios. They alleged that the number of transactions was not excessive and that the commissions and fees charged were reasonable. Respondents asserted seven affirmative defenses: 1) that Respondents' conduct was not the proximate cause of Claimants' losses, 2) that Claimants assumed the risks involved, 3) that Claimants are estopped from asserting their claims, 4) that Claimants' negligence caused or contributed to their losses, 5) that Claimants failed to mitigate their damages, 6) that Claimants failed to state facts upon which the relief sought may be granted, and 7) that the damages sought, including punitive damages, are improper and/or legally impermissible.

RELIEF REQUESTED

At the conclusion of the Hearing, Claimants submitted Exhibit "C-9" in which they request damages calculated as follows:

\$ 25,130	Lost capital value on March 8, 1993
29,231	Capital gains tax liability
75,356	Lost income
22,383	Commissions, fees and spreads
2,343	Accountant fees
4,800	Expert witness fee
<u>1,250</u>	Deposit with NASD
<u>\$160,493</u>	Total

In the Statement of Claim. Claimants also requested punitive damages in the amount of \$100,000.

Respondent requested dismissal of all claims against Respondents with prejudice.

OTHER ISSUES CONSIDERED AND 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 original remains 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. Respondents, Painewebber, Inc. and Moe Beren, are jointly and severally liable and shall pay to Claimants, Norman H. and Mary R. Schwichtenberg, the sum of Fifteen Thousand Dollars and No Cents (\$15,000.00).
2. Claimants' claim for pre-judgement interest is denied.
3. Claimants' claims for punitive damages, accountants' fees and expert witness fees are denied.
4. The parties shall each bear their respective costs and fees including attorneys' fees.
5. The NASD shall retain all fees and deposits.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure,

Respondents are jointly assessed forum fees of \$3,000.00, representing assessments for four hearing sessions at \$1,000.00, (\$4,000.00), less credit for the previously deposited \$1,000.00.

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

ARBITRATORS

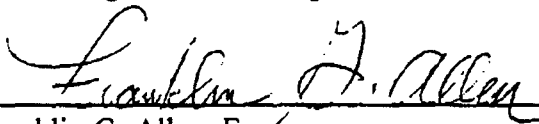
Name

Franklin G. Allen, Esq.
Gunnar Thowsen
Marjorie B. Newsom, Esq.

Public / Industry

Public Arbitrator
Industry Arbitrator
Public Arbitrator

Concurring Arbitrators' Signatures



Franklin G. Allen, Esq.

Gunnar Thowsen

Marjorie B. Newsom, Esq.

Served 7/29/94

Date of Decision: _____

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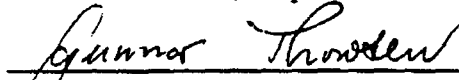
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