

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Mariynn K. Clayton, ttee.

93-04604

Name of Respondents

PaineWebber, Inc.  
William Blanton

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**REPRESENTATION**

For Claimant: Gregory Bartko, Esq. of Graham & James, Raleigh, North Carolina.

For Respondents: A. Todd Brown, Esq. of Hunton & Williams, Raleigh, North Carolina.

**CASE INFORMATION**

Statement of Claim filed: November 3, 1993.

Claimant's Submission Agreement signed on: November 1, 1993.

Joint Statement of Answer filed by Respondents on: March 7, 1994.

Respondent PaineWebber, Inc.'s Submission Agreement signed on: March 3, 1994.

Respondent William Blanton's Submission Agreement signed on: March 2, 1994.

**HEARING INFORMATION**

Hearing Dates / Sessions: January 4, 1995 / Two Sessions.  
January 5, 1995 / Two Sessions.  
February 6, 1995 / Two Sessions.

Hearing Location: Radisson Plaza  
421 South Salisbury Street  
Raleigh, NC 27601

### CASE SUMMARY

Claimant alleged that in the Spring of 1992 Respondent William Blanton ("Blanton") approached Max V. Krebs ("Krebs"), Claimant's father, with the idea of forming a Charitable Remainder Unitrust ("Trust") to be funded with 8,000 shares of Philip Morris stock owned by Krebs. Claimant further alleged that Respondent Blanton recommended that Krebs transfer the Philip Morris to the Trust so that the Philip Morris stock could be sold without recognition of taxable gains and reinvested in a diversified portfolio of investments. Claimant alleged that on November 19, 1992 she was named Trustee of the Trust established by, Krebs, the grantor of the Trust. Claimant further alleged that Blanton informed Krebs that the Trust trading account at Respondent PaineWebber, Inc. ("PaineWebber") had to be a discretionary account in order to meet the requirement that the grantor of a Charitable Remainder Unitrust retain no control over the assets of the Trust. Claimant alleged that based on this requirement Krebs opened a discretionary account for the Trust. Claimant next alleged that on or about November 24, 1992 Claimant Clayton executed Schedule A to the Trust in which she acknowledged receipt of the 8,000 shares of Philip Morris stock held in the PaineWebber account and that at that time the stock was trading at \$75 per share. Claimant further alleged that in a letter to the Trustee dated January 8, 1993 Blanton acknowledged that one of the fundamental goals in establishing the trust was to diversify the trusts assets. Claimant alleged that on January 18, 1993 Blanton wrote to Krebs to acknowledge that on January 12, 1993 PaineWebber initiated the transfer of 8,000 shares of Philip Morris stock from Krebs' personal account to the Trust account. Claimant further alleged that Blanton and PaineWebber took not action with regard to the Trust's portfolio despite knowledge that Krebs' primary purpose in establishing the Trust was to sell a portion of his Philip Morris stock. Claimant then alleged that in the first week of April 1993 Philip Morris stock lost nearly 25% of its value and that the Trust continued to hold the stock until September 9, 1993 where upon the shares were sold at the market price of \$47.75 per share, a loss of approximately \$27.25 per share from the time the stock was turned over to Blanton and PaineWebber. Claimant alleged that Respondents Blanton and PaineWebber as part of its contractual undertaking owed the rust a duty to use reasonable care in carrying out their duties as account manager and adviser and to promptly execute trades which were in the best interest of the Trust. Claimants alleged that Respondents breached their duties of care by their failure to sell the Philip Morris stock, by failing to diversify the Trusts holdings and by failing to reduce market risks to the Trust by placing stop loss orders on the stock. Claimant further alleged that Respondents breached their fiduciary duty owed to Claimant. Claimant further alleged that Respondents violated the North Carolina Investment Advisers Act.

Respondents maintained that on January 12, 1993 Krebs transferred 8,000 shares of Philip Morris stock to the Trust account and that the Claimant, as Trustee of the Trust, understood that the diversification process would be done gradually. Respondents also maintained that Blanton was provided with a copy of the Trust agreement by letter dated January 13, 1993. Respondents further maintained that as of January 13, 1993 Respondents did not have discretionary authority

over the trust account and that they had no legal right to exercise discretion over the account until April 1, 1993 when discretionary authority was approved. Respondents maintained that by letter dated January 15, 1993 Blanton sent to Clayton documents that when signed would evidence authorization to allow discretionary trading in an account subject to PaineWebber's approval. Respondent maintained that the signed documents were returned on or about February 26, 1993 and, signed by Branch Manager Joseph F. Cretello on March 10, and then forwarded to PaineWebber's Managed Accounts Dept. for approval. Respondents further maintained that PaineWebber's Managed Accounts Dept. confirmed that discretionary authority had been approved on April 1, 1993. Respondent maintained that the confirmation notice provided that discretion could be exercised for the period between April 1, 1993 and June 30, 1993. Respondent maintained that the share price of Philip Morris stock was \$64 when discretionary authority was approved. Respondents then maintained that as of the close of trading on April 1, 1993 the price of Philip Morris stock was 64-1/8 and that it opened on April 2, 1993 at a price at or below \$52. Respondents also maintained that the drop in price was unforeseeable and that any delays in completing the paperwork necessary to initiate discretionary authority in the account must be attributed to Claimant.

Respondents maintained the following affirmative defenses: (1) Claimant's claims were barred in whole or in part by the applicable statutes of limitations. (2) Claimant failed to state a claim upon which relief could be granted. (3) Respondents acted in good faith and did not knowingly or intentionally violate any of the laws alleged. (4) Claimant failed to mitigate her damages. (5) Claimant approved, authorized, participated in and ratified the acts and transactions complained of and upon which recovery is sought and claimant is, accordingly, precluded from recovery herein. (6) Claimant's claims are barred by the doctrine of laches. (7) The losses alleged by claimant were proximately caused by her own conduct or negligence and, therefore, claimant is precluded from recovery herein. (8) Claimant received written confirmations and statements advising her to communicate in writing with PaineWebber if she objected to any activity in his account. Claimant did not object at any time. Accordingly, claimant failed to seasonably complain of or disaffirm the transactions complained of and claimant is, accordingly, barred from asserting or recovering for any of the alleged wrongful acts or omissions. (9) Any alleged damages suffered by Claimant, if any, were caused or contributed to by persons, conditions or events beyond the control of respondents, who are not liable therefore. (10) Claimant's claims are barred by the doctrines of waiver and estoppel. (11) The client agreement signed by claimant expressly provides that the agreement is made and will be interpreted under the laws of the State of New York and therefore the North Carolina Statute is not applicable to this dispute. (12) Claimant is not entitled to attorneys' fees as a matter of law and respondents deny the authority of the arbitration panel to award attorneys' fees. (13) Claimant is not entitled to punitive damages as a matter of law and the client agreement signed by Claimant provided that the proceeding is governed by New York Law under which the arbitration panel is without authority to award punitive damages.

**RELIEF REQUESTED**

**Claimant requested:**

1. That Claimant be awarded damages in the amount of at least \$218,000, plus interest at the rate of 8% from January 12, 1993.
2. That Claimant be awarded damages based on lost income, determined as the difference between the income the Trust would have earned had the Trust assets been invested properly and the lower dividend income received on the Philip Morris stock.
3. That Claimant be awarded recovery of her attorneys' fees incurred in prosecuting this claim.
4. That the costs of this action, including all out-of-pocket costs incurred by Claimant, be taxed to Respondents.
5. That Claimant be awarded such other and further relief as the arbitrators deem just and proper.

**Respondents requested:**

1. All claims asserted against Respondents in the statement of claim filed in this proceeding be denied.

**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 are liable jointly and severally and shall pay to Claimant the sum of \$75,000, which is inclusive of interest.
2. Each party shall bear its respective costs and attorneys' fees.
3. Respondents are liable jointly and severally and shall reimburse to claimant the sum of \$950 which represents the filing fee of \$200 and hearing session deposit of \$750 paid by Claimant.
3. All other claims are denied.

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**FORUM FEES**

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

6 sessions X \$750 = \$4,500.

Forum fees Assessed Against:

Respondents are assessed the sum of \$4,500 which represents the total forum fees due, less the hearing session deposit paid by Claimant of \$750, leaving a balance due of \$3,750. Respondents are liable jointly and severally and shall pay to the NASD the sum of \$3,750.

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

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Concurring Arbitrators' Signatures

Name

Public Chairman

\_\_\_\_\_  
John A. Meadows

Name

Public Panelist

*John R. Angermayer 2/17/95*  
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John R. Angermayer  
*Swear and Subscribed*  
*before me this 17<sup>th</sup> day of*  
*February 1995. Mary P. Russ*  
*Natasha Public*

Name

*my commission expires 5-17-97*

\_\_\_\_\_  
Industry Panelist

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Daniel W. Desmond

Date of Decision: MARCH 3, 1995

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Name

Public Panelist

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John R. Angermayer

\_\_\_\_\_

Name

Industry Panelist

  
Daniel W. Desmond

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My Commission Expires 10-27-98

Date of Decision: MARCH 3, 1995

NORTH CAROLINA     )  
                              )  
ROWAN COUNTY         )

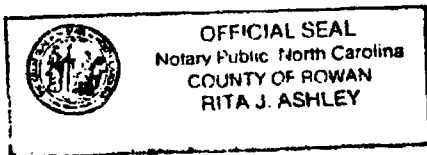
I, RITA J. ASHLEY, a Notary Public of said County and State,  
do hereby certify that JOHN A. MEADOWS appeared before me this day  
and acknowledged the execution of the foregoing document.

WITNESS MY HAND and official seal this the 20<sup>th</sup> day of  
February, 1995.

Rita J. Ashley  
Notary Public

My Commission Expires:

10-20-96





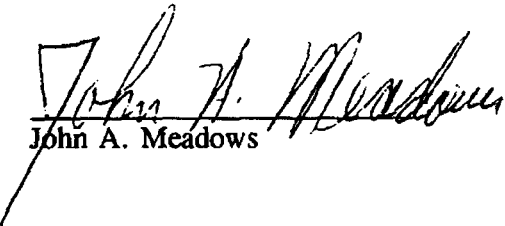
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Date of Decision: March 3, 1995