

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Anthony J. Pellarin

94-02092

Name of Respondents

PaineWebber, Inc.  
Anthony Fitzgerald

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**REPRESENTATION**

For Claimant Anthony J. Pellarin ("Pellarin") appeared John Lawlor, Esq., Garden City, New York.

For Respondents PaineWebber Incorporated ("PaineWebber") and Anthony Fitzgerald ("Fitzgerald") appeared George W. Clarke, Esq., of the Law office of Joseph D'Elia, Huntington, New York.

**CASE INFORMATION**

The Statement of Claim was filed on May 27, 1994. Claimant's Submission Agreement was signed on March 30, 1994.

A Joint Statement of Answer was filed by Respondents PaineWebber and Fitzgerald on August 29, 1994.

**HEARING INFORMATION**

Hearing Dates/Sessions:	September 20, 1995	-	2 Sessions
	December 4, 1995	-	1 Session

The hearings were held at the offices of the National Association of Securities Dealers, Inc., located in New York City, New York.

**CASE SUMMARY**

Claimant alleged that in or about February, 1989, claimant opened an IRA account with PaineWebber. In 1990 and thereafter, claimant was allegedly interested in liquid securities whose principal value was secure and which would generate income. It was also alleged that claimant informed respondents of his conservative investment requirements and was assured that a conservative investment strategy would be implemented.

Claimant alleged that on or about February 26, 1990, claimant was induced to purchase 10,000 shares of Careercom Corp. ("Careercom") at 4 3/8 per share for a total purchase price of \$44,609.05. It was

asserted by the claimant that respondents failed to advise claimant that the principal value of Careercom was not safe and secure but rather was subject to price fluctuation, an illiquid market, a substantial risk of depletion of principal value, and a considerable risk of loss of claimants entire investment therein. It was claimants contention that the purchase was unsuitable as inconsistent with claimants investment objectives and express authorization in that claimant was desirous of conservative, liquid investments. Claimant alleged that he relied entirely upon respondents and the representations of respondents with respect to the investments at issue in light of his lack of sophistication with regard to investment matters.

Respondents denied all allegations of wrongdoing asserted by the claimant. Respondents maintained that claimant opened the IRA account at issue in June, 1988 listing his net worth on the new account form at \$800,000.00 and an annual income of \$200,000.00. It was maintained that claimant listed his account objectives as investment grade, income and capital gains. Further, in July, 1989, claimant allegedly opened a second IRA account listing a net worth of \$1 million and an annual income of \$100,000.00 on the new account form. Claimant listed his primary account objective as capital gains, followed by investment grade and income.

Respondents maintained that the first account was funded initially with conservative investments. Respondent Fitzgerald, knowing that claimant opened a second account with less conservative objectives allegedly suggested the purchase of Careercom which claimant decided to purchase after having been fully and accurately informed as to all aspects of this investment. Thereafter, contrary to expectation, the share price declined steadily from the purchase price of \$4.375 per share to the eventual February 14, 1991 price of \$1.75 per share at which time claimant ordered the sale of his 10,000 shares, resulting in a credit to his account of \$17,500. Respondents also maintained that the losses incurred were attributable to market forces over which respondents have no control and thus they are not liable for claimant's losses.

As their affirmative defenses, respondents argued that claimant failed to state a cause of action against the respondents; that respondents acted in compliance with all applicable rules and regulations; that the damages suffered have no casual relationship with any act committed by respondents; that claimant is estopped by his actions from maintaining this action against respondent; that the Statement of Claim is barred by the doctrines of ratification and affirmance, laches and/or applicable statutes of limitations; and that respondent PaineWebber properly, diligently, and adequately supervised respondent Fitzgerald with respect to claimant's accounts.

#### **RELIEF REQUESTED**

Claimant requested an award against respondents in the sum of \$44, 609.05 or such other amount representing losses sustained in the account with interest thereon, plus consequential damages to be determined at the arbitration, and for interest from February 26, 1990 and for such other and further relief as this panel deems just and proper under the circumstances.

Respondents requested that the Statement of Claim be denied in its entirety.

#### **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.

Respondents PaineWebber, Inc. and Anthony Fitzgerald executed a Submission Agreement on August 25, 1994. However, said Submission Agreement was altered and therefore, not deemed to be a properly

executed Submission Agreement. The arbitration panel made the following rulings with respect thereto:

1. Pursuant to Section 1 of the NASD Code of Arbitration Procedure ("Code") the panel found subject matter jurisdiction over this entire controversy and specifically as it related to PaineWebber and Fitzgerald.
2. The panel found that Fitzgerald was a person associated with an NASD member namely, PaineWebber, at the time this controversy arose. Consequently, the panel found personal jurisdiction over PaineWebber and Fitzgerald pursuant to Section 12 (a) of the Code. Additionally, Fitzgerald executed a Form U-4 requiring him to arbitrate at this forum upon demand of the customer claimant.

### **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. All claims asserted herein against PaineWebber and Fitzgerald be and hereby are dismissed in their entirety.
2. Each party shall bear their own costs, including attorneys' fees.
3. All other claims be and hereby are denied.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$120.00 non-refundable filing fee previously submitted by claimant and have assessed the following forum fees:

3 hearing sessions x \$400.00 = \$1,200.00

1. Claimant be and hereby is liable for the sum of \$600.00, representing one half of the total amount of forum fees assessed. Claimant previously deposited \$530.00 with the NASD, which shall be applied toward the forum fees assessed and, therefore, claimant is liable and shall pay the sum of \$70.00 to the NASD.
2. Respondents PaineWebber and Fitzgerald be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$600.00, representing one-half of the total amount forum fees assessed.

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

Concurring Arbitrators' Signatures  
Name

W. Charles Robinson, Esq.  
Public Chairperson

Kevin C. Ahearn  
Industry Arbitrator

William G. Binckes  
William G. Binckes, Esq.  
Public Arbitrator

I, William G. Binckes, do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules,  
that this is my decision in the above-captioned matter.

William G. Binckes  
William G. Binckes

Date of Decision: