

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant(s)

PaineWebber, Inc.

95-00180

Name of Respondent(s)

Ben E. Boren

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**REPRESENTATION**

For Claimant PaineWebber, Inc.: Scott Ratchick, Esq. and David L. Pardue, Esq., of the law firm of Hunton and Williams, Atlanta, GA.

For Respondents Ben E. Boren and Blake Boren: Gerald S. Kline, Esq., Atlanta, GA.

**CASE INFORMATION**

Statements of Claim filed on January 12, 1995 on NASD Arbitration Number 95-00180 and NASD Arbitration Number 95-00181.

Claimant's Submission Agreement signed on: January 6, 1995 in NASD Arbitration Number 95-00180 and January 9, 1995 in NASD Arbitration Number 95-00181.

Reply to Counterclaim dated April 7, 1995.

Statement of Answer and Counterclaim filed by Respondent Blake Boren on: February 27, 1995.

Respondent Blake Boren's Submission Agreement signed on: February 7, 1995.

Statement of Answer and Counterclaim filed by Respondent Ben E. Boren on: March 30, 1995.

Respondent Ben E. Boren's Submission Agreement signed on: February 7, 1995.

**HEARING INFORMATION**

Hearing Dates/Sessions:      March 25, 1996 - Two Sessions  
   March 26, 1996 - Two Sessions  
   March 28, 1996 - One Session

Hearing Location: NASD offices located in Atlanta, GA.

### CASE SUMMARY

Claimant alleged that on or about December 17, 1992 PaineWebber, Inc. advanced to each Respondent the sum of \$110,592.00 and each Respondent signed a Promissory Note, also known as an Employee Forgivable Loan ("EFL") to PaineWebber, Inc. in that amount. Claimant further alleged that the terms of the Notes provided that the Respondents' indebtedness would be forgiven in four equal installments of \$27,648.00 each provided that certain conditions were met and if they paid the taxes, but that if Respondents' employment with PaineWebber, Inc. was terminated either voluntarily or involuntarily by the Respondents for any reason or involuntarily for cause, prior to the due date of the Note then PaineWebber, Inc. may, declare the Note immediately due and payable. Claimant next alleged on July 20, 1994 the Respondents' voluntary termination from PaineWebber, Inc. for job abandonment became effective and three-quarters of the Note was not forgiven.

Respondents maintained PaineWebber, Inc.'s claims result solely from its termination of the Respondents' employment which was caused by PaineWebber, Inc.; therefore, PaineWebber, Inc. should not be entitled to profit from its own wrongdoing. Respondents next maintained that PaineWebber, Inc. terminated the Respondents for low production and the Note is forgivable if PaineWebber, Inc. terminates the Respondents for reasons other than "for cause"; therefore, the remaining debt has been forgiven.

Respondents asserted a counterclaim maintaining the Respondents agreed to relocate to PaineWebber, Inc. with the express promise and understanding that their commodities practice would be supported and facilitated by PaineWebber, Inc. and based on those assurances the Respondents transferred to PaineWebber, Inc. giving up sizable invested pension benefits at A.G. Edwards. Respondents next maintained despite PaineWebber, Inc.'s promises and its implied duty to exercise good faith to support and promote the Borens' efforts, PaineWebber, Inc. thwarted the Respondents' business production and did not support the Borens' business production and development, resulting in a breach of its implied duty and express promises in that regard. Respondents next maintained on July 19, 1994 the branch manager informed the Borens that given their production levels, he had made a management decision that they would not sustain any improvement and that it was his intent to terminate them. Respondents next maintained on August 9, 1994 despite being advised otherwise by Respondents, PaineWebber, Inc. filed Form U-5s on the Respondents indicating termination dates of August 4, 1994 with the termination reason being job abandonment. Respondents next maintained PaineWebber, Inc. did nothing to inform Respondents that customer complaints came into PaineWebber, Inc. against the Respondents or obtain their position with regard to those complaints. Respondents next maintained PaineWebber, Inc.'s entries on the Respondents' U-5 were false and maliciously published so as to libel the Respondents in their occupation trade and reputation and to adversely impact their status within the industry and to impair their ability to gainfully employ themselves. Respondents next maintained the Claimants have acted maliciously with conscious indifference towards the Respondents thereby entitling them to an award of punitive damages pursuant to O.C.G.A. §51-12-5.1.

In response to the counterclaim, the Claimant maintained the drop off in commodities trading was due to business conditions and not due to any action on the part of PaineWebber, Inc. and the branch manager took steps to help the Respondents to increase clientele by spending almost \$1,000.00 in a mailing to customers and as of July, 1994 their production had failed to increase. Claimant next maintained that they did not terminate the Respondents and at a meeting on July 18 they told the branch manager they were resigning and the branch manager reiterated that he was not firing the Respondents and they should reconsider the consequences of their resignation very carefully as a voluntary resignation would trigger the amount due under their loan agreements with PaineWebber, Inc. and the Respondents then left the

office and when they did not return on the following Monday, the branch manager sent them a letter informing them they had abandoned their jobs and that they were considered terminated and the U-5 that was filed for the Respondents accurately reflected that they had been terminated for job abandonment. The Claimant next maintained the Respondents have not alleged and will be unable to prove that PaineWebber, Inc. acted with the requisite malice necessary to state a defamation claim.

### **RELIEF REQUESTED**

Claimant requested damages against each of the Respondents in the sum of \$97,945.82 representing principal and interest, together with reasonable attorney's fees in the sum of \$24,982.22, costs and NASD filing costs as expressly allowed for in the Note. Claimant further requested a dismissal of the counterclaims.

The Respondents requested the following relief:

- (a) that they recover compensatory and per se damages;
- (b) that the panel order PaineWebber, Inc. to cease and desist from continuing to make any defamatory written or oral statement regarding the Respondents' termination, reputation, brokerage activities or brokerage practices;
- (c) that the panel order PaineWebber, Inc. to immediately file an amended corrected Form U-5 stating that the Respondents were terminated because of a work force reduction or words of similar import;
- (d) that they recover an award declaring and determining the Note to have been cancelled and satisfied in full effective as of the Respondents' date of termination;
- (e) that the Panel award them attorneys' fees and other costs and expenses associated with this arbitration with all forum fees to be assessed against PaineWebber, Inc.;
- (f) that they recover an award of exemplary damages against PaineWebber, Inc. in sufficient sum to deter it from engaging in similar future conduct;
- (g) that all claims against the Respondents be dismissed with all filing costs and hearing session fees being taxed upon the 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. The Respondent Ben E. Boren be and hereby is liable and shall pay to the Claimant PaineWebber, Inc. the sum of \$97,945.82 inclusive of pre-judgment interest.
- 2. The Respondent Blake Boren be and hereby is liable and shall pay to the Claimant PaineWebber, Inc. the sum of \$97,945.82 inclusive of pre-judgment interest.
- 3. The counterclaims of Respondents Ben E. Boren and Blake Boren are dismissed in their entirety.
- 4. The U-5s of Respondents Ben E. Boren and Blake Boren should be amended to reflect that the Respondents left PaineWebber, Inc. voluntarily.
- 5. Each party shall bear their own costs and the panel acknowledges that parties have withdrawn their claims for attorney's fees.

**FORUM FEES**

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

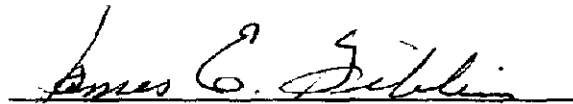
5 sessions x \$750.00 = \$3,750.00

The Claimant is liable and shall pay to the NASD the sum of \$1,875.00 less the hearing session deposits (\$1,200.00) = net \$675.00 due.

The Respondents are liable jointly and severally and shall pay to the NASD the sum of \$1,875.00 less their hearing session deposit (\$350.00) = net \$1,525.00 due.

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

**ARBITRATORS' SIGNATURE**



James E. Giblin, Esq.  
Public Arbitrator

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Roger A. Kirschenbaum, Esq.  
Public Arbitrator

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Alex Moore  
Industry Arbitrator

NASD Date of Decision: June 10, 1996

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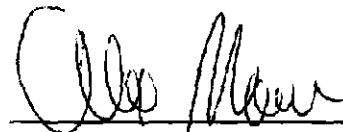
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