

AWARD

NASD Regulation, Inc. Office of Dispute Resolution
In the Matter of the Arbitration Between

Birger C. Nyborg;
Birger Nyborg & Co., Ltd.;
AccountAbility Computer Corp.;
Integrated Resource Development, Inc.
Claimants,

and

No. 95-02276

PaineWebber Incorporated;
Donald Crutchfield,
Respondents,

REPRESENTATION OF PARTIES

For Claimants: Birger C. Nyborg ("Nyborg"), Birger Nyborg & Co., Ltd. ("Nyborg & Co."), AccountAbility Computer Corp. ("AccountAbility"), and Integrated Resource Development, Inc. ("Integrated") were initially represented by James J. Moylan, Esq. of Arnstein & Lehr, located in Chicago, Illinois. At the later hearings, Claimants were represented by Robert L. Byman, Esq. of Jenner & Block, located in Chicago, Illinois.

For Respondents: PaineWebber Incorporated ("PaineWebber") and Donald Crutchfield ("Crutchfield") were represented by L. Andrew Brehm, Esq. and Michael B. Roche, Esq. of Schuyler Roche & Zwirner, located in Chicago, Illinois.

CASE INFORMATION

Claimants' Statement of Claim was filed on: May 10, 1995.

Claimants' First Amended Statement of Claim was filed on: July 18, 1995.

Claimants' Statement of Answer to Counterclaim was filed on: August 30, 1995.

Claimant Nyborg's Submission Agreement was signed on: May 9, 1995.

Claimant Nyborg & Co.'s Submission Agreement was signed by Birger C. Nyborg, Officer of Nyborg & Co., on: May 9, 1995.

Claimant AccountAbility's Submission Agreement was signed by Birger C. Nyborg, Officer of AccountAbility, on: May 9, 1995.

Claimant Integrated's Submission Agreement was signed by Birger C. Nyborg, Officer of Integrated, on: May 9, 1995.

Respondents PaineWebber and Crutchfield's Statement of Answer to the First Amended Statement of Claim, and Counterclaim was filed on: August 30, 1995.

Respondent PaineWebber's Submission Agreement was signed by Ronald Ostpowski, Associate Branch Manager of PaineWebber, on: July 10, 1995.

Respondent Crutchfield's Submission Agreement was signed on: July 10, 1995.

HEARING INFORMATION

Pre-hearing conferences: February 28, 1996 for One (1) session before One (1) arbitrator; and August 9, 1996 for One (1) session before a full panel.

Hearing Date/Sessions: May 6, 1996 for Two (2) sessions;
May 7, 1996 for Two (2) sessions;
May 8, 1996 for Two (2) sessions;
May 9, 1996 for Two (2) sessions;
May 10, 1996 for Two (2) sessions;
January 13, 1997 for Two (2) sessions;
January 14, 1997 for Two (2) sessions;
January 15, 1997 for Two (2) sessions; and
January 16, 1997 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants Nyborg, Nyborg & Co., AccountAbility, and Integrated alleged that Crutchfield, their registered representative at PaineWebber, made misrepresentations of material facts regarding the purchase of Fannie Mae Guaranteed REMIC Pass-Through Certificates ("FNR 1993-26 SA"). Claimants asserted that Crutchfield's misstatements and misrepresentations included:

- (1) The principal base used to calculate the cash flow was guaranteed not to change for 12 months;
- (2) During that period, the coupon rate would most likely be subject only to very slight fluctuations, which would not be material;
- (3) Thereafter, interest rate fluctuations would be offset by compensating changes in prepayment speeds;
- (4) The investment was particularly attractive because it was low leveraged, explaining that it was only 1 X LIBOR;

- (5) The underlying security was top quality;
- (6) Although Nyborg would be required to take half the tranche (\$500,000) it was marginable at 90%;
- (7) The returns were going up and the timing was good for this investment; and
- (8) The FNR 1993-26 SA was offered and apparently priced on a projected 32% annual rate of return.

Claimants stated that they purchased FNR 1993-26 SA on April 30, 1993, with a face value of \$8,364,000, at a price of 13.125 plus interest, for a total investment of \$1,105,148.18. Claimants further stated that an earlier investment in FHR 1483 SB was transferred into one of their PaineWebber accounts under the terms of the 90% margin loan. Subsequently, according to Claimants, they have suffered damages resulting from margin payments, the forced liquidation of FHR 1483 SB, and lost interest and lost opportunity costs. Claimants made the following legal claims: (1) violation of § 11 of the Securities Act of 1933; (2) violation of § 12(2) of the Securities Act of 1933; (3) violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; (4) violation of § 12 of the Illinois Securities Law of 1953, as amended; (5) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act; (6) breach of contract; (7) negligence; (8) common law fraud; (9) control person liability on the part of PaineWebber pursuant to § 20 of the Exchange Act; and (10) respondeat superior liability on the part of PaineWebber.

Respondents PaineWebber and Crutchfield denied the allegations set forth in the Statement of Claim, asserting that Nyborg was provided with a prospectus and prospectus supplement for FNR 1993-26 SA and that Nyborg was fully informed of the risks, benefits, and features of FNR 1993-26 SA. Respondents alleged that Nyborg deliberately allowed the liquidation of FNR 1993-26 SA by not honoring a margin call, and that he initiated this arbitration in order to recover the loss that resulted. Respondents made the following affirmative defenses: (1) Claimants' claim is barred by the applicable statute of limitations; (2) Claimants' claim fails to allege the facts necessary to support their causes of action; (3) PaineWebber has set-offs against the claims made against it that exceed the amount of Claimants' claim; (4) rescission of the purchase of FNR 1993-26 SA is not an available remedy and would be unfair and inequitable since Claimants' no longer own the instrument; (5) Claimants are barred from any equitable remedy by their unclean hands; (6) Claimants are barred and estopped from any claim against Respondents that is based, in whole or in part, upon the purchase of FNR 1993-26 SA due to the representations of Nyborg as to the financial resources at his disposal that could be used to make margin payments; (7) Claimants are barred from recovery under the doctrines of ratification, estoppel, and waiver; (9) Claimants are barred from any claim against Respondents that is based, in whole or in part, upon the purchase of FNR 1993-26 SA by the bespeaks doctrine; (10) Claimants have failed to comply with the statutory prerequisites to a claim

under the Illinois Securities Law of 1953; (11) the Illinois Consumer Fraud and Deceptive Business Practices Act does not apply to transactions involving claims against securities broker-dealers; (12) Claimants cannot maintain an action for purported breach of an implied contract due to their execution of an express written contract governing the same subject matter; (13) Claimants fail to allege that they fully performed their duties and obligations in their breach of contract claim; (14) Claimants' breach of contract claim is barred by their failure to perform their contractual obligations; (15) PaineWebber was at all times able, ready and willing to perform its obligations under the contracts with Claimants; (16) Crutchfield cannot be held personally liable for an alleged breach of contract by his principal; (17) economic losses are not recoverable on the basis of negligence; (18) Claimants are barred from recovery due to their comparative negligence; (19) Claimants have failed to state a cause of action for negligence; and (20) Claimants' allegations are not sufficiently definitive or specific to give rise to an actionable claim of fraud.

In its counterclaim, PaineWebber alleged that Claimants are liable for the deficit balances remaining on their accounts. PaineWebber asserted that after Claimants failed to meet a margin call and all of the positions existing in their accounts were liquidated, there was a principal deficit balance in their accounts in the amount of \$213,239.40, plus accrued interest thereon, which Claimants have failed and refused to pay.

RELIEF REQUESTED

Claimants Nyborg, Nyborg & Co., AccountAbility, and Integrated requested an award permitting them to rescind their purchase of FNR 1993-26 SA, to recover their margin interest wrongfully charged to the accounts, the \$32,000 loss incurred on the liquidation of FHR 1483 SB, consequential damages, loss interest and opportunity costs, filing fees, and hearing costs.

Respondents PaineWebber and Crutchfield requested that the claims asserted against them in the Statement of Claim be denied in their entirety and that they be awarded their costs and attorney fees. In addition, PaineWebber requested an award in the amount of \$213,239.40 plus interest thereon through the date of the award, and attorney fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

On July 10, 1996, during the break between sessions, Claimants moved for leave to amend their First Amended Statement of Claim. After careful consideration of this motion and Respondents' response, the panel of arbitrators denied the motion.

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 NASD Regulation, Inc. Office of Dispute Resolution.

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. Respondent PaineWebber Incorporated is liable for and shall pay to Claimants Birger C. Nyborg, Birger Nyborg & Co., Ltd., AccountAbility Computer Corp., and Integrated Resources Development, Inc. compensatory damages in the amount of \$154,000.00.
2. Any and all claims in the Statement of Claim asserted against Respondent Donald Crutchfield are dismissed with prejudice and denied in their entirety;
3. PaineWebber's counterclaim is dismissed with prejudice and denied in its entirety
4. The parties shall bear their own costs of arbitration, including attorney fees, except for those specifically enumerated herein; and
5. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to §10332(b) of the NASD Code of Arbitration Procedure ("Code"), the following Forum fees are assessed: One (1) pre-hearing conference session before One (1) arbitrator x \$300 per session = \$300.00; One (1) pre-hearing session before a full panel x \$600.00 per session = \$600.00; Eighteen (18) hearing sessions x \$600.00 per session = \$10,800.00; Total Forum Fees = \$12,000.00.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$120 and shall **retain** as forum fees the hearing session deposit in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimants. In addition, the Office of Dispute Resolution shall retain the \$730.00 overpayment of the hearing session deposit as forum fees. Claimants Birger C. Nyborg, Birger C. Nyborg & Co., Ltd., AccountAbility Computer Corp., and Integrated Resources Development, Inc. are jointly and severally liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution additional forum fees in the amount of \$4,870.00.

NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$400 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Nyborg.

The NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by PaineWebber. In addition, the Office of Dispute Resolution shall retain the \$950.00 overpayment made by Respondent PaineWebber Incorporated as forum fees. Furthermore, Respondent PaineWebber Incorporated is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution additional forum fees in the amount of \$4,450.00.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent PaineWebber Incorporated.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

/s/ Colleen Grace, Esquire
Colleen Grace, Esquire
Public Arbitrator, Presiding Chair

February 25, 1997

/s/ Raymond J. Glatthorn
Raymond J. Glatthorn
Public Arbitrator

February 26, 1997

/s/ Robert L. Sanders
Robert L. Sanders
Industry Arbitrator

February 24, 1997