

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Barbara J. Cleary and  
Michael S. Pesavento

Claimants,

v.

No. 95-03211

PaineWebber, Inc.,  
James MacDonald and  
James Layden

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimants Barbara J. Cleary ("Cleary") and Michael S. Pesavento ("Pesavento") (collectively referred to as "Claimants") were represented by Barbara J. Cleary. Claimants were previously represented by Nelson S. Chase, Esq. of Farmington Hills, Michigan and Richard E. Segal, Esq. of Segal Goldman located in West Bloomfield, Michigan.

Respondents PaineWebber, Inc. ("PWI"), James MacDonald ("MacDonald") and James Layden ("Layden") (collectively referred to as "Respondents") were represented by Stephanie Morse-Shamosh, Esq. of PaineWebber, Inc. located in Weehawken, New Jersey.

### **CASE INFORMATION**

The Statement of Claim was filed on or about July 10, 1995.

Claimants' Joint Submission Agreement was signed on February 9, 1995.

Respondents' Joint Statement of Answer was filed on or about August 30, 1995.

Respondents' Joint Amended Statement of Answer was filed on or about July 17, 1996.

Respondents' Joint Motion to Dismiss was filed on or about May 21, 1996.

Respondent PWT's Submission Agreement was signed on August 31, 1995 by Stephanie Morse-Shamosh, First Vice President and Managing Attorney of PaineWebber, Inc.

Respondent MacDonald's Submission Agreement was signed on August 8, 1995.

Respondent Layden's Submission Agreement was signed on August 8, 1995.

### **HEARING INFORMATION**

The telephonic pre-hearing conference was held on May 20, 1996 for one (1) session.

The Hearing was held on December 10, 1996 for two (2) sessions and December 11, 1996 for one (1) session.

The Hearing was held in Southfield, Michigan.

### **CASE SUMMARY**

Claimants Barbara J. Cleary and Michael S. Pesavento alleged that they were joint owners of a securities account maintained at Respondent PaineWebber, Inc. Claimants contended that Respondent James MacDonald was a registered representative of PWI and a financial consultant to Claimants. Claimants asserted that Respondent James Layden was the supervisor of Respondent MacDonald.

Claimants maintained that Cleary called Respondent MacDonald concerning the possibility of PWI managing her money to provide safe, conservative investments to insure that Cleary would receive sufficient income to care for her future financial needs. Claimants alleged that Respondents lured an unsuspecting Cleary into the purchase of securities through the use of high pressure tactics and deceptive and fraudulent sales practices, which were not in accordance with Cleary's investment goals. Claimants asserted that Respondent MacDonald made numerous recommendations to Cleary which did not fall within Cleary's investment goal. Claimant contended that one example of the unsuitable investments in which Respondents placed Cleary was a limited partnership called Pegasus Aircraft Partnership II. Claimants maintained that she communicated with Respondent Layden and asked that her account be closed, but that Layden convinced Cleary to open a margin trading account.

Claimant alleged that this claim was based on the following legal theories and principals: breach of contract; common law fraud; conspiracy; promissory estoppel; conversion; negligence;

malpractice; breach of fiduciary duty; breach of federal securities law; breach of Michigan securities law; and violation of Michigan Consumers Protection Act.

Respondents denied all liability to Claimants in the Joint Statement of Answer and Amended Statement of Answer. Respondents alleged that Claimants did not suffer any losses at PWI, but rather, their account was profitable from November 1987 until it closed in November 1994. Respondents contended that Claimants withdrew approximately \$242,000 over the life of the account. Respondents denied that Claimants account was ever unsuitably invested or invested contrary to their stated investment objectives. Respondents also denied that any misrepresentations, high pressure sales tactics or guarantees of any kind were ever made by any of the Respondents, or that Claimants account was ever excessively traded. Respondents maintained that, with respect to the use of margin in Claimants' account, the use of margin was Cleary's idea

#### **RELIEF REQUESTED**

Claimant requested an award of combined total out-of-pocket losses in excess of \$256,000. Claimant also sought an award of exemplary and punitive damages, interest at 12%, attorney fees, court costs and an award of such additional damages as deemed appropriate.

Respondents requested that the Statement of Claim be dismissed in its entirety, an assessment of all costs, including reasonable attorneys fees and expert witness fees and a finding by the arbitration panel that the proceeding is being dismissed as a frivolous claim brought in bad faith so that Respondents MacDonald's Form U-4 may be amended accordingly. At the hearing, Respondents also requested that the panel order the expungement of this arbitration case from the Form U-4 of Respondent Layden.

#### **OTHER ISSUES CONSIDERED & DECIDED**

At the hearing, all parties to this matter agreed to a settlement in which Claimants would dismiss all claims against Respondents with prejudice, and Respondents would withdraw all requests for relief against Claimants.

### **AWARD**

The undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) The Statement of Claim is hereby dismissed in its entirety with prejudice;
- (2) Respondents PaineWebber, Inc., James MacDonald and James Layden's request for an award of all costs and expenses, including reasonable attorney fees, is hereby denied with prejudice;
- (3) The panel orders the expungement of this arbitration case from the Central Registration Depository ("CRD") of the National Association of Securities Dealers, Inc. for the record of Respondents James MacDonald and James Layden; and
- (4) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby dismissed with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any.

There were three (3) hearing sessions x \$750 = \$2,250 in forum fees. There was one (1) pre-hearing session x \$300 = \$300 in forum fees. Total forum fees are \$2,550. Pursuant to 10332(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall retain the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to 10332(c) of the Code, Claimants Barbara J. Cleary and Michael S. Pesavento are liable for, and shall pay forum fees in the amount of \$525.

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Pursuant to 10332(c) of the Code, Respondents PaineWebber, Inc.,  
James MacDonald and James Layden are liable for, and shall pay forum fees in the amount of  
\$1,275.

**Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of  
Dispute Resolution.**

Concurring Arbitrators' Signatures

\s\ H. Rollin Allen, Esq.  
H. Rollin Allen, Esq.  
Chairperson  
Public Arbitrator

January 14, 1997

Dated:

\s\ Isadore Bernstein  
Isadore Bernstein  
Panelist  
Public Arbitrator

January 30, 1997

Dated:

\s\ Timothy D. Wasson  
Timothy D. Wasson  
Panelist  
Industry Arbitrator

January 10, 1997

Dated:

For NASD Regulation use only:

Date award served on the parties: February 10, 1997