

**NASD REGULATION, INC. AWARD**  
**NASD REGULATION, INC.**

---

In the Matter of the Arbitration Between

**Name of Claimants**

Lois Potts POA/Shirley Potts  
Lois Potts  
Lois Potts Executrix/Estate of Edward Potts

95-05990

**Name of Respondents**

Kidder Peabody & Co.  
PaineWebber, Inc.  
George Gregory

---

**REPRESENTATION**

For Claimants ("Claimants") appeared, David Silverberg, Esq., of the law firm Silverberg, Yood, Sellers & McGorry located in Buffalo, New York.

For Respondents PaineWebber, Inc. ("PaineWebber") Kidder Peabody & Co. ("Kidder Peabody") and George Gregory ("Gregory") (collectively the "Respondents") appeared, Brian McDonough, Esq., of the law firm Shanley & Fisher located in New York, New York.

**CASE INFORMATION**

Statement of Claim filed: December 22, 1995.

Claimants' Submission Agreement signed on: December 7, 1995.

Joint Statement of Answer filed by Respondents on: May 8, 1996.

Respondent PaineWebber's Submission Agreement signed on: May 8, 1996.

Respondent Gregory's Submission Agreement signed on: June 3, 1996.

**HEARING INFORMATION**

Hearing dates/sessions:	March 25, 1997	-	One Session
	March 26, 1997	-	Two Sessions
	March 27, 1997	-	One Session

The hearings were conducted in Buffalo, New York.

### CASE SUMMARY

Claimants alleged that she was the Executrix of the estate of Edward Potts and that prior to his death he maintained a brokerage account at Kidder Peabody and Co., which was later merged with PaineWebber, and that at all relevant times George Gregory was Edward Potts' broker at PaineWebber. Claimants further alleged that Shirley Potts, the sister of Edward Potts, opened an account with Respondents in 1982 and in May of 1990 she executed a General Power of Attorney designating Edward S. Potts and Lois M. Potts as her Attorney-in-fact and that Edward Potts began to manage Shirley Potts' account with Gregory in June 1991. Claimants also alleged that, prior to Edward Potts' death, the investment objectives of Shirley Potts was "long term growth." Claimants asserted that, in May of 1990, Gregory was aware that Shirley had become afflicted with Alzheimers and that she would be placed in a nursing home. Claimants maintained that Gregory knew that Lois Potts had no knowledge of the stock market or investing and that she would rely heavily on him for investment advice and that she discussed with him the need for safe and secure investments which would provide both income and security. Claimants further asserted that Gregory: had Edward Potts' account retitled the Estate of Edward Potts, Louis Potts, Executrix; rolled Edward Potts' IRA Account into Lois Potts' pre-existing IRA account; opened a new account for Lois Potts individually which was funded with \$75,806.00 received by Lois Potts as death benefits; and listed Lois Potts instead of Edward Potts on Shirley Potts' account. Claimants also asserted that Gregory began to trade the accounts without the knowledge or consent of Lois Potts causing significant losses while earning significant income for himself and Kidder Peabody.

Claimants contended that in the Shirley Potts Account Gregory traded the account without the consent, knowledge or authorization of Louis Potts. Claimants alleged that, in 1992, there were 59 separate transactions in Shirley Potts' account and that the account had an average net equity of \$91,994.00 and an average net deficit of \$109,079.00 which, considering Shirley Potts age, financial condition and Alzheimers, was excessive and abusive use of margin. Claimants further contended that, on July 6, 1992, there was a margin call resulting in liquidation of the account. Claimants also contended that the activity in Shirley Potts' account continued at a high level in 1993 and that Kidder Peabody was a market maker in a significant number of the transactions and in 1993 the account lost \$1,265.00. Claimants maintained that the investments made in this account were not in conformity with the investment objectives given to the Respondents.

Claimants further maintained that in the Lois Potts' IRA there were 22 separate transactions from May 20, 1992 to December 18, 1992 and eight transactions in 1993 and seven transactions in 1994. Claimants also maintained that, between March 6, 1992 to April 28, 1995, the Lois Potts IRA had a growth of \$1,404.00 and that Respondents benefitted far in excess of the benefit received by Lois Potts.

Claimants alleged that in the estate of Edward Potts 1,600 shares of SLM International ("SLM") were sold without the knowledge or consent of Louis Potts. Claimants further alleged that, between May 20, 1992 and December 15, 1992, the account had a net asset value of \$38,831.00 resulting in a loss of \$123.00 despite having interest and dividend income in 1992 of \$1,365.00 and that the account was traded only for the Respondents' benefit.

Claimants also alleged, that in 1992, there were seven transactions in the Lois Potts Individual Account Respondents without the authority of Lois Potts and inconsistent with her investment objectives and that, from April 1993 to November 1993, the use of margin grew from \$3,491.00 to \$146,000.00. Claimants asserted that, between March 4, 1993 and December 13, 1993, there were 23 transactions in risky stocks in which Respondents were market makers allowing them to maximize their benefits and that, in 1994, the account lost in excess of \$40,000.00.

Claimants further asserted that Respondents violated their fiduciary obligations and were negligent in the handling of the accounts and that Kidder Peabody & Co. did not adequately and properly supervise Gregory. Claimants also asserted that the above describe acts constituted breach of contract; breach of duty; violations of federal and state securities laws; breach of fiduciary duty and violations of the rules and regulations of the NASD and the New York Stock Exchange and the New York State General Business Law Section 49.

Respondents maintained that, prior to 1982, Gregory served as the broker for the family holding company T.E. Potts Equipment Co and that in 1982 Edward Potts and his sister, Shirley Potts, opened individual premium accounts with Gregory and Edwards wife, Lois Potts opened an IRA account with Gregory. Respondents further maintained that, in the late 1980's, Edward Potts began a more aggressive investment strategy and participated in the IPO market. Respondents also maintained that, in mid-1991, Ted Potts met with Gregory and suggested that Shirley Potts' account continue a similar investment strategy as his which included margin purchases. Respondents contended that, prior to his death in November 1991, Edward Potts elected to leave responsibility for his sister's affairs and his own estate with his wife, Lois Potts. Respondents further contended that, in January 1992, Lois Potts opened an individual premium account and the remaining assets in Edward Potts' estate account were transferred to Lois Potts' individual account and Edward Potts' IRA was rolled over into Lois Potts' IRA.

Respondents also contended that, shortly after Edward Potts died, Gregory met with Lois Potts and she reaffirmed that she wished to continue the investment strategy of using margin in a moderately aggressive trading strategy. Respondents alleged that Gregory discussed with Mrs. Potts a strategy for the use of margin to permit the purchase of securities and the risks in such a strategy were carefully explained. Respondents further alleged that Gregory discussed with Lois Potts the trades he recommended and that she often gave him time and price discretion with regard to those trades. Respondents maintained that the use of margin and the purchases in question were reflected on Lois Potts' trade confirmations and that she agreed to and ratified the monthly statements. Respondents also alleged that there was no excessive trading in the accounts and that the turnover ration was consistent with the stated investment objectives and were within acceptable legal and professional limits.

Respondents contended that there was no churning in Lois Potts' IRA account and that the account was profitable. Respondents further contended that Lois Potts opened her individual account in 1992 looking for growth and income and the purchases in this account were consistent with these objectives and that she was kept inform of the status of her account. Respondents also contended that the estate account of Edward Potts had a churning ratio under two and suffered no significant loss.

Respondents alleged that Claimants failed to object to the transactions with in the time periods agreed to in the Customer's Agreement. Respondents further alleged that Claimants' claim should fail on the grounds of laches, estoppel, waiver and ratification. Respondents maintained that Claimants are not entitled to punitive damages.

#### **RELIEF REQUESTED**

Claimants requested for the Shirley Potts Account: loss in equity in the amount of at least \$33,517.00; damages equal to the value of the market appreciation not realized by the account; and punitive damages to be determined by the arbitration panel. Claimants requested for the Lois Potts IRA Account: a sum equal to the anticipated market appreciation not realized by the account; a return to Lois Potts of all income derived by the Respondents through the management of the account; a sum equal to any losses sustained in the account; and punitive damages to be determined by the panel. Claimants requested for the Estate of Edward Potts Accounts: actual losses of \$1,719.00; damages equal to the value of the

market appreciation not realized by the account for the period in question; a refund to the account of the income derived therefrom by the Respondents. Claimants requested damages for the Lois Potts Individual Account: losses in equity of at least \$40,000.00; damages equal to the value of the market appreciation not realized by the account for the period in question; a refund to the account of the income derived therefrom by the Respondents in addition to reasonable legal fees and such further relief as the panel deemed just.

Respondents requested that Claimants' claim be dismissed in its entirety.

#### **OTHER ISSUES CONSIDERED AND 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.

Attorney for the Respondent, Brian McDonough, Esq., represented both Kidder Peabody & Co. and PaineWebber, the alleged successor in interest to Kidder Peabody & Co. The panel granted PaineWebber's motion to be removed from the hearing as not a proper party.

#### **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. Claimant's claims are dismissed in their entirety.
2. All requests for attorney fees are denied.
3. All requests for punitive damages are denied.
4. All other requests for relief are denied.

#### **FORUM FEES**

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$450.00 non-refundable filing fee previously deposited by the Claimants and have assessed the following forum fees:

$$4 \text{ Hearing Sessions} \times \$500.00 = \$2,000.00$$

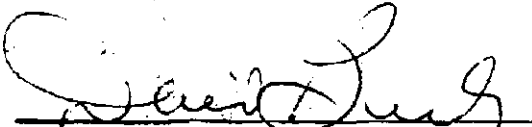
Claimants, Lois Potts POA/Shirley Potts, Lois Potts and Lois Potts Executrix/Estate of Edward Potts, are and are hereby liable and shall pay to NASD Regulation Inc. \$1,000.00 representing one-half of the total amount of forum fees assessed. Claimants previously deposited \$500.00 to NASD Regulation, Inc. Therefore, Claimants owes \$500.00 to NASD Regulation, Inc.

Respondent, Kidder Peabody & Co. is liable for \$1,000.00 representing one-half of the forum fees assessed. Therefore, Respondent Kidder Peabody & Co. shall pay to NASD Regulation, Inc. the sum of \$1,000.00.

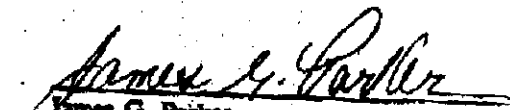
Fees are payable to NASD Regulation, Inc.

**ARBITRATORS' SIGNATURES**


I, David Buch, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

  
David Buch, Esq.

I, James G. Parker, do hereby affirm, pursuant to article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

  
James G. Parker

I, Robert Ouriel, Esq., do hereby affirm, pursuant to article 7507 of the Civil Practice Law and rules, I am the individual described herein, and who executed this instrument which is my award.

  
Robert Ouriel, Esq.

Date of Decision: June 2, 1997