

## **AWARD**

### **NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION**

In the matter of the Arbitration Between

**Name of Claimant**

Evangeline M. Andersen a.k.a. ANN

v.

Arbitration No.  
96-00535

**Name of Respondents**

Smith Barney Inc., Ted Kenney,  
Jacqueline Berkaw, Dan Breen, and  
Pacific Asset Group, Inc.

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### **REPRESENTATION**

For Claimant:

Nancy B. Duffy, Esq.  
Law Office of Nancy B. Duffy  
Santa Barbara, California

For Respondents

Smith Barney Inc. and  
Ted Kenney:

Sean J. Coughlin, Esq.  
Smith Barney Inc.  
New York, New York

David M. Bartholomew, Esq.  
Keesal, Young & Logan  
Long Beach, California

### **CASE INFORMATION**

Statement of Claim filed:

January 26, 1996

First Amended Statement of Claim filed:

May 30, 1996

Second Amended Statement of Claim filed:

December 27, 1996

Supplement to the Second Amended Statement of Claim filed:	January 3, 1997
Claimant's Submission Agreement signed:	January 26, 1996
Joint Statement of Answer filed by Respondents Smith Barney Inc. and Ted Kenney:	July 3, 1996
Respondent Smith Barney Inc.'s Submission Agreement signed:	July 3, 1996
Respondent Ted Kenney's Submission Agreement signed:	July 1, 1996
Statement of Answer filed by Respondent Dan Breen:	June 4, 1996
Respondent Dan Breen's Submission Agreement signed:	June 4, 1996
Statement of Answer to the Amended Statement of Claim filed by Respondent Pacific Asset Group, Inc.:	June 10, 1996

### **HEARING INFORMATION**

Pre Hearing Conference Dates / Sessions:	December 19, 1996 (1 Session) February 13, 1997 (1 Session) February 26, 1997 (1 Session) July 23, 1997 (1 Session) July 29, 1997 (1 Session) June 11, 1998 (1 Session)
Hearing Dates / Sessions:	August 31, 1998 (1 Session)
Hearing Location:	Los Angeles, California

### **CASE SUMMARY**

Claimant alleged that all Respondents made false or misleading statements of fact in connection with the sale of securities, committed fraud and deceit and violated NASD rules. Claimant alleged that Respondent Smith Barney committed the torts of negligent hiring, negligent supervision and conversion, breached its fiduciary duty owed to the Claimant, and breached its contract with the Claimant. Claimant alleged that Respondent Ted Kenney committed the torts of negligent hiring and negligent supervision, breached his fiduciary duty owed to the Claimant, and breached his contract with the Claimant. Claimant alleged that Jacqueline Berkaw committed the tort of conversion, breached her fiduciary duty owed to the Claimant, breached her contract with the Claimant, and engaged in a conspiracy with Respondent Dan Breen. Claimant alleged that Respondent Dan Breen committed the tort of conversion and engaged in a conspiracy with Respondent Jacqueline Berkaw. Claimant alleged that Respondent Pacific Asset Group, Inc. committed the torts of negligent supervision and conversion.

Respondents denied each and every allegation of wrongdoing set forth in the Claimant's Statement of Claim.

### **RELIEF REQUESTED**

Claimant sought \$46,400.00 in compensatory damages, interest, punitive damages, costs and attorney's fees.

Respondents sought dismissal of Claimant's Statement of Claim in its entirety, costs and attorney's fees.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The parties have agreed that the Award in this matter may be executed either 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 original remains on file with the NASD Regulation, Inc., Office of Dispute Resolution.

Claimant named Jacqueline Berkaw as a Respondent in her Statement of Claim. At the time of filing, Jacqueline Berkaw had filed for bankruptcy protection. On February 12, 1996, the NASD Regulation, Inc., Office of Dispute Resolution requested Claimant to submit any documentation indicating that the bankruptcy stay was lifted or Jacqueline Berkaw would be removed as a party. Claimant was given 30 days to submit the documents. No documents were submitted and Jacqueline Berkaw was removed as a party.

On December 19, 1996, Claimant's First Amended Statement of Claim was dismissed without prejudice, subject to Claimant filing a Second Amended Statement of Claim.

On January 31, 1997, Claimant filed a request for a continuance. The request was granted.

On March 4, 1997, Respondent Dan Breen was dismissed without prejudice.

On March 4, 1997, Respondent Pacific Asset Group, Inc. was dismissed without prejudice.

On June 15, 1998 Claimant filed a request for an emergency continuance. The request was granted.

On August 28, 1998, Claimant filed a request for an emergency continuance. The request was denied.

On August 31, 1998, neither the Claimant nor Claimant's counsel appeared in Los Angeles for the hearing. Claimant's counsel did appear telephonically and stated that Claimant was not prepared to go forward with her case. Respondents made an oral motion to dismiss.

### **AWARD**

After considering the parties' motions and arguments presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1) All of Claimant's claims are dismissed with prejudice.
- 2) The NASD shall expunge Respondent Ted Kenney's regulatory record of any mention of this arbitration.
- 3) Each party shall bear its own costs, including attorney's fees.

### **FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following forum fees are assessed against Claimant:

Two Single Arbitrator Pre-Hearing Conference Session @ \$300.00 / Session	= \$600.00
Four Full Panel Pre-Hearing Conferences @ \$400.00/Session	= \$1,600.00
One Hearing Session @ \$400.00 / Session	= \$400.00
One Postponement Fee (For March 1997 Hearing Dates)	
<u>Assessed Against Claimant</u>	<u>= \$400.00</u>
Total Fees Assessed Against Claimant	= \$3,000.00
<u>Credit for Claimant's Hearing Session Deposit</u>	<u>= \$400.00</u>
Claimant's Balance Due	= \$2,600.00

Fees are payable to NASD Regulation, Inc.

**OTHER FEES**

Pursuant to Rule 10333 of the Code, Respondent Smith Barney Inc. shall pay to NASD Regulation, Inc. the \$200.00 past due member surcharge previously invoiced.

Pursuant to Rule 10333 of the Code, Respondent Pacific Asset Group, Inc. shall pay to NASD Regulation, Inc. the \$200.00 past due member surcharge previously invoiced.

**ARBITRATORS**

<u>Name .....</u>	<u>Public / Industry</u>
Herbert Murez, Esq.	Public Arbitrator
Christopher J. Rogers	Industry Arbitrator
Charles L. Repp, Jr.	Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Herbert Murez, Esq.

\_\_\_\_\_  
Christopher J. Rogers

\_\_\_\_\_  
Charles L. Repp, Jr.

Date of Service: \_\_\_\_\_

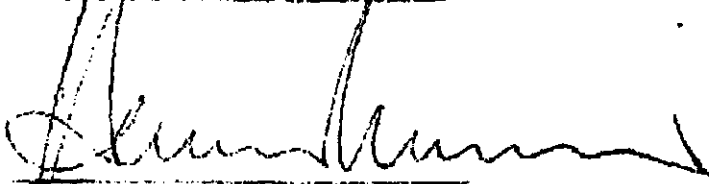
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ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Herbert Murez, Esq.	Public Arbitrator
Christopher J. Rogers	Industry Arbitrator
Charles L. Repp, Jr.	Public Arbitrator

Consenting Arbitrators' Signatures  
Herbert Murez, Esq.

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Christopher J. Rogers

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Charles L. Repp, Jr.

Date of Service:

September 8, 1998

ARBITRATORS

Name

Herbert Murez, Esq.  
Christopher J. Rogers  
Charles L. Repp, Jr.

Public / Industry  
Public Arbitrator  
Industry Arbitrator  
Public Arbitrator

Concurring Arbitrators' Signatures

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Herbert Murez, Esq.

*C. Rogers*  
Christopher J. Rogers

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Charles L. Repp, Jr.

Date of Service: Sept. 8, 1998



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ARBITRATORS

<u>Name</u> <u>CHARLES L REPP JR</u>	<u>Public / Industry</u>
Herbert Murez, Esq.	Public Arbitrator
Christopher J. Rogers	Industry Arbitrator
Charles L. Repp, Jr.	Public Arbitrator

Concurring Arbitrators' Signatures

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Herbert Murez, Esq.

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Christopher J. Rogers  
Charles L. Repp, Jr.Date of Service: Sept. 8, 1998