

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

David E. Mayhew  
David Mayhew FBO Lauren C. Mayhew  
David Mayhew FBO Briana M. Mayhew  
Sharon S. Mayhew  
David E. Mayhew Profit Sharing Plan

96-01342

Name of Respondents

PaineWebber, Inc.  
Sam Guiliano  
Dianne Borden  
Warren R. Schreiber  
Lorette D. Farris  
John A. Gentilella, Jr.  
Vincent Mongno  
The Estate of James Mongno

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REPRESENTATION

For Claimants: Richard Groner, Esq. of Groner & Schieb, Sarasota, Florida.

Respondent Sam Guiliano did not appear.

Respondent Dianne Borden ("Borden") appeared pro se.

For Respondent John A. Gentilella, Jr. ("Gentilella"): Terrance A. Bostic, Esq. of Akerman, Senterfitt & Edison, P.A., Tampa, Florida.

Respondent Vincent Mongno ("Mongno") appeared pro se.

CASE INFORMATION

Statement of Claim filed: March 27, 1996.

Each Claimants' Submission Agreement signed on: June 10, 1996.

Respondent Sam Guiliano did not submit a Statement of Answer or file an executed Submission Agreement.

Respondent Borden's Submission Agreement signed on: August 9, 1996.

Respondent Borden's Statement of Answer submitted on: August 12, 1996.

Respondent Gentilella's Submission Agreement signed on: September 4, 1996.

Respondent Gentilella's Statement of Answer submitted on: August 2, 1996.

Respondent Mongno's Submission Agreement signed on: August 9, 1996.

Respondent Mongno's Statement of Answer submitted on: August 12, 1996.

### **HEARING INFORMATION**

On January 3, January 20, February 26, April 10, and June 4, 1997 telephonic pre-hearing conferences lasting five (5) sessions were conducted with the arbitration panel.

On September 8, 9, 10, 11, 12, and November 20, 1997 hearings lasting eleven (11) sessions were conducted in Tampa, Florida.

### **CASE SUMMARY**

The Claimants alleged that their accounts were brought to J. Gregory & Co., Inc. through a bond of trust that they had with their personal broker, Sam Guiliano. At no time while he was at J. Gregory was Respondent Sam Guiliano ever a duly licensed broker within the industry. Still, while their accounts were at J. Gregory, the Mayhews were led to believe by all the Respondents that Respondent Guiliano was duly licensed and trustworthy. Respondent Sam Guiliano is jointly and severally liable for the losses the Claimants have suffered.

Further, all the Respondents in this case realize that due to the demands of the Claimants' professional schedules and due to their lack of financial education and sophistication, the Claimants were totally dependant on Respondent Guiliano to adhere to his professional duties of honesty, fair dealing, and open communication.

The Claimants further alleged that the licensed broker, who by necessity received all the commissions from all transactions in the Mayhew's accounts, was, for a time certain, Respondent John Gentilella. Respondent Gentilella allowed and directed Guiliano to maintain contact with the Mayhews while their accounts were at J. Gregory, and further, directed the execution of multiple unauthorized transactions in the Claimants' accounts. Claimants assert that Gentilella's conduct is so outside the lines of the rules regulating the industry that he should be held liable for compensatory as well as punitive damages and that as the individuals who controlled J. Gregory, Respondents Borden and Mongno are liable for the conduct of Respondent Gentilella.

Further, upon the demise of J. Gregory, the Respondents Dianne Borden and Vincent Mongno, used Guiliano to obtain the transfer of the Mayhews' accounts to the Wellbrook Group, a division of H.D. Brous. While at H.D. Brous, these same Respondents, Borden and Mongno, engaged in multiple unauthorized transactions in the Claimants' accounts. Claimants assert that their conduct is so outside the lines of the rules regulating the industry, that Respondents Borden and Mongno should be held liable for compensatory as well as punitive damages.

Respondents Borden and Mongno alleged that Claimants filed a Statement of Claim alleging that

Respondents were liable to them in the amount of \$5,000,000.00, alleging acts, omissions and control person liability with respect to the following: sale of grossly unsuitable products; unsuitable recommendations; misrepresentations; excessive mark-ups; unauthorized trading; dishonest practices; violations of the NASD rules; violations of the New York Stock Exchange rules; violations of the internal compliance manual; failure to deliver prospectus; self dealing; failure to comply with the Penny Stock Reform Act; unfair and artificial pricing; dishonest trading; over-concentration of highly risky products; fraudulent and negligent conduct; breach of fiduciary duty; breach of industry and ethical standards; violations of the 15g Penny Stock Act; common law fraud and conversion; intentional infliction of emotional distress; negligent misrepresentation and supervision; failure to use due diligence; violation of the Florida Securities Protection Act; and violation of 10b.

Respondents Borden and Mongno jointly answered the Statement of Claim and denied all claims. Further, Respondents Borden and Mongno asserted the following affirmative defenses: the Statement of Claim fails to state a claim upon which relief may be granted; the Claimants are sophisticated investors; none of the stocks were unsuitable; Claimants are precluded from recovery on the basis of ratification, estoppel and waiver; Claimants' losses were a result of market conditions; Claimants failed to mitigate their damages; Claimants failed to use requisite due diligence in monitoring, managing and handling their account; Respondents deny their conduct would in any way justify punitive damages and denies a private right of action under the NASD rules of fair practice and denies they violated any NASD rules; further, Respondents deny any basis or liability as control persons to the Claimants.

Respondent Gentilella alleged that the Statement of Claim lists a whole host of charges, including excessive mark ups, suitability violations, unauthorized trading, fraud and misrepresentation, against various individuals. Notwithstanding the allegations in the claims, the Claimants have abandoned their claim of suitability and have not offered any proof regarding their claim of excessive mark ups. Additionally, the majority of the Respondents have been released from this case. The only issue left for the panel to decide is the unauthorized trading and the fraud and misrepresentations related to the unauthorized trading as to Respondent Gentilella.

Respondent Gentilella further alleged that the Claimants have the burden of proving their allegations and have failed to do so by credible evidence. The credible testimony in this case, and the documents supporting that testimony, clearly establish that Claimants' allegations of unauthorized trading, as well as their claim that they did not know Respondent Gentilella was their broker, are without merit and should be denied.

#### **RELIEF REQUESTED**

The Claimants requested the following relief:

1. Compensatory damages (out of pocket losses combined with statutory interest) in the amount of:

Sam Guiliano:	\$306,788.87;
John Gentilella:	\$296,382.87;
Vincent Mongno:	\$249,892.87; and
Dianne Borden:	\$249,892.87.
2. A punitive damage award appropriately reprimanding the Respondents' conduct, during the facts in question, in an unspecified amount;
3. A punitive damage award appropriately reprimanding the Respondents' conduct during the presentation of this matter, in an unspecified amount;

4. Entitlement to a reasonable attorney fee;
5. All costs incurred by the Claimants in this matter; and
6. Forum Fees jointly and severally assessed against all Respondents.

Respondents Borden and Mongno requested dismissal with prejudice, expungement of the record, out of pocket costs of \$35,000.00 for defending this frivolous and baseless action; an assessment of all Forum Fees, administrative expenses, and all other fees relating to the administration of the proceeding against Claimants; sanctions, punitive and treble damages for continuous misrepresentations to the Panel and acts of bad faith toward Respondents throughout the proceeding; and respectfully request any and all such relief that his tribunal may deem just and proper.

Respondent Gentilella requested an award of a reasonable attorneys' fee in an amount to be determined by a court of competent jurisdiction.

#### **OTHER ISSUES CONSIDERED & 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 NASD Regulation, Inc.

Pursuant to Rule 10101 of the Code of Arbitration Procedure ("Code"), the arbitration panel found subject matter jurisdiction over this entire controversy.

During the hearing in this matter, the Claimants settled their claim with Respondent PaineWebber, Inc.

Prior to the hearing in this matter, the Claimants withdrew Respondents Patrick Mongno as Executor of the Estate of James Mongno, Lorette D. Farris and Warren R. Schreiber from the Statement of Claim.

The arbitration panel found that Respondent Guiliano was an associated person of the NASD at the time the controversy arose. Consequently, the arbitration panel found personal jurisdiction over Respondent Guiliano pursuant to Rule 10301 of the Code.

In view of the above, the arbitration panel found that Respondent Guiliano was required to file with NASD Regulation, Inc. a Statement of Answer and a properly executed Submission Agreement pursuant to Rule 10314(b) of the code. In this regard the arbitration panel found that the Statement of Claim was properly served upon Respondent Guiliano, pursuant to Rule 10314(a) of the Code.

In addition, in accordance with Rules 10310, 10315 and 10318 of the Code, the arbitration panel found that NASD Regulation, Inc. provided Respondent Guiliano with "due notice" of the hearing conducted in this matter by regular and certified mail. The arbitration panel, therefore, determined to proceed with the hearing without Respondent Guiliano, whose absence was unexcused.

#### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- 1) The arbitration panel denied all Motions to Dismiss, Motions for Sanctions and Respondents Borden and Mongno's Motion to Expunge, denied their requests for out of pocket costs, administrative expenses and other fees as well as punitive and treble damages.
- 2) Respondents Guiliano and Gentilella are found jointly and severally liable and shall pay to the Claimants compensatory damages in the sum of \$61,251.00 (\$90,000.00 less \$28,749.00 previously settled).
- 3) Respondents Guiliano and Gentilella are found jointly and severally liable and shall pay to the Claimants interest in the sum of \$10,000.00.
- 4) Respondents Guiliano and Gentilella are found jointly and severally liable and shall pay to the Claimants, pursuant to Florida Statutes Section 517, their attorneys' fees as determined by a court of competent jurisdiction.
- 5) The claims against Respondents Mongno and Borden are denied.

#### **OTHER COSTS**

Respondent Borden shall pay costs to the Claimants for previously ordered copy fees in the sum of \$410.00.

#### **FORUM FEES**

Pursuant to Rule 10332 of the Code, the panel has assessed Forum Fees in the sum of \$16,000.00 (five pre-hearing conferences with the arbitration panel x \$1,000.00 plus eleven hearing sessions with the arbitration panel x \$1,000.00).

- 1) Claimants are hereby jointly and severally assessed \$8,000.00 for which NASD Regulation, Inc. shall retain the \$1,000.00 previously deposited by the Claimant in partial satisfaction thereof, leaving a balance due in the sum of \$7,000.00.
- 2) Respondents Guiliano and Gentilella are hereby jointly and severally assessed \$8,000.00.
- 3) NASD Regulation, Inc. shall retain the \$500.00 member surcharge previously paid by the Respondent.
- 4) NASD Regulation, Inc. shall retain the \$250.00 claim filing fee previously paid by the Claimants.

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

Arbitrators' Signatures

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Allen J. Kaplan, Esq.  
Chairperson - Public Arbitrator

/S/

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Samuel M. Niden  
Industry Arbitrator

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Muriel Desloovere, Esq.  
Public Arbitrator

Date of Decision: 1/13/98