

NASD Regulation, Inc. AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

Kenneth & Brooke Findley

and

96-05480

Name of Respondents

Dain Bosworth, and
David Nelson, Jr.

Consolidated with

Name of Claimants

Kenneth & Brooke Findley

and

96-05533

Name of Respondents

PaineWebber, Inc., and
David Nelson, Jr.

REPRESENTATION OF PARTIES

Kenneth and Brooke Findley ("Claimants") were represented by Stuart R. Berkowitz, Esq., of Platke and Berkowitz, St. Louis, Missouri.

Dain Bosworth ("Dain") was represented by Jesse B. Simpson, Esq., of Lewis & Roca, Phoenix, Arizona.

PaineWebber, Inc. ("PaineWebber") was represented by William "Mack" Montgomery, Esq., PaineWebber, Inc., Los Angeles, California.

David Nelson, Jr. ("Nelson") was represented by Jesse B. Simpson, Esq., of Lewis & Roca, Phoenix, Arizona for the period of time he was employed with Dain, and by William "Mack" Montgomery, Esq., PaineWebber, Inc., Los Angeles, California, for the period of time he was employed at PaineWebber.

CASE INFORMATION

Claimants filed the Statement of Claim in case 96-05480 on or about December 6, 1996 and signed the Submission Agreement on November 23, 1996. Claimants' filed their Statement of Claim for case 96-05533 on or about December 9, 1996, and signed the Submission Agreement for case 96-05533 on November 23, 1996.

Dain and Nelson filed a Statement of Answer for case 96-05480 on or about February 5, 1997, and signed Submission Agreements on January 10, 1997 and January 6, 1997 respectively..

PaineWebber and Nelson filed a Statement of Answer on or about March 26, 1997 and signed their Submission Agreements on February 10, 1997 and February 11, 1997 respectively. .

HEARING INFORMATION

The Arbitration Panel held a hearings on September 30, 1997 for two (2) sessions, October 1, 1997 for two (2) sessions, January 16, 1998 for two (2) sessions, January 17, 1998 for two (2) sessions, January 18, 1998 for two (2) sessions, January 19, 1998 for two (2) sessions, and February 13, 1998 for two (2) sessions in Scottsdale, Arizona for a total of 14 sessions.

CASE SUMMARY

Claimants alleged that Dain, PaineWebber and Nelson: Had a duty to recommend suitable investments in light of the understood investment objectives, past trading history and contractual understanding of the Claimants, and Dain and Nelson failed to exercise prudence in recommending suitable securities; made excessive and unsuitable trading in Claimant's account for the primary purpose of generating commissions; and made unauthorized trades in Claimants' account. Claimants alleged that Dain and PaineWebber breached their duty to monitor and supervise the activities of Nelson. The allegations arose out of transactions in securities more fully presented at the hearing in this matter.

Dain and Nelson denied the allegations set forth in the Statement of Claim. Dain and Nelson specifically stated that: Nelson's investment recommendations were suitable; Claimants' accounts were not churned in light of the twin investment objectives of growth and speculation; all of the trading was authorized by the Claimants; and Nelson did not exercise discretion in the accounts.

PaineWebber and Nelson denied the allegations contained in the Statement of Claim. PaineWebber and Nelson asserted the following affirmative defenses: Claimants failed to state a claim upon which relief may be granted; Claimants at all relevant times had full knowledge of all material facts concerning their accounts with PaineWebber, including the positions maintained and the transactions made therein; Claimants authorized and/or ratified all transactions in said account

with PaineWebber with full knowledge of all material facts thereto, and accordingly, Claimant's demands are barred by the applicable principles of waiver and ratification; Claimants with full knowledge of all material facts concerning said account with PaineWebber, waived the alleged claims and injuries set forth in the statement of Claim and the alleged damages therefrom by failing to take timely and appropriate action prior to incurring such damages; PaineWebber and its officers, agents and employees, in discharging their duties, if any, to Claimants acted in good faith and exercised that degree of care, diligence, and skill which ordinary prudent men would exercise in similar circumstances and like positions; the damages allegedly suffered by Claimants have no casual relationship with any act committed by or legally attributable to PaineWebber and Nelson; Claimants' claim is barred in whole or in part by the applicable statute of limitations; Claimants did not reasonably rely to their detriment on any action or inaction of PaineWebber and Nelson or any action or inaction legally attributable to them; the transactions complained of were duly authorized by the Claimants, who, at all times, were in sole control of the assets in said account; Claimants knew and understood the risks associated with the investments made in their accounts and were willing to accept and able to assume those risks; and Claimants had the opportunity and means to mitigate damages to their account but failed to do so in an appropriate and responsible manner.

RELIEF REQUESTED

In case number 96-05480, Claimants requested a joint and several award against Dain and Nelson as follows: Compensatory damages in the amount of \$250,000; pre-award and post-award interest from the date of the original investments as allowed by law; and costs of arbitration and expenses including consulting fees, expert witness fees, filing fees, and any other costs deemed reasonable and just.

Dain and Nelson requested that the panel dismiss the claim in its entirety and award Dain and Nelson their costs and reasonable attorneys' fees.

In case number 96-05533, Claimants requested a joint and several award against PaineWebber and Nelson as follows: Compensatory damages of \$350,000; pre-award and post-award interest from the date of the original investments allowed by law; costs of arbitration and expenses including consulting fees, expert witness fees, filing fees, and any other costs deemed reasonable and just.

PaineWebber and Nelson requested that: Claimants' demand for damages be denied in its entirety and that all claims be dismissed; costs, and that expenses and attorneys' fees be assessed against Claimants.

OTHER ISSUES CONSIDERED & DECIDED

At the requests of the parties to these arbitrations, case numbers 96-05480 and 96-05533 were consolidated.

At the close of Claimants' case, respondents made a motion for directed verdict. The motion was unopposed as to the allegations of unauthorized trading, and was granted as to those allegations.

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 original(s) 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:

Claimants' claims in cases 96-05480 and 96-05533 are, and each of them, denied with prejudice.

Each party shall bear its own costs and expenses associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference, if any. There were 14 sessions x \$750 = \$10,500 in forum fees. Pursuant to Rule 10332(b) of the 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 Rule 10332© 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 as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants for case number 96-05480.

Pursuant to Rule 10332© 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 as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants for case number 96-05533.

Pursuant to Rule 10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 paid by Dain for case number 96-05480 and the member surcharge in the amount of \$350 paid by PaineWebber for case number 96-05533.

Additional forum fees in the amount of \$9,000 (\$10,500 - \$1,500) are assessed by the arbitrators against the Claimants.

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

Dated:

K. Leonard Judson
K. Leonard Judson
Public Arbitrator, Presiding Chair

/s/

April 8, 1998

Louise R. Wakem
Louise R. Wakem
Public Arbitrator

/s/

April 1, 1998

Mercedes G. Johnson
Mercedes G. Johnson
Industry Arbitrator

/s/

March 30, 1998