

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Kenneth W. McDonald and Paulette McDonald (Claimants) v. William C. Piontek,  
Morgan Stanley Dean Witter & Co., D.E. Frey & Co., Dale E. Frey, Kimberlee D.  
Cornelius, John F. Owens, Michele A. Desilets, and PaineWebber, Inc. (Respondents)

Case Number: 99-03371

Hearing Site: New York, NY

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Nature of the Dispute: Customers vs. Members and Associated Persons

**REPRESENTATION OF PARTIES**

Claimants Kenneth W. McDonald ("K. McDonald") and Paulette McDonald ("P. McDonald") hereinafter collectively referred to as "Claimants": Jay R. McDaniel, Esq., Sichenzia Ross Friedman Ference, LLP, New York, NY. Previously represented by: Jay R. McDaniel, Esq., Porzio, Bromberg & Newman, P.C., New York, NY.

Respondent William C. Piontek ("Piontek") appeared *pro se*. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent D.E. Frey & Co., ("D.E. Frey") appeared *pro se*. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent Dale E. Frey was previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent Kimberlee D. Cornelius ("Cornelius") appeared *pro se*. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent John F. Owens ("Owens") appeared *pro se*. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent Michele A. Desilets ("Desilets") appeared *pro se*. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent PaineWebber, Inc. ("PaineWebber"): Matthew Farley, Esq., Drinker Biddle & Reath, LLP, New York, NY. Previously represented by: Stuart N. Bennett, Esq., Brega & Winters, P.C., Denver, CO.

Respondent Morgan Stanley Dean Witter & Co. ("MSDW"): Dan F. Laney, III, Esq., Rogers & Hardin, LLP, Atlanta, GA.

### CASE INFORMATION

Statement of Claim filed on or about: July 22, 1999.

Amended Statement of Claim filed on or about: November 21, 2000

K. McDonald signed the Uniform Submission Agreement: July 15, 1999.

P. McDonald signed the Uniform Submission Agreement: July 15, 1999.

Joint Statement of Answer filed by Piontek, D.E. Frey, Frey, Cornelius, Owens, Desilets, and PaineWebber on or about: December 3, 1999.

Joint Statement of Answer to the Amended Statement of Claim filed by Piontek, D.E. Frey, Frey, Cornelius, Owens, Desilets, and PaineWebber filed on or about: January 15, 2001.

Owens signed Uniform Submission Agreements: December 3, 1999 and February 1, 2000.

D.E. Frey signed the Uniform Submission Agreement: November 23, 1999.

Cornelius signed the Uniform Submission Agreement: November 22, 1999.

Frey signed the Uniform Submission Agreement: November 23, 1999.

Desilets signed the Uniform Submission Agreement: November 24, 1999.

PaineWebber signed the Uniform Submission Agreement: January 3, 2000.

Piontek did not sign a Uniform Submission Agreement.

Statement of Answer filed by MSDW on or about: October 22, 1999.

Answer to the Amended Statement of Claim filed by MSDW on or about: December 11, 2000.

MSDW did not sign a Uniform Submission Agreement.

### CASE SUMMARY

In the Statement of Claim and Amended Statement of Claim, Claimants asserted the following causes of action: suitability; negligence; failure to supervise; violation of federal securities laws; breach of fiduciary duty; failure to supervise; breach of contract; misrepresentation; and fraud. Claimants' claims involved mortgage backed derivatives; and foreign bonds.

Unless specifically admitted in their Answer and their Answer to the Amended Statement of Claim, Respondents Piontek, D.E. Frey, Cornelius, Owens, Desilets, and PaineWebber denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in its Answer and its Answer to the Amended Statement of Claim, Respondent MSDW denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

In the Statement of Claim, Claimants requested recovery against Respondents Piontek, MSDW, D.E. Frey, Cornelius, Owens, Desilets, and PaineWebber, jointly and severally, as follows:

- a. compensatory damages in the principal amount of \$600,000.00;
- b. punitive damages in the amount of \$600,000.00;
- c. costs and disbursements.

In the Amended Statement of Claim, Claimants seek recovery against Respondents Piontek, MSDW, D.E. Frey, Cornelius, Owens, Desilets, and PaineWebber, jointly and severally, as follows:

- a. compensatory damages in the principal amount of \$600,000.00;
- b. punitive damages in the amount of \$600,000.00;
- c. costs and disbursements; and

Claimants seek a further and additional recovery against Respondent MSDW as follows:

- a. attorneys' fees in the amount of \$59,278.00 constituting the costs of the Claimants' defensive effort against the Georgia action, including, for the most part, the attorneys' fees incurred in preparing for and prosecuting the New York proceeding; and
- b. costs and disbursements involved in said defensive effort of \$3,777.48.

In their Answer and their Answer to the Amended Statement of Claim, Piontek, D.E. Frey, Cornelius, Owens, Desilets, and PaineWebber requested that the Panel dismiss Claimants' Statement of Claim and Amended Statement of Claim in their entirety.

In its Answer to the Statement of Claim, MSDW requested that the Panel enter the following relief:

1. Stay this arbitration proceeding as against MSDW until after the resolution of MSDW's court action seeking a declaratory judgment and injunctive relief holding that the claims against MSDW are ineligible for arbitration under the NASD Code;
2. Dismiss any claims against MSDW that are found by the court to be ineligible for arbitration under the NASD Code; and
3. Grant such other relief as the Panel deems just and proper.

In its Answer to the Amended Statement of Claim, MSDW requested that the Panel dismiss with prejudice all of Claimants' claims against them and to grant MSDW such other relief as the Panel deems just and proper.

By letter dated November 14, 2003, Cornelius requested expungement of this action from her Form U-4 and CRD records.

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

Upon review of the file and the representations made on behalf of the Claimants, the undersigned arbitrators (the "Panel") determined that Respondents Desilets, and D.E. Frey have been properly served with the Statement of Claim and received due notice of the hearing and that arbitration of the matter would proceed without said Respondents present, in accordance with the NASD Code of Arbitration Procedure (the "Code").

Respondent Piontek did not file with NASD Dispute Resolution properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

An Order of the Panel dated October 24, 2003 stated that upon application of PaineWebber, and upon consent of the Claimants, the claims against PaineWebber were dismissed in their entirety with prejudice.

At a prehearing conference held on October 20, 2003, the Panel denied MSDW's Request that Claimants' claims be dismissed. By letter dated November 7, 2003, Claimants settled all claims against MSDW.

At the end of the hearing on November 11, 2003, Claimants dismissed all claims against Cornelius.

At the hearing, Claimants advised the Panel that their claims against Dale E. Frey were not to be pursued in light of his bankruptcy proceeding which was filed on May 5, 2001; therefore, all claims against him were indefinitely stayed.

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.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Piontek, Desilets, and D.E. Frey are jointly and severally liable for and shall pay to the Claimants compensatory damages in the sum of \$60,000.00.
2. Respondent Owens is liable for and shall pay to the Claimants compensatory damages in the sum of \$9,750.00.
3. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent Kimberly Cornelius' registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent Cornelius must obtain confirmation from a court of competent jurisdiction before CRD will execute the expungement directive.
4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$500.00
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#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, D.E. Frey & Co. is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, Morgan Stanley Dean Witter & Co. is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, PaineWebber, Inc. is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$4,500.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

March 27, 28, and 29, 2001, April 17, 18, and 19, 2001, and May 23, and 24, 2001

Adjournment requested by Claimants and Respondents	WAIVED
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**Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel @ \$1,200.00	= \$ 2,400.00
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Pre-hearing conferences:	November 7, 2000	1 session
	October 20, 2003	1 session

Eight (8) Hearing sessions @ \$1,200.00	= \$ 9,600.00
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Hearing Dates:	November 10, 2003	2 sessions
	November 11, 2003	2 sessions
	November 19, 2003	2 sessions
	November 20, 2003	2 sessions

Total Forum Fees	= \$12,000.00
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1. The Panel has assessed \$6,000.00 of the forum fees jointly and severally against Claimants.
2. The Panel has assessed \$6,000.00 of the forum fees jointly and severally against Piontek, Desilets, and D.E. Frey.

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$6,000.00
Total Fees	= \$6,500.00
Less payments	= \$1,700.00
Balance Due NASD Dispute Resolution	= \$4,800.00

2. D.E. Frey is solely liable for:

Member Fees	= \$7,600.00
Total Fees	= \$7,600.00
Less payments	= \$7,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. PaineWebber is solely liable for:

Member Fees	= \$7,600.00
Total Fees	= \$7,600.00
Less payments	= \$7,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

4. MSDW is solely liable for:

Member Fees	= \$7,600.00
Total Fees	= \$7,600.00
Less payments	= \$7,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

5. Piontek, Desilets, and D.E. Frey are jointly and severally liable for:

Forum Fees	= \$6,000.00
Total Fees	= \$6,000.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$6,000.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.
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**ARBITRATION PANEL**

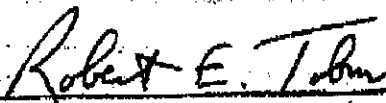
Robert Pincus, Esq.	-	Public Arbitrator, Presiding Chair
Robert E. Tobin	-	Public Arbitrator
Louis Wald, Esq.	-	Non-Public Arbitrator

**Consenting Arbitrators' Signatures**

I, the undersigned arbitrator, 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.

\_\_\_\_\_  
Robert Pincus, Esq.  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
Signature Date

  
\_\_\_\_\_  
Robert E. Tobin  
Public Arbitrator

12-18-03  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Louis Wald, Esq.  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

December 22, 2003

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)



NASD Dispute Resolution  
Arbitration No. 99-03371  
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ARBITRATION PANEL

Robert Pincus, Esq.	-	Public Arbitrator, Presiding Chair
Robert E. Tobin	-	Public Arbitrator
Louis Wald, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

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Public Arbitrator, Presiding Chairperson

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Signature Date

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Public Arbitrator

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Signature Date

  
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Louis Wald, Esq.  
Non-Public Arbitrator

12/18/03  
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Signature Date

December 22, 2003

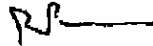
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**ARBITRATION PANEL**

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Public Arbitrator, Presiding Chairperson

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