

PACIFIC EXCHANGE, INC.
301 Pine Street
San Francisco, California 941104

In The Matter Of The Arbitration Between:

PCX CASE # 00-L023

DONALD S. CASON
Claimant

DECISION

FIRST UNION SECURITIES, INC.
And
SCOTT M. DENNISTON
Respondents

The undersigned Arbitrators, having read and considered the Claim submitted by Claimant on July 17, 2000 and the Answer of Respondents, hereby render the following Decision pursuant to Rule 12 of the Rules of the Board of Governors of the Pacific Exchange:

REPRESENTATION OF PARTIES

Of Claimant: Steven L. Miller
Kenneth S. Gaines

Of Respondents Timothy N. Will

SUMMARY OF FACTS

Claimant states that during the week of April 10 through April 14, 2000, he attempted to sell shares of Sonic Foundry and that the Respondents failed to execute his instructions and were negligent in not referring the liquidation to its trading/special handling desk; that Respondents breached their fiduciary duty by failing to keep Claimant advised of his position and by failing to advise him of the sale/liquidation trading tools available, including the trading desk.

Respondents allege that the Claimant has fabricated this claim to avoid paying his margin debit balance; that he was a sophisticated trader and in control of all sales and liquidation of his Sonic Foundry stock; that if his orders were not filled, it was because the stock was thinly traded and extremely volatile; that Claimant failed to give Respondents sufficient trading discretion; that he wanted to maintain a position in Sonic Foundry because of

impending news; that Claimant believed the news would increase the Sonic Foundry value.

ISSUES PRESENTED

Issues raised by Claimant:

1. The Respondents failed to execute by not selling Claimant's Sonic Foundry stock during the period April 10 through April 14, 2000 in accordance with his instructions.
2. The Respondents were negligent in not referring the sale of Claimant's Sonic Foundry stock to the Respondents' trading/block/special handling desk.
3. The Respondents breached their fiduciary duty to Claimant by not advising him of the availability of the trading desk and by not selling/liquidating his Sonic Foundry stock position through their trading desk.
4. If the Respondents had followed Claimant's instructions, Claimant would have received \$857,127.00 (adjusted to \$188,000.00); in addition, Claimant is due its attorneys' fees and costs.

Issues raised by Respondents:

1. The Claimant is a sophisticated, experienced trader and investor and authorized and instructed all Sonic Foundry stock sales as executed by Respondents.
2. The Claimant prevented some sales/liquidation of his Sonic Foundry stock by his instructions limiting the actions of the Respondents.
3. Sonic Foundry stock is thinly traded and volatile and the action of the market at times prevented Claimant's instructions from being executed.
4. The Claimant's damages are hypothetical and speculative.
5. The Claimant failed to pay his margin debt to Respondents.

Counterclaim:

The Respondents allege a margin debt due from Claimant in the amount of \$146,894.58 plus interest, attorneys' fees and costs.

RELIEF REQUESTED

For Claimant: Claimant alleges damages of \$857,127.00 (adjusted to \$188,000.00) plus its costs in the amount of \$6,096.18 and attorneys' fees for 50.87 hours expended by Steven L. Miller and 205.20 hours expended by Kenneth S. Gaines at an hourly rate to be determined by the Arbitrators consistent with the background and experience of Claimant's attorneys; that it be declared that Claimant does not owe Respondents any sum.

For Respondents: Respondents request that the Claimant's claims be denied and that they be awarded the margin debt allegedly due from Claimant in the amount of \$146,894.58, plus interest at the legal rate of 10 percent per annum from April 30, 2000 through February 22, 2002 in a total amount of \$26,484.50, plus costs in the amount of \$4,707.74 plus additional costs of arbitration, if any, plus attorneys' fees in the amount of \$48,799.50. Respondent Denniston requests that the claims alleged against him in this arbitration be expunged from his CRD record.

FINDINGS AND DECISION

A. Findings of fact:

After considering the argument and evidence of both the Claimant and Respondents in this matter, the undersigned Arbitrators make the following findings:

1. The Claimant and Respondent FUSI maintained a broker-customer relationship based upon an account application and client agreement updated on January 7, 1999.
2. The Claimant maintained a broker-customer relationship with Respondent Scott M. Denniston for approximately six years, continuing through April 17, 2000.
3. The Claimant is a sophisticated, intelligent and experienced trader familiar with the purchase, sale and execution of securities trades.
4. The Claimant was experienced in the use of "margin" in the purchase of securities and the effect of market fluctuation upon the use of margin and margin debt; prior to the margin issues raised in this arbitration, the Claimant had experienced many margin calls and understood the use, effect, benefit and detriment of margin based upon a particular stock's characteristics and market conditions.
5. Most trades of Sonic Foundry and other stocks traded through Respondents by Claimant were "unsolicited" wherein Claimant instructed Respondents on the stock price and number of shares to be bought or sold.
6. The Respondent Scott M. Denniston is an experienced broker/consultant with 19 years in the securities industry, employed by the Respondent FUSI during the month of April, 2000 and before; Respondent Denniston seldom gave advice to Claimant and during the period in question was primarily an "order taker".
7. The Claimant did not like market orders; the Claimant, with rare exceptions, used limit orders in placing orders or giving instructions to Respondents during the period April 10 through April 14, 2000; during this period, while trading in Sonic Foundry stock with Respondents, the Claimant also traded other stocks; the Claimant kept in constant contact with the Respondents by telephone and during the period April 10 through April 14, 2000, on at least one day, as many as 24 times.

8. At all times, during April 10 through April 14, 2000, the Claimant remained calm, uncomplaining and business-like in placing trades with Respondents and the receipt of both favorable and unfavorable information about his trades from Respondents.
9. In April, 2000, Claimant became aware of events expected to be announced that month, and desired to retain some of his Sonic Foundry stock, at least until after the information became public. The Claimant did not suffer losses as a result of Respondent Denniston, not entering orders until the market price was at or close to the limit price set by Claimant.
10. The Respondents executed Claimant's trades as instructed.
11. During the month of April, 2000, and in particular, the period April 10 through April 17, the Claimant took no steps to mitigate his damages from the effect of a falling market on a thinly-traded Sonic Foundry stock and the resulting deterioration of his equity position and margin debt.

B. Decision:

After considering the argument and evidence of both the Claimant and Respondents in this matter, the undersigned Arbitrators make the final determination and decision of the issues presented, as set forth below:

Decision:

1. Claim: For Respondents; Claimant's requests are denied.
2. Counterclaim: For Respondents/Counterclaimants as detailed below.

C. Award:

1. Monetary damages: \$146,894.58
2. Punitive damages: None
3. Costs: None
4. Attorneys' fees: None
5. Other:
 - a. Interest: None

D. Other determinations:

1. Respondents shall reimburse Claimant's non-refundable filing fee
Yes___ No X
2. Respondent shall reimburse Claimant's hearing session deposit
Yes___ No X
3. Parties shall bear their own costs of arbitration
Yes X No___
4. Should this matter be referred to any regulatory organization (SRO or SEC) for disciplinary investigation of rule violations or violation of federal securities laws?
Yes___ No X

5. Respondent Denniston's CRD record shall not be expunged.

6. Forum Fees: Forum fees of \$10,000 shall be split evenly.

Dated: 3/15/02


Mandel B. Himmelstein, Chair

Dated: 3/19/02


Frederick Kam Gleason, Public Arbitrator

Dated: _____

Mona Moore, Industry Arbitrator