

PACIFIC EXCHANGE, INC.
301 Pine Street
San Francisco, California 94104

RECEIVED

AUG - 3 2001

In The Matter Of The Arbitration Between:

ANTHONY APPELL,

Claimant.

PCX CASE NO. 00-S029

DECISION

PCX ARBITRATION

v.

MORGAN STANLEY DEAN WITTER & CO.
and ALAN BARTLEY.

Respondents.

The undersigned Arbitrator, having read and considered the Claim dated December 5, 2000 submitted by Claimant and the Answer of Respondents dated January 10, 2001, hereby renders the following Decision pursuant to Rule 12 of the Rules of the Board of Governors of the Pacific Exchange.

REPRESENTATION OF PARTIES

Of Claimants: William Marsh, Esq.
Resolution Law Group

Of Respondents: Ronald E. Wood, Esq.
Morgan Stanley Dean Witter

SUMMARY OF FACTS

On or about July 24, 2000, Anthony Appell ("Claimant") telephoned the Citrus Heights branch of Morgan Stanley Dean Witter ("MSDW") to inquire about a forthcoming Avici initial public offering ("Avici IPO"). He was connected to Alan Bartley, a broker, and they discussed the Avici IPO. Claimant had recently moved to California and wished to open an account with MSDW in a branch office that would be more local than the Fort Worth, Texas branch where his account was located at that time. According to Bartley, Claimant was told that the system for the allocation of the Avici IPO shares made it unlikely that Claimant would be able to obtain any shares, and, because of the timing, the shares had to be allocated by the Fort Worth branch. Bartley indicated that he would not be able to access Claimant's Fort Worth account until the next week to see if the Avici IPO shares were in the account.

The form to switch Claimant's account from the Fort Worth branch to the Citrus Heights branch was faxed to Claimant, who completed it and faxed it back to Bartley the same day. The form contained Claimant's new address. Bartley spoke with the Fort Worth broker, Sherry, and the account transfer was initiated. According to Bartley, Sherry stated that there was a possibility of Claimant receiving some shares of the Avici IPO, but they would have to be reallocated shares that were unused in an earlier allocation.

Bartley and Claimant discussed the financial requirements that Claimant's account should have at least \$100,000 in it in order to qualify to invest in the Avici IPO. However, Bartley indicated that his manager could waive this financial requirement (supported in the internal documents of MSDW). Bartley discussed Claimant's interest in the Avici IPO with his sales manager, Ed Radatz. Radatz told him to enter a GEI, and Bartley stated he left a message for Sherry to do so (no GEI was entered in the Citrus Heights branch).

Claimant wanted to invest \$25,000 in the Avici IPO. He offered to Federal Express a check to Bartley, but, according to Claimant, Bartley told him to mail it. According to Bartley, he told Claimant to deliver the funds to the San Francisco branch of MSDW. The \$25,000 was recorded in Claimant's account on July 31, 2000.

The crux of the case is what happened on the afternoon of Friday, July 28, 2000. Claimant stated that Bartley unequivocally told him "I did get you 100 shares; you are in at \$31." Brian Zagon, Claimant's attorney, testified that Bartley confirmed that he had told Claimant that he had 100 shares of the Avici IPO. Bartley testified that he would not make such an unequivocal statement. Bartley's day notes confirmed that he still had no information as of August 2, 2000. Sherry did not return his phone calls and he still had no access to the Fort Worth account. Bartley stated he might have used words like "possibly" or "probably" or that he "tried" to get 100 shares. Mail from MSDW's Fort Worth branch was still being sent to Claimant's Texas address.

Claimant and Bartley differ on what was said in the next few days regarding the Avici IPO. They discussed a stop-loss order at \$120, but they differ on whether this stop-loss order was on the shares Claimant had (Appell) or on the shares if Claimant had them (Bartley). Bartley testified he left a message for Sherry to put in such an order. No order was placed at the Citrus Heights branch, and the branch manager, Gilliam, testified that such an order would not have been accepted since the shares were not in the account.

Bartley testified that he thought the account was at the Citrus Heights branch by August 5, 2000. The fact that the Avici IPO shares were not in the account did not alarm him since it might have been due to time lags in posting to the account.

On August 8, 2000, Claimant purchased an additional 50 shares of Avici. Bartley's notes state he still did not know about the Avici IPO shares. On August 11, Claimant learned that Bartley had left MSDW. Stephen Blinsinger, his new broker, told him that there were only 50 Avici shares in his account. Claimant phoned Bartley at home and stated that Bartley confirmed that he should have 100 shares of the Avici IPO in his account.

On August 21, 2000, Bartley sent Radatz a summary of his version of the events. Bartley admitted that he destroyed notes that he considered irrelevant and that his day notes were edited for relevancy.

ISSUES PRESENTED

Did Bartley ever tell Claimant that 100 shares of the Avici IPO were purchased for Claimant's account through the Fort Worth branch or speak in a manner that could easily be misinterpreted to this effect?

RELIEF REQUESTED

Claimant demands lost profits of \$8,900, prejudgment interest of \$519, arbitration costs, and attorney's fees. Respondent requests denial of all Claimant's demands on the grounds that Claimant received no indication that he would get or did get 100 shares of the Avici IPO.

FINDINGS AND DECISION

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

Bartley did not explain the Avici IPO position to Claimant in a clear and consistent manner. Bartley offered a range of explanations, as paraphrased below:

1. Denial that he would make an unequivocal statement that the shares had been obtained for Claimant;
2. Admission that he might have said something that caused a misunderstanding, either because he was caught up in Claimant's enthusiasm or because he misunderstood the question;
3. Bartley was annoyed at MSDW at that time and might have given Claimant the wrong impression; and
4. Bartley did not want to be a "grinch" and squelch Claimant's enthusiasm.

The internal documents at MSDW concerning "hot" IPOs such as Avici warn that "ordinary 'sales talk' can be easily misinterpreted, especially if an issue is in heavy demand and a client is anxious to obtain shares."

Claimant's account at MSDW was not a new account, but one that had to be transferred from the Fort Worth branch to the Citrus Heights branch. MSDW's system of transferring accounts is cumbersome. Sherry did not return Bartley's phone calls. Bartley could not access Claimant's account because of the system, and he could not "take over the account" to do things directly. Neither Bartley nor Radatz suggested to Claimant that he should deal directly with the Fort Worth branch and not transfer the account until after any possible Avici IPO purchase.

The combination of Bartley's less than clear manner of expressing himself, the lack of communication by Sherry, MSDW's method of transferring accounts, and the delay by MSDW in changing the address of record of the Claimant has resulted in this impasse. Claimant thought that he was told that he had 100 shares of the Avici IPO, and Bartley wavered on clearly denying that he had said anything that would reasonably cause Claimant to believe this to be true.

The statements and actions of Bartley, combined with institutional problems of Morgan Stanley Dean Witter, caused Claimant damages. After considering all of the facts and circumstances, the Claimant is awarded \$2,325 in damages from MSDW.

AWARD

Claimant is awarded the sum of \$2,325 from MSDW. MSDW shall bear the costs of arbitration and reimburse Claimant's nonrefundable filing fee in the amount \$75 and hearing session deposit in the amount of \$200. MSDW shall pay \$800 towards Claimant's attorney's fees. The request for prejudgment interest is denied. MSDW shall be responsible for forum fees, payable to the Pacific Exchange, in the amount of \$600. MSDW is therefore assessed \$3,400 payable to Claimant and \$600 payable to the Pacific Exchange.

Dated: Aug. 1, 2001

Michelle Brant
Michelle Brant, Chair