

PACIFIC EXCHANGE, INC.
115 Sansome Street, 3rd Floor
San Francisco, California 94104

FILED

NOV 13 2001

In The Matter Of The Arbitration Between:

Karyn Whitham,

CLAIMANT

PCX CASE 01-L004

DECISION

Salomon Smith Barney and Larry Rush,

RESPONDENTS

The undersigned Arbitrator, having reviewed the pleadings and evidence of both Karyn Whitham ("Claimant") and Salomon Smith Barney and Larry Rush ("Respondents") in this matter, hereby renders the following Decision pursuant to Rules 12.2 and 12.29(a) of the Rules of the Board of Governors of the Pacific Exchange:

REPRESENTATION OF PARTIES

Of Claimant(s): David L. Whitham, Esq.

Of Respondent(s): Ann Parry, Esq.
Salomon Smith Barney

FACTS AND ISSUES PRESENTED BY THE PARTIES
AND ADDUCED FROM THEIR SUBMISSIONS

Claimant had a 100-day window by which to exercise an option to sell Nordstrom stock, commencing March 31, 2001. Through a referral from her former employer, Nordstrom, Claimant contacted Respondent-broker Rush. Claimant allegedly contacted Respondent Rush on the first week of April 2000 to discuss selling two separate blocks of stock for \$34.00 per share. Block one contained 568 shares valued at \$23.09375 per share and block two contained 651 shares valued at \$25.6875 each. Claimant alleges Respondent Rush informed her that she needed to send him an authorization letter as a prerequisite for trading. Despite a few days of delay, Respondents faxed this form and a new account form to Claimant who, in turn, signed and returned the documents via fax Monday, April 10, 2000. For the most part, the forms were purposefully left blank pursuant to Respondent broker's instructions. On the same day, Claimant allegedly spoke with Respondent broker to confirm receipt of the fax. During the call, the parties

allegedly discussed Respondent's commission and Respondent is said to have confirmed Claimant's open order to sell her stock at \$34.00. Later in the week, the price of Nordstrom stock evidently reached \$34.50.

One week later, on Monday morning, April 17, 2000, Claimant called Respondent Rush and was informed by his assistant that Respondent Rush did not place a sell order for Claimant's stock. Later that day, Respondent Rush called Claimant and left a recorded message. Respondent Rush's message acknowledged Claimant's earlier order to sell her shares at \$34.00, but stated "I cannot take phone orders." Respondent's message further advised that his outgoing voice mail message states "If you need to place an order, talk to [my assistant] or call back to the operator." Respondent's message also explained that the [sell] order was not placed since neither he nor his assistant personally confirmed the order. Lastly, Respondent's message contains a statement that, "I have been delusional last week and I have probably made very very few outgoing phone calls." Claimant contends this statement should be treated as the broker's admission of neglect.

Ultimately, on June 25, 2000, Claimant attempted to exercise her option to sell her Nordstrom shares with another brokerage house. Claimant was evidently able to sell only block one of her Nordstrom shares (560) for \$25.00 each, resulting in a net profit of \$1,082.75.

Claimant contends Respondent Rush was negligent in failing to trade an open sell order proximately resulting in a \$10,523.44 loss. To keep within the jurisdictional amount of a simplified arbitration, Claimant seeks only \$10,000 in damages excluding costs.

II

Respondents dispute much of Claimant's version of the facts, including the time and content of the parties' various telephonic communications. In short, Respondents maintain Claimant merely considered selling the stock in early April and that by the time she "gave proper instructions to exercise and sell, the price of the Nordstrom stock had declined below \$34.00." Respondents allege they received a copy of Claimant's "Personnel Options Status" from Nordstrom after the market closed on April 11th, 2000 and that receipt of this document was impliedly a condition precedent to implementing Claimant's sell instruction. Respondent broker's recorded April 17th message, *supra*, explained that the order was not placed because it was not made directly (in real time versus phone messages) to Respondent broker or a designated Respondent employee. The purpose for this requirement is the assurance of a "meeting of minds." Given this scenario, Respondents insist there was no meeting of the minds and assert Claimant's allegations are without merit.

Respondents do not directly address the import of this statement or possibly misstatement.

III

Following her receipt of the April 17th news that her stock was not sold, Claimant complained to Respondents without success and eventually attempted to exercise her option through another brokerage house, albeit some twelve days before the option expired. The record is unclear, if not silent, on any other attempts at remedial action, and thus, the possibility of mitigation of damages or maximizing any lost profits.

REQUESTED RELIEF

Claimant seeks \$10,000.00.

Respondents seek dismissal of Claimant's claims and costs.

PROCEDURAL INFORMATION

This was a simplified arbitration involving only written submissions and no live testimony or oral argument. Claimant's claim was submitted on March 26, 2001 and Respondents' answer was filed on May 23, 2001. All evidence, exhibits, written arguments and promises contained therein were originally submitted to the arbitrator on September 18, 2001. However, because Claimant's final submission was received by the Exchange on September 13, 2001 and due to events that occurred on September 11, 2001, Respondents were permitted additional time in which to lodge any final reply.

AWARD

From the cold record, this arbitrator finds simple negligence on the part of Respondent broker in addition to Claimant's partial failure to make reasonable efforts to mitigate. Both Respondents are jointly and severally liable to Claimant in the sum of \$5,307.45. Respondents will also reimburse Claimant for \$75.00 hearing session deposit. Therefore, the total due from Respondents to Claimant is \$5,382.45. Each party shall bear its own costs and attorneys fees. Forum fees in the amount of \$150.00 payable to the Pacific Exchange are assessed against Respondents.

Date: Nov 7, 2001



Elliott Finkel, Esq.