

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

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PCX ARBITRATION

In the Matter Of The Arbitration Between:

PAUL F. PELOSI, JR.,

PCX Arbitration No. 01-S009

Claimant.

DECISION

v.

BANC OF AMERICA SECURITIES,  
LLC, and EDWIN BARRETTO.

Respondents.

NOV 3 2002  
PCX ARBITRATION

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The undersigned Arbitrators, having read and considered the Claim submitted by Claimant on June 12, 2001, 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

For Claimant, Richard Sacks and Irwin Stein, representatives

For Respondents, Peter Boutin and Julie Kole, Keesal, Young and Logan, counsel

SUMMARY OF FACTS

Claimant's Statement of Claim:

Claimant Pelosi alleges three causes of action. The first cause of action is based on breach of fiduciary duty. This claim concerns two securities, namely, those of Chyron Corporation ("Chyron") and American Champion Entertainment ("American Champion"). In each instance, among other things, Claimant alleges that Respondents were selling the respective securities while urging clients and Claimant to purchase securities of Chyron and American Champion. Similarly, Respondent Barretto's purchase and sale prices for these securities were considerably better than that of Claimant. Respondent Barretto is supervisor of Claimant, where both worked at Respondent Banc of America Securities.

With respect to American Champion, Claimant alleges that assistants to Respondent Barretto transferred the purchase of 26,000 shares from Respondent Barretto's account to Claimant's account without notification to Claimant. Respondent purchased the shares on March 6, 2000, at \$4.40, and when the transfer was completed on March 14, 2000, the price per share was \$5.40. Respondent Barretto should be liable to Claimant in the amount of \$125,000

Concerning Chyron, Claimant alleges that Respondent Barretto presented himself as a knowledgeable salesman in new media and stated that Chyron would be a success similar to another security, Sonic Foundry, which had appreciated from \$10 to \$125 in a three-month period some months before. Since Chyron stock was somewhat illiquid, Claimant's purchases enhanced the prices at which Respondent Barretto were selling. Even when Claimant was selling on April 6, 2000, as a result of a margin call, Respondent Barretto was assuring Claimant that Chyron had solid prospects. Respondent Barretto drew a false parallel between Sonic Foundry and Chyron, and Respondent Barretto should be liable to Claimant in the amount of \$1,157,949. The total loss claimed for both securities is \$1,282,949.

Claimant's second cause of action against Respondent Banc of America Securities is based on an alleged error regarding an options trade involving 1000 OFX Calls. Claimant alleges that on June 12, 2000, Claimant purchased these options at an average price of \$0.75 and the next day, June 13, 2000, sold all of them at an average price of \$0.4375. On both days, Claimant received oral confirmations. However, later on June 13, 2000, Claimant suspected a booking error and asked the trade be flattened. That request was denied. The next day, June 14, 2000, the position was flattened at a loss of \$252,000 to Claimant, without any investigation on the part of Respondent Banc of America Securities as to booking error. Claimant seeks from Respondent Banc of America Securities, \$43,750 for his sale of the options and also \$252,000 charged to his account.

Claimant's third cause of action is against Respondent Banc of America Securities for alleged overcharging of commissions to Claimant's account on June 14, 2000, in the amount of \$10,920. Respondent Banc of America Securities was of the belief that many of its employees may not have understood its commission schedule. However, the only employee account adjusted for commission was that of Claimant. Claimant seeks from Respondent Banc of America Securities in the amount of \$10,920.

Respondents' Answer:

With respect to the claim for breach of fiduciary duty relating to American Champion, Respondents assert that Respondent Barretto did not owe Claimant a fiduciary duty since he was a fellow registered representative and a fellow employee; Respondent Banc of America Securities was not a market maker in the security; the price at which Respondent Barretto purchased was not dramatically better, whereas on March 6, 2000, his purchase price was same as that of Claimant, namely, \$4.463 as was the case of the highest price

paid by both, which was \$6.12; the purchase price of \$4.40 on March 6 but received a higher price on March 14, 2000 is misleading in that the purchase price should have been \$4.46, but Claimant received a favorable price due to key punch error; Claimant was enthusiastic about the prospects of American Champion and needed no encouragement; the fact that another employee of Respondent Banc of America Securities made a small profit shorting the stock in March 2000 does not give rise to liability on the part of either Respondent.

With respect to the claim for breach of fiduciary duty relating to Chyron, Respondents assert that: Respondent Barretto as a fellow employee owed no fiduciary duty; Respondent Banc of America Securities had no relationship with Chyron and did not make a market in Chyron and did not provide research coverage on that company; Claimant, as a Series 7 licensed salesperson was entitled to listen to Respondent Barretto's opinion on the stock, but cannot look to him as a form of "investor insurance." Claimant and Respondent Barretto purchased Chyron on the same day, March 7, 2000, whereas Respondent liquidated his position on April 7, 2000, and Claimant not until May 5, 2000; Respondent's purported statement: "buy Chyron, it is the next Sonic Foundry" is not actionable as a matter of law because it is nothing more than "puffing;" to the extent Claimant asserts that Respondent violated securities law by dissuading him to sell his position, that is not actionable because the damages are speculative; and the claim that Respondent Barretto was given preferential treatment is preposterous since the margin call Claimant received was due to a drop in the price of Chyron, as did most securities in the latter part of March 2000.

In response to the claim of a purported trading reporting error relating to 1000 OEX June 805 calls, Respondents assert Claimant was engaging in revisionist history for there was no error. Following the execution of the trades, according to Respondents, Claimant regretted his actions. He asked for suggestions from the trader to remedy the situation and eventually adopted one of the suggestions. Relying on an internal memorandum where the matter was looked into, Respondents claim that Claimant was trying to evade higher margin requirements.

In response to the claim of reimbursement for alleged inconsistent commissions, Respondents state that employees are charged a favorable rate for options trading, and employees in New York are given an even more favorable rate. Beginning in early 2000, Claimant began to arrange surreptitiously to have a large number of his trades billed under other "rep numbers" of other employees of Respondent Banc of America Securities. Respondent Banc of America merely rebilled Claimant for the correct commissions in May 2000, but not for other trades that took place from December 1999 to April 30, 2000, where Claimant engaged in actively misleading Respondent Banc of America Securities.

Respondents assert the following affirmative defenses: Claimant fails to state a claim; Damages suffered by Claimant was the result of his own wrongful conduct and not that of Respondents; Damages Claimant suffered were proximately caused by himself; Claimant authorized and ratified actions of Respondents; Claimant is barred from his

claim due to doctrines of waiver and estoppel; Claimant failed to use the requisite due diligence in monitoring and managing his own account; Claimant, as a fully licensed securities salesperson, voluntarily assume the risk of investing; and Damages Claimant seeks are too speculative to be awarded.

### ISSUES PRESENTED

#### Issues Raised by Claimant:

At the hearing, Claimant raised theories, including the following: that he was unable to prove his case effectively as Respondents failed to provide him with the documents he sought; that he was a customer of Respondents; that he was prevented in selling his securities; that Respondents recommended securities which were not suitable; that there was a lack of supervision; that Respondents breached their fiduciary duties; and that there was unauthorized trading in his account.

#### Issues Raised by Respondents:

Theories emphasized by Respondents at the hearing include the following: that Claimant did research on the securities he purchased and did not rely on Respondents; that Respondents did not make a market in the securities involved, did not provide research reports, nor did Respondent Edwin Barretto do independent research; that Claimant was not a customer of Respondents; that Claimant had not complained about the securities in his account which he claimed he did not purchase; that Claimant was not a customer of Respondents; that no fiduciary duty was owed by Respondents to Claimant; that there were no supervisory issues relating to Claimant; that the trades were that of Claimant and there was no unauthorized trading; that Claimant ratified the trades.

### RELIEF REQUESTED

Claimant seeks the following relief:

1. For the first cause of action the amount of \$1,282, 949;
2. For the second cause of action the amount of \$43,7560 for his sale of the options, and amount charged to Claimant's account of \$252,000; and
3. For the third cause of action the amount of \$10,920 based on inconsistent commissions.

Respondents seek the following relief by way of denial and affirmative defenses:

1. Claimant be denied any damages;
2. Respondents be awarded their costs and other relief deemed proper by the panel.

## FINDINGS AND DECISION

### Motions:

Claimant in his motion sought a negative inference or to strike Respondents' pleading relating to Respondents' failure to supply him with documents sought. The panel grants that motion on drawing a negative inference but on grounds which differed from that asserted by Claimant.

### 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:

The panel determines that the various theories advanced by Claimant are not supported by the factual setting of the case.

### 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:

The panel of arbitrators determines that Claimant did not meet his burden of proof relating to his claims.

### Award:

The panel finds for the Respondents and that Claimant takes nothing. Each party shall bear its own costs.

### Forum Fees:

Forum fees, totaling Five Thousand Four Hundred Dollars (\$5,400.00), shall be borne one half by Claimant and one half by Respondents.

Dated: November 6, 2002

Dated: 11/19/2002

Dated: \_\_\_\_\_

  
Robert L. Liu, Chairperson

  
Kenneth Domingues

  
J. Holmes Armstead