

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Charles R. Tantillo and
Financial Association, Inc.
Claimant

vs.

89-01624

Tidd Lackey & Co., Inc. and Donaldson,
Lufkin & Jenrette Securities Corporation
Respondents

REPRESENTATION OF PARTIES

Claimants Charles R. Tantillo and Financial Associates, Inc. were represented by Russell S. Jones of the Law Offices of Shughart, Thomson & Kelroy, Kansas City, Missouri.

Respondent Donaldson, Lufkin & Jenrette Securities Corporation was represented by Susan L. Hoffman of Tuttle & Taylor, Los Angeles, California and Joseph D. Donnelly of Donaldson, Lufkin & Jenrette Securities Corporation, New York, New York.

CASE SUMMARY

In a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on June 2, 1989, Claimant Charles R. Tantillo ("Tantillo") and Financial Associates, Inc. ("Financial") alleged that Respondents failed to execute on order to sell 30,000 shares of Hammer Technologies, Inc. common stock. As alleged in the claim, Claimants maintained a brokerage account with Respondent Tidd, Lackey & Co., Inc. ("Tidd Lackey"). The Pershing division of Respondent Donaldson, Lufkin & Jenrette Securities Corporation ("Donaldson") served as the clearing broker, settling transactions for the accounts of Tidd Lackey's customers and for Tidd Lackey's trading account. Relying on the recommendations of Tidd Lackey, Claimants purchased shares of Hammer Technologies, Inc. common stock, eventually owning 30,000 shares. No certificates for the shares were provided even though Claimants requested delivery. In April of 1986, Claimants instructed Tidd Lackey to sell one-half of the Hammer Technologies shares for \$14.50 purchase. In addition, Tidd Lackey was instructed to sell all of Claimants Shares in the event that the price fell in the market to \$9.75 per share. On Monday, April 21, 1986, after Claimants became aware of an article questioning the value of the stock, Tantillo attempted to contact Tidd Lackey by telephone, but was unsuccessful. On April 22, 1986, Tantillo sent a mailgram requesting confirmation of the

sale of one-half the position in Hammer Technologies at \$14.50 and liquidation of the balance at \$9.75. On April 24, 1989, Tantillo received a telephone message from Tidd Lackey that the shares had not been sold as requested due to a NASD trading halt, but the shares were now on the market and the sell orders were transmitted to Donaldson.

As further alleged, on April 21, 1986, Tidd Lackey purchased approximately \$7,500,000.00 of common stock of Hammer Technologies and certain related companies for Tidd Lackey's account and for the account of third-party customers of Tidd Lackey. Throughout April 21st, the price of Hammer Technologies dropped from \$14.67 per share to \$5.00 per share at the end of the day. In addition, Donaldson took control of the operations of Tidd Lackey on April 21, 1986 as a means of protecting Donaldson's economic interest because there was insufficient collateral in Tidd Lackey's account to cover Donaldson's obligations to settle with and pay the parties selling securities to Tidd Lackey. Subsequent to taking control, Donaldson failed to promptly execute the claimants' sell order and interposed its own interests by selling 256,000 Hammer Technologies shares on April 24 for its own account to partially recover monies owed to it by Respondent Tidd Lackey. Furthermore, Respondents failed to execute Claimants' sell order even though an active market remained in the stock during the week beginning April 21, 1986. After that week, the market price dropped below \$2.00 per share, and claimants were unable to sell at a price which compared to the price available the week of April 21, 1986. Tidd Lackey misrepresented to claimants that it was seeking buyers for Claimants shares and Donaldson failed to disclose that it was liquidating Tidd Lackey's trading account in preference to Claimants' interest. Claimants alleged violation of Section 10(b) of the Securities Exchange Act of 1934, breach of fiduciary duty, breach of contract, interference with contract, negligence and violation of the Kansas Securities Act.

In a Statement of Answer filed with the NASD on August 14, 1989, Respondent Donaldson, Lufkin & Jeurette Securities Corporation denied the material allegations of the Statement of Claim, stating that: 1) Pershing was never informed prior to May 30, 1986 that claimants desired to have the stock certificates mailed to them; 2) No information was ever received by Pershing indicating that Claimants had requested sale of their stock; 3) Donaldson did not "take control" of Tidd Lackey's operations on April 21, 1986, or anytime thereafter, though its employees were present; 4) Donaldson never liquidated Tidd Lackey's account, but did make a payment to Shearson for certain shares of stock. Furthermore, Donaldson alleges that the claims under Rule 10b-5 and for breach of fiduciary duty could not be asserted against them.

Respondent Tidd, Lackey & Co., Inc. did not file a Statement of Answer.

RELIEF REQUESTED

Claimants Charles R. Tantillo and Financial Associates, Inc. requested entry of an award against Respondents in the amount of \$364,000.00 plus interest at the legal rate, costs and expenses of arbitration, and for an unspecified amount of punitive damages.

Respondent Donaldson, Lufkin & Jenrette Securities Corporation requested that an award be entered for Pershing and against Claimants and that the Claimants be ordered to reimburse Pershing for its costs and attorneys' fees incurred in defending the claim.

OTHER ISSUES

Respondent Tidd, Lackey & Co., Inc. did not file an answer, respond to the notice of hearing or appear at hearing. The panel, upon review of the record, determined that Respondent Tidd, Lackey & Co., Inc. had received due notice of the claim and of the hearing and, pursuant to Section 29 of the Code of Arbitration Procedure, determined that they would proceed with the arbitration of the controversy.

At hearing, the panel requested post-hearing memorandum from the parties which were forwarded to the panel upon receipt by the NASD.

PROCEDURAL MATTERS

On March 12 and 13, 1991 in Kansas City, Missouri during a hearing lasting a total of five (5) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed on April 27, 1989 by Claimant Charles R. Tantillo, on April 27, 1989 by Charles R. Tantillo on behalf of Respondent Financial Associates, Inc. and on August 9, 1989 by Joseph D. Donnelly on behalf of Respondent Donaldson, Lufkin & Jenrette Securities Corporation.

Respondent Tidd, Lackey & Co., Inc. did not file with the NASD a properly executed submission to arbitration, but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and is bound by the determination of the arbitration panel on all issues submitted.

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. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

AWARD

The arbitration panel, having considered the pleadings, the testimony, the evidence presented at the hearing, and the post-

hearing submissions, has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Tidd, Lackey & Co., Inc. is liable for and shall pay to Claimants Charles R. Tantillo and Financial Associates, Inc the sum of \$72,225.00 plus interest at the rate of 5.25% per annum from May 2, 1986 until the award is paid;

2. Respondent Donaldson, Lufkin & Jenrette Securities Corporation is liable for and shall pay to Claimants Charles R. Tantillo and Financial Associates, Inc. the sum of \$62,775.00 plus interest at the rate of 5.25% per annum from May 2, 1986 until the award is paid;

3. The claim for punitive damages is dismissed and denied;

4. Each party shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein;

5. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$200.00 and return the hearing session deposit in the amount of \$550.00 previously deposited with the NASD by the Claimants Charles R. Tantillo and Financial Associates, Inc. Respondent Donaldson, Lufkin & Jenrette Securities Corporation is liable for and shall pay to the NASD forum fees in the amount of \$3,750.00.

Dated:

June 10, 1991

Robert E. Fitzgerald, Jr.
Robert E. Fitzgerald, Jr. Esq.
Presiding Chair
Public Arbitrator

June 2, 1991

David I. Lewin
David I. Lewin
Public Arbitrator

June 11, 1991

James S. Allen, Jr.
James S. Allen, Jr., Esq.
Industry Arbitrator