

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Timothy R. McLaughlin

89-02975

Name of Respondent(s)

Richard T. Fisher

REPRESENTATION

For Claimant: Timothy R. McLaughlin ("McLaughlin") was represented by Matthew D. Manghini, Esq. of Busch & Eppenberger, located in St. Louis, Missouri.

For Respondent: Richard T. Fisher ("Fisher") was represented by David Wells, Esq., Kenton E. Knickmeyer, Esq. and Jennifer J. Harner, Esq. of Thompson & Mitchell, located in St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: October 23, 1989.

Amended Statement of Claim filed: December 29, 1990.

Claimant's Submission Agreement signed on: October 17, 1989 and December 17, 1990.

Statement of Answer and Affirmative Defenses filed by Respondent Richard T. Fisher on: March 2, 1992.

Respondent Richard T. Fisher's Submission Agreement signed on: February 2, 1992.

The Statement of Claim filed on October 23, 1989 named the following respondents: Drexel Burnham Lambert Incorporated; Burns Pauli and Company, Incorporated; Richard Gray; Gordon Schreier and James Morrison. On May 29, 1990, Drexel Burnham Lambert Incorporated filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code. Pursuant to Section 362(a) of the Bankruptcy Code, all proceedings against Drexel Burnham Lambert Incorporated were stayed.

On May 7, 1990, the NASD was informed by letter that Claimant McLaughlin had reached a resolution of his dispute with Respondents Burns Pauli & Company, Inc. and Richard Gray. McLaughlin withdrew with prejudice his claims against these two respondents.

On September 27, 1992, the NASD was informed by letter that Claimant was

withdrawing with prejudice his claims against Respondents Gordon Schweser and James Morrison. Accordingly, the file was closed by the NASD on October 2, 1990.

On December 27, 1990, Claimant filed an Amended Statement of Claim naming Richard Fisher as a respondent. The file was reopened on or about August 27, 1991 after receipt of the file from archives. Fisher was served with the Amended Statement of Claim on or about December 18, 1991.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: June 8, 1992 for Three (3) sessions

Hearing Location: St. Louis, Missouri

CASE SUMMARY

Claimant Timothy R. McLaughlin alleged that Respondent Richard T. Fisher, while employed by or acting as an agent for Drexel Burnham Lambert Incorporated, engaged in the unauthorized sale of McLaughlin's holdings in Panteras Corp. and claimed that the sale was executed to cover a margin call. McLaughlin specifically alleged the following:

1. On or about Wednesday, October 21, 1987, he was informed by his account representative, Rick Gray ("Gray") that he was going to need to meet a margin call of \$511,000.00 by the end of the next day. McLaughlin agreed at that time to sell his miscellaneous small stock holdings and, if necessary, to sell some of his Panteras shares to meet the call. Drexel sold the miscellaneous shares and reduced the call to approximately \$372,000.00;
2. McLaughlin called Gray late Wednesday evening to tell him he had decided to keep his Panteras shares and would raise capital from other sources to cover the margin call;
3. McLaughlin called Gray before the market opened on Thursday, October 22, 1987 and again indicated he would be covering the call from other sources. Gray called back later, informing McLaughlin that he had personally instructed Drexel's trader not to sell the Panteras shares and that McLaughlin had until 3:00 p.m. St. Louis time to raise the funds to cover the margin call before Drexel would begin liquidating his holdings;
4. At approximately 10:45 a.m. Thursday, Gordon Schweser of Drexel called McLaughlin pushing for him to meet the margin call and McLaughlin repeated that he was not going to sell the Panteras shares and planned to meet the call by 3:00 p.m. with funds from other sources;
5. McLaughlin was busy that morning making the arrangements for meeting the margin call with Drexel's margin department and attempting to make a private sale of his 130,000 shares of Panteras shares to an undisclosed party. At approximately 12:45

p.m., McLaughlin was informed that 130,000 shares of Panteras had just sold for 4-7/8;

6. McLaughlin called Drexel and Schweser informed him that 130,000 shares of his Panteras had been sold, a decision that McLaughlin later discovered had been ordered by Fisher; and

7. McLaughlin met the margin call by 3:00 p.m. CST with money other than the Panteras proceeds. By October 30, 1987, Panteras closed at a 7 bid, 7-1/2 ask.

Respondent Richard T. Fisher denied the material allegations of wrongdoing, misfeasance, bad faith, and unauthorized conduct, alleging that:

1. Late on the morning of October 22, 1987, McLaughlin informed Drexel that he would not be able to have any securities and/or bonds transferred to Drexel by that date and was trying to cover the margin deficiency with cash, but that he could not guarantee that he could meet the margin with a cash payment by the end of the day;

2. Drexel advised McLaughlin that absent such a guarantee, it would have to liquidate his position to protect Drexel's interests;

3. At 12:30 p.m. on October 22nd, the margin department of Drexel's main office directed that the margin deficiency be covered and 130,000 shares of McLaughlin's 192,500 shares was sold at 4-7/8 per share to cover the deficiency, leaving a margin debit of approximately \$100,000.00; and

4. As branch manager, Fisher was bound to comply with this order from the main office and the action was within all federal and regulatory rules.

Fisher asserted as affirmative defenses that:

1. Pursuant to Paragraph 7 of the Customer's Agreement executed by McLaughlin, Fisher, as Drexel's agent, was authorized to sell the Panteras stock to meet McLaughlin's margin deficiency and protect Drexel's interests as a creditor of McLaughlin;

2. The Statement of Claim failed to state a claim upon which relief can be granted;

3. McLaughlin's Statement of Claim was barred by laches for his failure to raise the claims promptly;

4. The claim for damages should have been denied because they are incapable of estimation;

5. The claim for damages should have been barred due to McLaughlin's failure to mitigate because Drexel offered to re-acquire his position in Panteras at a lower price than that at which it was sold; and

6. At all times, Fisher was acting in a representative capacity under the direction and control of Drexel's main office in New York, did not have any discretion regarding the computer-generated margin calls made by Drexel's main office and was bound to meet all margin deficiencies under the rules of the NASD and the SEC relating to margin.

RELIEF REQUESTED

Claimant requested the entry of an award against Respondent in the sum of \$308,750.00 plus interest at 9% per annum since October 22, 1987; attorneys' fees in the sum of 1/3 of the total damages; and punitive damages in the sum of \$2,000,000.00. The amounts received in settlement from prior Respondents would be credited against any recovery received from Fisher.

Respondent requested that the claim against him be dismissed and that the costs associated with his defense be charged against the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

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.

On June 8, 1992, Respondent Fisher made a motion for a directed verdict at the close of the Claimant's case. After argument by the parties, the panel determined that the motion would be denied.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Richard T. Fisher is liable for and shall pay to Claimant Timothy R. McLaughlin the sum of One (\$1.00) Dollar;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

OTHER COSTS

Pursuant to Section 43(c) and Section 37 of the Code of Arbitration Procedure, Respondent Richard T. Fisher shall pay for all costs of the court reporter except for the cost of any transcription ordered by Claimant Timothy R. McLaughlin.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following total Forum Fees are assessed: Three (3) sessions x Hearing

Session Deposit of \$1,000.00 = \$3,000.00.

The National Association of Securities Dealers, Inc. shall retain the claim filing fee of \$250.00 and refund the \$750.00 hearing session deposit previously deposited by the Claimant Timothy R. McLaughlin. Respondent Richard T. Fisher is liable for and shall pay to the NASD forum fees in the sum of \$3,000.00.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCERNING ARBITRATORS' SIGNATURE

Dated:

C. J. McEnery, Jr.
C. J. McEnery, Jr.
Public Arbitrator
Chairperson

July 29, 1992

Thomas A. Cipolla
Thomas A. Cipolla, Esq.
Public Arbitrator

July 29, 1992

Jan M. Jansen
Jan M. Jansen
Industry Arbitrator

July 31, 1992

Date of Service on Parties:

August 3, 1992