

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Steven F. Isenberg, M.D.

90-01174

Names of Respondents

John Fink;
Gregory Fisher;
Jeffrey Fisher;
Robert Fisher;
Richard Fisher;
William Scott; and
Drexel Burnham Lambert, Inc.

REPRESENTATION

Claimant was represented by Francis E. Pennington, Esq. of Green, Hoffman & Dankenbring, St. Louis, Missouri.

Respondent, John Fink was originally represented by Jay L. Levitch, Esq. of the Stolar Partnership of St. Louis, Missouri who filed an answer on Fink's behalf. Thereafter, Fink filed a petition in bankruptcy on December 12, 1990 under Chapter 13 of the U.S. Bankruptcy Code and Jay L. Levitch, Esq. withdrew as counsel of record for Fink. Fink appeared at each hearing date in this matter pro se.

Respondent, Gregory Fisher was represented by Alan E. Popkin, Esq. and Daniel N. Bloom, Esq. of Busch & Eppenberger, St. Louis, Missouri.

Respondent, Jeffrey Fisher was represented by J. Thomas Archer, Esq. and Helen Paulin Gab, Esq. of Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri.

Respondent, Robert Fisher was represented by David Wells, Esq. and Kenton E. Knickmeyer, Esq. of Thompson & Mitchell, St. Louis, Missouri.

Respondent, Richard Fisher was represented by David Wells, Esq. and Kenton E. Knickmeyer, Esq. of Thompson & Mitchell, St. Louis, Missouri.

Respondent, William Scott was represented by Stanley Yorsz, Esq. of Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania.

Respondent, Drexel Burnham Lambert, Inc. which was represented by Karen M. Cullen, Esq. of Drexel Burnham Lambert, Inc., New York, New York filed for bankruptcy under Chapter 11 U.S.C. on May 20, 1990 and was removed without prejudice as a party from this action by the NASD Arbitration Department in accordance with the automatic stay provisions of the Federal Bankruptcy Code.

CASE INFORMATION

The Statement of Claim was filed with the NASD by Claimant, Steven F. Isenberg on April 25, 1990.

Claimant, Steven F. Isenberg's Submission Agreement was signed on April 20, 1990.

A Statement of Answer was filed with the NASD by Respondent, John Fink on June 25, 1990.

Respondent, John Fink's Submission Agreement was signed on May 31, 1990.

A Statement of Answer was filed with the NASD by Respondent, Gregory Fisher on June 25, 1990.

Respondent, Gregory Fisher's Submission Agreement was signed on June 14, 1990.

A Motion for Temporary Stay, Request for Clarification of Statement of Claim, Motion to Dismiss and Statement of Answer was filed with the NASD by Respondent, Jeffrey Fisher on June 25, 1990.

Respondent, Jeffrey Fisher's Submission Agreement was signed on May 25, 1990.

A Response of Claimant, Steven F. Isenberg to Respondent, Jeffrey Fisher's Motion to Dismiss was filed with the NASD on August 14, 1990.

A Joint Temporary Motion to Stay the Arbitration by Respondents, John Fink, Jeffrey Fisher and Gregory Fisher was filed with the NASD on or about June 25, 1990.

Claimant, Steven F. Isenberg filed an Amended Statement of Claim and a Response to the Joint Motion to Stay the Proceeding with the NASD on August 14, 1990.

Respondent, John Fink filed an Answer to the Amended Claim with the NASD on September 18, 1990.

Respondent, Jeffrey Fisher filed an Alternative Answer to the Amended Statement of Claim with the NASD on September 26, 1990.

Respondent, Gregory Fisher filed an Answer to the Amended Claim with the NASD on October 4, 1990.

Claimant, Steven F. Isenberg filed a Second Amended Statement of Claim with the NASD on November 12, 1990.

Respondent, Gregory Fisher filed a Second Joint Temporary Motion to Stay the Proceeding with the NASD on January 25, 1991.

Respondent, Jeffrey Fisher filed an Answer to the Second Amended Statement of Claim with the NASD on February 6, 1991.

Respondent, Richard T. Fisher Filed and Answer to the Second Amended Statement of Claim with the NASD on February 20, 1991.

Respondent, Robert C. Fisher filed an Answer to the Second Amended Statement of Claim with the NASD on February 20, 1991.

Respondent, Gregory Fisher filed an Answer to the Second Amended Claim with the NASD on March 5, 1991.

Respondent, William C. Scott filed an Answer to the Second Amended Claim with the NASD on March 11, 1991.

Respondent, William C. Scott's Submission Agreement was signed on March 7, 1991.

Respondent, John Fink did not file a written Answer to Claimant Steven F. Isenberg's Second Amended Statement of Claim.

Respondent, Drexel Burnham Lambert, Inc. did not file a written Statement of Answer to the Claim, Amended Statement of Claim or Second Amended Statement of Claim due to its bankruptcy filing on May 20, 1990.

HEARING INFORMATION

Pre-Hearing Conferences were held without the arbitrators on February 4, 1991 for One (1) Session and with the arbitrators on March 14, 1991 for One (1) Session to consider the various Motions to Stay which were filed by the Respondents.

The Dates of the Hearing and the number of Sessions held on each hearing date were as follows:

October 22, 1991 for Two (2) Sessions;
October 23, 1991 for Two (2) Sessions;
October 24, 1991 for Two (2) Sessions;
October 25, 1991 for Two (2) Sessions;
November 24, 1991 for Two (2) Sessions;
November 25, 1991 for Two (2) Sessions;
November 26, 1991 for Two (2) Sessions;
November 27, 1991 for Two (2) Sessions;
December 6, 1991 for Two (2) Sessions;
December 7, 1991 for Two (2) Sessions; and

December 8, 1991 for Two (2) Sessions.

The Hearing Location was St. Louis, Missouri.

CASE SUMMARY

Claimant, Steven F. Isenberg ("Isenberg") alleged that he was a forty year old physician living and practicing in Indianapolis, Indiana. Isenberg alleged that prior to September, 1987, he had very little experience investing in stocks and bonds and one unpleasant experience with options trading and some real estate investments which he managed himself. Isenberg alleged that most of his liquid assets were safely invested in mutual funds. In September of 1987, Isenberg alleged that he met with Respondent John Fink ("Fink"). Isenberg alleged that Fink touted his experience, his good track record and his commitment of thorough research and hard work. Isenberg alleged that he discussed his investment objectives with Fink which were to open a securities account to hold safe, high grade, income producing stocks and bonds. Isenberg also stated that he wanted to stay away from options trading. As a result of this meeting with Fink, Isenberg opened an account with Fink at Respondent Drexel Burnham Lambert, Inc., ("Drexel"). Isenberg did not give Fink discretionary trading and in fact all trades were to be cleared with Isenberg before they were made.

Isenberg alleged that during the first 4 months of the account several of the transactions made in his account were call options despite Isenberg's instructions not to trade options. Isenberg alleged he met with Fink in March 1988 and Respondent Gregory Fisher ("G. Fisher") who was introduced as a partner of Fink. Isenberg alleged that Fink and G. Fisher recommended that Isenberg liquidate his mutual funds and consolidate all of his investments at Drexel to be managed by Fink and G. Fisher.

In April 1988, Isenberg opened 5 more accounts at Drexel including a pension plan account, an individual retirement account ("IRA"), and three custodial accounts for his children.

Isenberg alleged that the level of trading in his individual account steadily increased and despite Isenberg's concerns voiced to Fink, Isenberg was told that the type and frequency of the trades in the account were in Isenberg's best interests. Isenberg alleged that on repeated occasions throughout the life of his account he asked Fink to provide both him and his accountant with a detailed statement of the trading in the account for use in preparation of Isenberg's 1988 tax return. It was not until August of 1989 that Isenberg received a detailed report of his account performance in 1988. The report was furnished by Respondent William Scott ("Scott"), who had been co-branch manager of Drexel's Clayton, Missouri Office and was not provided by Fink. Isenberg alleged that the report furnished by Scott had a significantly lower gain than the report furnished by Fink.

Isenberg alleged that Fink intentionally misled him regarding the performance of his account and that Fink's willful deception led him to trade the account aggressively through volatile and speculative stocks that could produce long term profits. Isenberg alleged that this strategy subjected

his portfolio to great risk of loss.

Isenberg also alleged that Fink, G. Fisher and Respondent, Jeffrey Fisher ("J. Fisher") and other Drexel brokers participated in a scheme to purchase large blocks of Panteras, Inc. ("Panteras"), a pizza company, which was a St. Louis company that was acquiring another large pizza company based in Dallas, Texas called Pizza Inn. Isenberg alleged that 52,800 shares of Panteras stock were purchased in his account by Fink without prior approval and that Isenberg lost over \$400,000 alone on this one transaction in his individual securities account and other smaller purchases of Panteras made in his pension account and IRA.

The foregoing allegations by Isenberg were alleged to be violations of the Federal Securities Laws, the Missouri State Securities Law, common law fraud and breach of fiduciary duty.

Respondents Fink, J. Fisher and G. Fisher filed a Joint Temporary Motion to Stay the arbitration in which it was alleged that Isenberg's claim should be stayed due to the bankruptcy filing of Respondent, Drexel. Fink, J. Fisher and G. Fisher alleged they would be prohibited from proceeding against Drexel with any claims they had against Drexel and that ordinary discovery could not be obtained from Drexel which would prejudice them in their defense against the Claims of Isenberg.

Respondent Fink requested that Isenberg's Claim be clarified because the Claim lacked specificity as to which Federal and/or State laws were violated. Fink reserved the right to amend his answer at such time as Isenberg's claims were more definitely stated.

Respondent Fink denied that any trades were made without the prior authorization of Isenberg and denied being unavailable when Isenberg tried to reach him. Fink asserted that the trading volume did increase in Isenberg's account, but that Isenberg requested this increased trading and was fully aware of it. Fink denied that he was dilatory in providing Isenberg with information in order for him to prepare his 1988 tax return. Fink denied that he engaged in any improprieties in connection with the purchase of Panteras stock or that he engaged in any deception of Isenberg, willful or otherwise. Fink alleged that the purchase of Panteras stock was not done unilaterally, but with the prior approval of Isenberg and Fink denied that he engaged in any conspiracy to manipulate the price of Panteras stock. Fink also asserted certain affirmative defenses including, but not limited to, ratification, estoppel, waiver and that Isenberg had no private cause of action under the NASD Rules of Fair Practice.

Respondent, G. Fisher also requested the right to further amend his answer in the event Isenberg's Claim was clarified so as to more specifically allege wrongdoing on the part of G. Fisher.

In his Answer, Respondent, G. Fisher denied that he was an account executive assigned to Isenberg's accounts. G. Fisher admitted that he had visited with Fink and Isenberg in Indianapolis in March of 1988, but denied that Fink and G. Fisher emphasized that Isenberg should liquidate his mutual fund positions. G. Fisher alleged that all purchases of Panteras stock took place after he had moved to Atlanta, Georgia and resigned from Drexel. Since

all trading in Panteras took place subsequent to his move and termination with Drexel, G. Fisher alleged that he was without sufficient knowledge and information to form a belief with respect to these transactions. G. Fisher denied that he churned Isenberg's accounts, disregarded Isenberg's best interests, engaged in any misrepresentations, omissions or fraud, or breached any fiduciary duties owed to Isenberg. G. Fisher also asserted various affirmative defenses including, but not limited to, laches, waiver, estoppel and ratification.

Respondent, J. Fisher filed a Motion to Dismiss the Claim, Request for Clarification, Motion for Temporary Stay and Answer to the Claim. J. Fisher requested dismissal of the Claim on the basis that he was never, contrary to Isenberg's allegation, branch manager of the Drexel Clayton, Missouri office and he did not effectuate any of the transactions at issue. J. Fisher also reserved the right to amend his Answer in the event Isenberg's claims were clarified. J. Fisher's Answer denied all allegations set forth in Isenberg's Statement of Claim.

Isenberg filed an Amended Claim, Reply to Respondents' Joint Motion to Stay, and a Reply to J. Fisher's Motion to Dismiss. In the Reply to the Motion to Stay, Isenberg asserted that Fink, J. Fisher, and G. Fisher failed to specify what, if any, potential cross-claims against Drexel they would pursue and that they had not specified which documents, if any, they would seek to obtain from Drexel. Isenberg also asserted that it was well established that stays pursuant to Section 362(a) of the Bankruptcy Code are limited to debtors and do not encompass non-bankrupt co-defendants. Therefore, the Motion to Stay should be denied. Isenberg also replied to J. Fisher's Motion to Dismiss and requested that the Motion to Dismiss should be denied on the basis that the allegations in Isenberg's Claim and Amended Claims were sufficiently specific and directed so as to warrant an Answer and defense by J. Fisher.

Isenberg's Amended Statement of Claim restated the allegations of the Claim and also asserted that Drexel and certain of its managers failed to adequately supervise the conduct of Fink.

Fink replied to Isenberg's Amended Claim and denied all allegations contained therein.

G. Fisher filed a response to the Amended Claim wherein he re-adopted and incorporated his previous motions and responses to Isenberg's Statement of Claim as his motion and responses to Isenberg's Amended Statement of Claim.

J. Fisher filed a reply to Isenberg's Amended Statement of Claim in which he denied the allegations as unsubstantiated and requested dismissal of the Amended Claims.

G. Fisher filed a Second Joint Motion to for Temporary Stay following Fink's bankruptcy filing on December 12, 1990. G. Fisher alleged that Fink was Isenberg's broker and that without Fink, the other Respondents would be prejudiced unfairly in the defense of the Claims asserted against them.

Isenberg filed a Second Amended Claim which reasserted the allegations

in the other two pleadings and added additional Respondents, William C. Scott ("Scott"), Robert C. Fisher ("Robert Fisher") and Richard T. Fisher ("Richard Fisher"). The substantive Claims in this pleading were not changed very much other than to specifically assert that Drexel management, at various times, Richard Fisher, Robert Fisher, J. Fisher and Scott were well aware that G. Fisher and Fink were excessively trading Isenberg's account to generate commissions and these individuals were alleged to be grossly negligent in their supervision of the trading activities in Isenberg's account.

Scott answered Isenberg's Second Amended Claim and alleged that he was only in the branch office for a short two month period, that no problems were brought to his attention concerning the account and that nothing happened that would put a reasonable manager on notice that something was seriously wrong in Isenberg's account. Scott specifically denied that he was aware of any impropriety or mishandling of Isenberg's account and specifically denied that he consciously disregarded the situation or was grossly negligent in his duty to supervise the trading activities in the account. Scott further asserted certain affirmative defenses including, but not limited to, laches, waiver, estoppel and applicable statutes of limitation.

G. Fisher readopted and incorporated his previous motions and responded to Isenberg's Amended Claim as his responses to Isenberg's Second Amended Claim. Additionally, G. Fisher asserted that Isenberg's Claims in the Second Amended Claim were time barred by applicable statutes of limitation.

Richard Fisher and Robert Fisher likewise denied the allegations stated in Isenberg's Second Amended Statement of Claims. Richard and Robert Fisher both denied that they aware of excessive trading in Isenberg's account. Additionally, Robert Fisher and Richard Fisher denied that Isenberg complained to them that the activity in his account was either unauthorized or inconsistent with his investment objectives.

J. Fisher answered the allegations of Isenberg's Second Amended Claim by incorporating as his answer the Alternative Answer to Isenberg's Amended Claim and asserted that Isenberg's claims were time barred by applicable statutes of limitation.

Fink did not file a written Answer to Isenberg's Second Amended Claim.

RELIEF REQUESTED

Claimant, Isenberg requested damages of \$750,000, margin interest paid, interest, reasonable attorney's fees, expert witness fees, costs of the proceeding and an award of punitive damages for the egregious conduct of all Respondents.

Respondent, Fink requested that the claims Isenberg asserted against him be denied and that costs, including reasonable attorney's fees and travel expenses for Respondent, Fink and his attorneys be assessed against Claimant, Isenberg.

Respondent, G. Fisher requested that the claims Isenberg asserted against him be denied and that costs, including reasonable attorney's fees and travel expenses for Respondent, G. Fisher and his attorneys be assessed against Claimant, Isenberg.

Respondent, J. Fisher requested that the claims Claimant, Isenberg asserted against him be denied and costs, including reasonable attorney's fees and travel expenses for Respondent, J. Fisher and his attorneys be assessed against Claimant, Isenberg.

Respondent, Scott requested that the panel rule that Scott committed no breaches of duty which he may have owed to Claimant, Isenberg; that Isenberg's claims against Scott were unfounded and frivolous; that Claimant, Isenberg was obligated to reimburse Scott for his costs and reasonable attorney's fees in connection with defense of this frivolous claim and for such other relief as the Arbitrators deemed just and proper.

Respondents, Robert Fisher and Richard Fisher requested that the panel rule that they committed no breach of any duty which they actually or allegedly owed to Claimant, Isenberg; the claims asserted by Claimant, Isenberg are legally and factually unfounded and frivolous; and that Claimant, Isenberg should be required to reimburse them for the costs and reasonable attorney's fees incurred in connection with their defense of this frivolous arbitration claim and for such other relief as may be appropriate under the circumstances.

OTHER ISSUES CONSIDERED & DECIDED

During a telephonic pre-hearing conference held on March 4, 1991 before the panel of arbitrators, the parties' counsel argued their respective positions on the various motions to stay the arbitration. Following the conclusion of the pre-hearing conference, the panel of arbitrators deliberated and determined to deny the Motion to Stay the hearing until Drexel and or Fink emerged from bankruptcy.

The Motion to Dismiss Respondent, J. Fisher was not specifically ruled upon and was taken with the merits of the case.

Respondent, Fink filed for bankruptcy on December 12, 1990. Fink appeared at all hearing dates in St. Louis, Missouri. On October 22, 1990 Fink advised the panel of arbitrators that the bankruptcy stay as to him was lifted for purposes of the arbitration hearing. Therefore, the case proceeded against Fink.

However, the bankruptcy stay was not lifted as against Respondent, Drexel and the arbitration panel did not consider any of Claimant, Isenberg's Claims asserted against Drexel.

A preliminary Motion in limine was asserted by David Wells, Esq., counsel for Respondents, Robert and Richard Fisher. The motion asked that the panel limit evidence presented by Isenberg as to anything connected with Isenberg's trading with another broker-dealer. Isenberg's counsel asserted

that while there would be no evidence relative to damages as to the other broker-dealer, certain events took place which the panel would find relevant to Isenberg's claims in this case. The panel denied the motion to exclude evidence.

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

After considering the pleadings, the testimony, the evidence presented at the hearing and review of the transcript of the parties' respective closing arguments, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All Claims asserted in the Claim, Amended Claim and Second Amended Claim filed by Claimant, Isenberg against all Respondents, other than Dressel which was removed as a party by the NASD due to its bankruptcy filing, shall be and are hereby denied and dismissed in their entirety;
2. The Motion to Dismiss filed by Respondent, J. Fisher which was taken under advisement with the case is dismissed as moot; and,
3. Other than those costs designated elsewhere in the Award, the parties shall each bear their own costs, expenses and attorney's fees incurred in the prosecution or defense of this arbitration matter.

OTHER COSTS

The arbitration panel requested that transcripts of the closing arguments be prepared and forwarded to the arbitrators prior to their deliberation on the merits of the case. In addition, the record of the entire proceeding was transcribed and made available for the panel's review after the various groups of hearing dates. The panel received the transcripts of the closing arguments and had access to the remainder of the record of proceedings. Thereafter, J. Thomas Archer, Esq. of Bryan, Cave, McPheeters & McRoberts on behalf of Respondent, J. Fisher, requested that the panel assess the cost of the transcript preparation in accordance with applicable NASD rules, in connection with the final resolution of this matter. Mr. Archer's request of the panel was copied to all counsel of record and no replies to the request were forthcoming from the other attorneys.

The panel considered Mr. Archer's request without reply from the other attorneys of record and pursuant to Section 37 of the NASD Code of Arbitration Procedure ("NASD Code"), the panel hereby equally assesses each

of the individual named Respondents, the amount of \$1256.38 for the cost of transcribing the closing argument portion of the record and other record transcription costs incurred by J. Fisher.

Accordingly, each individual named Respondent shall pay to J. Thomas Archer, Esq. of Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri, J. Fisher's counsel, this sum as their proportional share of the transcript cost.

FORUM FEES

Pursuant to Section 43c of the NASD Code, the following Forum Fees are assessed. The NASD shall retain the hearing session deposit of \$1000.00 previously paid to the NASD by Claimant, Isenberg. Claimant, Isenberg is assessed and shall pay to the NASD additional Forum Fees of \$10,500.00.

Individual Respondents, Pink, J. Fisher, G. Fisher, Robert Fisher, Richard Fisher and Scott are each individually assessed and shall pay to the NASD as additional Forum Fees, the sum of \$1,916.66. Forum Fees were assessed on the basis of \$1000.00 per hearing session for twenty-three (23) hearing sessions.

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

Concurring Arbitrators' Signatures
Name


Charles Clardy, Esq.
Presiding Chairperson/Public Arbitrator


Dated

Frederic Dubois
Panelist/Public Arbitrator

Dated

Richard Johannessen
Panelist/Industry Arbitrator

Dated

Date Award Served by the NASD: _____

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Charles Clardy, Esq.
Presiding Chairperson/Public Arbitrator

Dated

L. Fredine DuBois
Fredric Dubois
Panelist/Public Arbitrator

3/4/72
Dated

Richard Johannesen
Panelist/Industry Arbitrator

Dated

Date Award Served by the NASD: _____

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Presiding Chairperson/Public Arbitrator

Dated

Fredric Dubois
Panelist/Public Arbitrator

Dated

Richard Johannekman
Richard Johannekman
Panelist/Industry Arbitrator

3-4-92
Dated

Date Award Served by the NASD: _____