

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant(s)

Farallon Capital Partners, L.P.

NASD Arbitration
No. 95-03610

Name of Respondent(s)

M.J. Whitman, Inc.
Chicago Partnership Board, Inc.

REPRESENTATION

For Claimant: Brian S. Fraser, Esq., Richards Spears Kibbe & Orbe,
New York, New York

For Respondent M.J. Whitman, Inc.: Brian Zagon, Esq., Keesal,
Young & Logan, San Francisco, California

For Respondent Chicago Partnership Board, Inc.: James F. Fotenos,
Esq., Fotenos & Suttle, P.C., San Francisco, California

CASE INFORMATION

Statement of Claim filed: July 20, 1995

Amended Statement of Claim filed: November 2, 1995

Claimant's Submission Agreement signed: July 11, 1995

Statement of Answer and Cross-Claim filed by Respondent M.J.
Whitman, Inc.: September 14, 1995

Response to Amended Statement of Claim and Cross-Claim filed by
M.J. Whitman, Inc.: November 28, 1995

Statements of Answer by Chicago Partnership Board, Inc. filed on or about: August 24, 1995

Answer of Chicago Partnership Board, Inc. to Amended Statement of Claim filed: November 10, 1995

Respondents' Submission Agreements signed as follows:

M.J. Whitman, Inc.: September 13, 1995

Chicago Partnership Board, Inc.: August 23, 1995

HEARING INFORMATION

Pre-Hearing Conference Date(s)/Session(s):

January 29, 1996 (one session)

Hearing Date(s)/Session(s): February 8, 1996 (three sessions)

February 9, 1996 (three sessions)

Hearing Location:

San Francisco, California

CASE SUMMARY

Claimant Farallon Capital Partners, L.P. (Farallon) filed its claim for damages from Respondents M.J. Whitman, Inc. (Whitman) and/or Chicago Partnership Board, Inc. (CPB) arising from Farallon's aborted purchase of 638 units of ML-Lee Acquisition Fund, L.P. #1 (ML-Lee) from Whitman. Claimant Farallon alleged that on March 2, 1995, Whitman agreed, as principal, to sell 638 units of ML-Lee to Farallon at a price of \$415.00 per unit for a total of \$264,770 and that this agreement was memorialized in a March 7, 1995 commitment letter from Whitman to Farallon in which the parties further agreed that Farallon will receive any and all distributions by the fund administrator made after the trade date. Claimant Farallon further alleged that on March 15, 1995, Farallon wired \$264,770.00 to Whitman; on March 24, 1995, without any explanation or notice, Whitman wired \$264,770.00 back to Farallon's account; Whitman did not call to identify the source of the returned funds or the reason for the return; the next day, Farallon called Whitman for an explanation; and at that time Whitman contended, for the first time, that it had acted, not as principal, but as Farallon's agent, and had entered into an agreement to purchase the units of ML-Lee from CPB on Farallon's behalf. Farallon also alleged that Whitman further advised Farallon that it

could not deliver the ML-Lee units; although demand has been made, to date, the 638 ML-Lee units have not been delivered to Farallon; and although distributions were paid on May 15, 1995 and August 14, 1995, no such distributions have been paid to Farallon by either Whitman or CPB. Farallon further alleged breach of contract and breach of fiduciary duty and alleged that as a result of Whitman's and/or CPB's wrongful breaches, Farallon has been injured in an amount not less than \$250,000.00.

Whitman denied Farallon's allegations of wrongdoing and denied any liability to Farallon. Whitman alleged that it did not breach a binding agreement to sell certain limited partnership interests to Farallon because no such binding agreement existed between Farallon and Whitman. Whitman further alleged that the letter Farallon relies on as memorializing any agreement between Whitman and Farallon makes clear that any agreement to sell was subject to certain conditions and that those conditions were not met; and that there could have been no obligation on the part of Whitman to sell to Farallon.

In it's Cross-Claim, Whitman alleged that it acted as Farallon's agent in seeking to purchase units of ML-Lee for Farallon. Whitman further alleged that as it had before in May 1994 and December 1994, Whitman made arrangements to buy the units from Respondent CPB, which was fully aware that Whitman was acting on behalf of Farallon as purchaser. Whitman further alleged that CPB refused to fulfill its obligations to transfer the subject units to Farallon and to pay Farallon the distribution, despite Whitman's demand that CPB fulfill its obligations to Farallon. Whitman further alleged that because of CPB's breach of it's duty, Whitman has been sued by Farallon; and that CPB is liable to indemnify Whitman for any injuries incurred by Whitman as a result, including any liability or expenses of defense.

Respondent CPB denied Farallon's allegations of wrongdoing and denied any liability to Farallon. CPB alleged that the dispute between Farallon and Whitman has nothing to do with CPB; Farallon has never been a customer of CPB; and that CPB has had no trade with Farallon. CPB further alleged that this Complaint centers around a purchase and sale agreement dated March 7, 1995 between Farallon and Whitman; prior to entering into this agreement with Farallon, Whitman had placed a separate order with CPB to buy limited partnership interests which Whitman in turn apparently

intended to sell to Farallon; the terms of the agreement between Farallon and Whitman were materially different than the terms of the agreement between Whitman and CPB; and that CPB was not a party to Whitman's agreement with Farallon. CPB further alleged that no contract between CPB and Farallon existed or was breached and that CPB had no fiduciary obligation to Farallon.

CPB denied any liability to Whitman and alleged that Whitman's Cross-Claim lacks merit. CPB further alleged that its dealings with Whitman are governed by the Inter-dealer Trading Agreement dated March 16, 1994 between Whitman and CPB; and that CPB did not breach its contract with Whitman and that CPB acted in good faith with Whitman.

RELIEF REQUESTED

Claimant Farallon requested:

1. Specific performance of the March 2, 1995 transaction;
2. In the alternative, damages in an amount not less than \$250,000.00;
3. All costs including reasonable attorneys' fees;
4. Pre- and post-award interest; and
5. Such other and further relief as the panel deems just and equitable.

Respondent Whitman requested:

1. An award in favor of Whitman and against Farallon, that Whitman has no liability to Farallon;
2. All costs including reasonable attorneys fees; and
3. Such other and further relief as the panel deems just and equitable.

Whitman requested the following relief against CPB on its Cross-Claim:

1. An award in favor of Whitman and against CPB, finding CPB liable to Whitman for any liability or expenses of defense (including attorneys' fees) arising out of the claims made by Farallon, in an amount to be proven at hearing; and

2. Such other and further relief as the panel deems just and equitable.

Respondent CPB requested that it be excluded from this proceeding.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in either 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 National Association of Securities Dealers, Inc. (NASD).

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 M.J. Whitman, Inc. is liable for and shall pay to Farallon Capital Partners, L.P. the sum of \$2,346.00, inclusive of interest.

2. Respondent Chicago Partnership Board, Inc. is liable for and shall pay to M.J. Whitman, Inc. the same sum of \$2,346.00 under principles of indemnity.

3. The parties shall each bear their respective costs including attorney's fees.

FINDINGS

The panel issued the following findings:

Farallon:

1. M.L. Lee units could have been purchased sometime after one month after the busted sale date at a price of \$333/unit. Farallon should have made such a purchase in order to mitigate its damages.

2. The distribution lost was \$90/unit.

3. This equals a total value/unit ($\$333 + \90) = $\$423$.
4. The price Farallon would have paid for the units was $\$415$.
5. This equates to a loss of ($\$8/\text{unit} \times 638 \text{ units}$) = $\$5,104$.
6. Subtract the interest earned ($\$2,758$) on the purchase funds during two weeks of that month ($\$264,770 \times 25\%$ divided by 12 divided by 2 = $\$2,758$).

Total loss with the offset: $\$5,104 - \$2,758 = \$2,346$.

Whitman

If Whitman had fulfilled its agreement with Farallon, Farallon would not have incurred this loss. Whitman is therefore liable to Farallon for $\$2,346$.

CPB

CPB failed to fulfill its contract with Whitman. Therefore, indemnity principles apply and CPB is liable to Whitman for the $\$2,346$.

Additionally, the panel reviewed the confirmation procedures and inter-dealer agreements used both by M.J. Whitman, Inc. and Chicago Partnership Board, Inc. with respect to the subject transaction and found that they contain fundamental ambiguities. The ambiguities resulted in differing interpretations by the parties which gave rise to this action. The panel suggests that M.J. Whitman, Inc. and Chicago Partnership Board, Inc. review and clarify their confirmation procedures and inter-dealer agreements in order to avoid future misunderstandings and resulting actions.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed: The NASD shall refund the $\$750.00$ hearing session deposit previously deposited by the Claimant. Forum fees are to be split between M.J. Whitman, Inc. and Chicago Partnership Board, Inc. and are calculated as follows:

One pre-hearing session @ $\$300.00/\text{session}$	=	$\$ 300.00$
Six hearing sessions @ $\$750.00/\text{session}$	=	<u>$\\$4,500.00$</u>
Total fees assessed	=	$\$4,800.00$

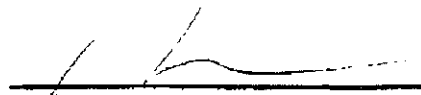
Whitman's share (50%)	=	\$2,400.00
Balance due	=	\$2,400.00
CPB's share (50%)	=	\$2,400.00
Balance due	=	\$2,400.00

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

ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Bette J. Roth, Esq.	Public Arbitrator
Sterling N. Frost	Public Arbitrator
Joseph H. Sturdivant	Industry Arbitrator

Concurring Arbitrators' Signatures


 Bette J. Roth, Esq.

 Sterling N. Frost

 Joseph H. Sturdivant

Date of Decision: _____

Date Served: 03/15/96