

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

William G. Herlihy, as trustee for the  
Pathology Biomedical Laboratories Profit Sharing Plan

96-02864

Name of Respondents

Smith Barney Inc.  
Roger Diebel

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CASE SUMMARY

In a case filed with the National Association of Securities Dealers Regulation, Inc. on July 5, 1996 claimant William G. Herlihy, as Trustee for the Pathology Biomedical Laboratories Profit Sharing Plan ("claimant"), who appeared Pro Se, alleged that respondents Smith Barney, Inc. ("Smith Barney") and Roger Diebel ("Diebel") were negligent in the handling of his order of an IPO underwritten by Smith Barney. Claimant further alleged that on November 16, 1994 he opened an account at Smith Barney and placed an order for 1000 shares of Physician Reliance Network ("PHYN") with Diebel. Claimant also alleged that the proper application paperwork was filled out in Diebel's presence. Claimant asserted that he gave Diebel a \$15,000.00 check for the order. Claimant further asserted that after the IPO was completed, Diebel informed him that none of his orders for the profit sharing plan had been filled out. Claimant also asserted that he filed a complaint with Smith Barney which revealed that his order was not filled out because of a policy limiting the number of IPO shares that would be allowed to settle on a DVP (delivery vs. payment). Claimant contended that he found out later that Diebel never filed his application for a new account, never placed his order for 1000 shares of PHYN and never cashed his check. Claimant further contended that Diebel has been relieved of his job at Smith Barney due in part to this complaint and others.

Claimant in a second claim alleged that he placed an order for 5000 shares of PHYN for his personal account. Claimant further alleged that on November 21, 1994 Diebel gave him a verbal confirmation that he had received 500 of his 5000 share order (10%). Claimant also alleged that Diebel told him that he could get the rest of the shares through a "pot" being offered by Smith Barney, but that this would be a commissioned sale, so he decided to wait. Claimant asserted that on November 23, 1994 when PHYN started trading, Diebel called and told him that he was only going to get 200 shares at \$14.00. Claimant further asserted that Diebel stated that his cash account balance was slightly below \$75,000.00 and would not cover the check written. Claimant also asserted that despite his assurances and an explanation of why the account was a little short, Diebel recommended that a separate check be written for the actual cost of the transaction and a stop order be issued on the first check. Claimant contended that only after the second check was accepted was a stop payment order placed on the first check. Claimant further contended that the confirmation was retracted as retaliation for not placing an order for the balance of the 5000 shares at regular market prices with commissions.

Respondents Smith Barney and Diebel (collectively referred to as "respondents") through their representative and counsel Marion S. Chan of the firm Smith Barney, Inc. maintained that Diebel discussed a possible investment in PHYN with claimant. Respondents further maintained that Diebel explained that, as with any IPO, it was likely that claimant would not be allocated all of the shares that he might want to purchase. Respondents also maintained that Diebel explained that the likelihood of his order being filled was greater if he placed an order for an "even lot" of PHYN shares. Respondents contended that claimant ordered 5,000 shares of PHYN for his personal account and gave Diebel a check for \$75,000.00. Respondents further contended that the following day, claimant called Diebel with an interest in ordering an additional 1000 shares of PHYN for his Merrill Lynch PSP account. Respondents also contended that Diebel explained that he was unsure whether shares could be purchased on a delivery versus payment (DVP) basis, but that he would look into the possibility. Respondents maintained that claimant and Diebel met later that day and claimant gave him a check for \$15,000.00 for the possible DVP purchase.

Respondents further maintained that on November 21, 1994 Diebel informed claimant that the purchase could not be done on a DVP basis, that he did not deposit the check into claimant's individual account and that he returned the check to claimant. Respondents also maintained that as a result claimant never opened a profit sharing account with Smith Barney. Respondents contended that from November 21 through November 23, 1994, claimant spoke with Diebel concerning the possible allotment of PHYN shares for his individual account and when trading opened he was allocated 200 shares of PHYN. Respondents further contended that claimant does not allege to have suffered any out-of-pocket losses in connection with this transaction.

#### **RELIEF REQUESTED**

Claimant requested a minimum of \$4,100.00 representing 10% of his original order and a maximum of \$10,000.00 representing a completion of his original order up to the maximum amount of this arbitration proceeding.

Respondents requested that the claims of claimant be dismissed in its entirety, plus costs in defending against this arbitration.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

The arbitrator did not consider the additional submission from respondents Smith Barney, Inc. and Roger Diebel dated January 17, 1997, as it was not submitted in a timely manner.

#### **AWARD**

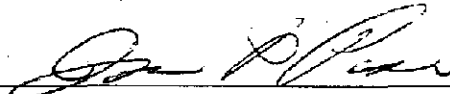
In accordance with Section 10302 Code of Arbitration Procedure, a single Public Arbitrator, Jonathan Pace, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by claimant William G. Herlihy, as trustee for the Pathology Biomedical Laboratories Profit Sharing Plan on July 15, 1996, by respondent Smith Barney, Inc. on September 23, 1996 and by respondent Roger Diebel on September 19, 1996.

And, the Arbitrator, having considered the proof of the parties, had decided and determined in full and final resolution of the issues submitted for determination as follows:

1. The claims of claimant William G. Herlihy, as trustee for the Pathology Biomedical Laboratories Profit Sharing Plan against respondents Smith Barney, Inc. and Roger Diebel are dismissed in their entirety.
2. All other relief requests are denied.
3. The \$150.00 filing fee previously deposited with the National Association of Securities Dealers Regulation, Inc. by claimant William G. Herlihy, trustee for the Pathology Biomedical Laboratories Profit Sharing Plan shall be retained by NASD Regulation, Inc.
4. The parties shall bear their respective costs.

**AFFIRMATION**

I, **Jonathan Pace**, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my oath and award.

  
Jonathan A. Pace, Esq.

Date of Decision: February 5, 1997