

PACIFIC EXCHANGE

PACIFIC EXCHANGE, INC.
501 Pine Street
San Francisco, California 94104

Clifford Wagener, individually and derivatively,
on behalf of West Coast Capital, L.P.

CLAIMANT

v

Jeffrey T. Wilson,

RESPONDENT

DECISION IN THE MATTER
OF ARBITRATION BETWEEN
CLIFFORD WAGENER, INDIVIDUALLY
AND DERIVATIVELY ON BEHALF OF WEST
COAST CAPITAL, L.P., AND JEFFREY T.
WILSON

PCX CASE #: 99-S034

The undersigned Arbitrators, having read and considered the Claim submitted by Claimant on August 3, 1999, and the Answer of Respondent, having considered all testimony given on December 20, 21 and 22, 1999, at San Francisco, California, lasting nine (9) hearing sessions, and, having considered all papers submitted in this matter, hereby render the following Decision pursuant to Rule 12.29(a) of the Rules of the Pacific Exchange

REPRESENTATION OF PARTIES

Of Claimant: Robert C. Friese, Esq., Carl D. Cichon, Esq.
Shortis, Friese & Ginsburg LLP - San Francisco

Of Respondents: Ira Lee Sorkin, Esq.; Donald E. Corbett, Esq.
Squadron, Ellenoff, Plesant & Shemfeld - New York

SUMMARY OF CASE

Claimant, Clifford Wagener is the Limited Partner of West Coast Capital, L.P.; a San Francisco based options trading firm and member of the Pacific Stock Exchange. He seeks to remedy alleged gross mismanagement of, and withdrawal of capital from, West Coast Capital, L.P. by its General Partner, Respondent Jeffrey T. Wilson. Respondent Wilson denies all claims made by Claimant and makes a counterclaim alleging unauthorized withdrawals by Claimant Wagener.

The purpose of the Partnership, which was formed in November 1995 and began operations in March 1996, was to utilize the securities, options and commodities markets to make profits from trading. Profits generated by such trading activities were to be allocated by a formula in dispute. The percentage allocation of losses is also in dispute.

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This dispute, which is between Exchange members or persons associated with an Exchange member is arbitrable under Rule 12.1 (a) of the Exchange Rules. In addition, Article 10.10 entitled Arbitration, of the Agreement of Limited Partnership of West Coast Capital, L.P. provides for all disputes or questions relating to the Partnership, or accounts or transactions, or dissolution, winding up or construction, meaning or effect of the Agreement, or rights or liabilities of the Partners, to be referred to the Exchange in accordance with its rules.

Claimant's Perspective:

Wagener alleges gross mismanagement of the Partnership by Wilson and seeks an accounting and dissolution of the Partnership. Wagener claims Wilson abused his authority as General Partner, breached his fiduciary duties to Wagener and the Partnership by unauthorized withdrawals of funds thereby causing West Coast Capital to incur severe trading losses and threatening the Partnership's viability as an ongoing concern. By Wilson's refusal to provide money to the partnership at a critical time, Wagener alleges traders were denied the ability to trade thereby forcing the Partnership to liquidate positions resulting in losses of approximately \$3.7 million. Acting on his own behalf and derivatively on behalf of West Coast Capital, Wagener claims breach of fiduciary duty, breach of contract, breach of covenant of good faith and fair dealing, imposition of a constructive trust, removal of Wilson as General Partner and dissolution of the Partnership.

Respondent's Perspective:

Wilson denies Wagener's allegations asserting both a course of dealings between the parties and limited partnership statutes that govern the respective rights and responsibilities of the parties. Wilson claims he has the authority as General Partner to distribute profits to himself. He claims Wagener's trading losses in the Fall of 1998 caused a sudden drop in West Coast Capital's equity, not the General Partner's withdrawals. Wilson counterclaims that Wagener made a series of unauthorized withdrawals totaling \$1,260,000 in 1999 from Wagener's trading account without Wilson's consent. Wilson claims breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment and an order severing Wagner's relationship with West Coast Capital denying him any rights to participate in future profits of the Partnership.

ISSUES FOR RESOLUTION

CLAIMANT: Wagener seeks the following findings.

1. That any deficit in West Coast Capital "Group" Account is the sole responsibility of the

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General Partner, Jeffrey Wilson.

2. That nominee traders should be permitted on or before January 31, 2000 to liquidate or transfer their accounts to a new broker-dealer without making any further payments to West Coast Capital, and
3. That Wilson is responsible for taking all necessary steps to cover any deficit in the Group Account so that West Coast Capital's clearing firm will permit nominee traders to liquidate or transfer their accounts

RESPONDENT Wilson seeks the following findings:

1. That Wagener is entitled to only a 1% interest in West Coast Capital's NPC cash account.
2. That withdrawals of profits from trading accounts, including Wagener's personal T-48 trading account were subject to allocations on a sliding scale of profits ranging from 50% to 15% going to the General Partner;
3. That Wagener was entitled to a maximum 35% interest in Wilson's allocation of profits with the exception of the T48 account;
4. That Wagener's withdrawal of profits from T48 trading account and his 35% interest in Wilson's allocation of profits were subject to offset by trading losses suffered in all West Coast capital trading accounts.
5. That Wilson was not obligated to contribute capital to West Coast Capital in addition to his initial \$99,000 capital contribution; and
6. That Wagener is not entitled to damages based on trading losses suffered in trading account J87, T48 or other trading account in August, September and October 1998.

RELIEF REQUESTED

BY CLAIMANT:

1. That compensatory damages be awarded to West Coast Capital as follows:
 - a. Damages resulting from the forced closing of positions in Banker's Trust for \$1,309,838;

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- b. Damages resulting from the forced closing of positions in Bowater in the amount of \$196,881;
 - c. Damages resulting from the forced closing of positions in Gannett in the amount of \$248,225; and
 - d. Damages resulting from the forced closing of positions in Morgan Stanley Dean Witter in the amount of \$538,875
2. An accounting of all rebates or overrides paid to Jeffrey Wilson and an order that they be returned to West Coast Capital;
3. An accounting of the Partnership since inception;
4. Dissolution of the Partnership;
5. That compensatory damages be awarded to Clifford Wagener as follows:
 - a. 50% share of Partnership profits, calculated on an annual basis for 1996, 1997, 1998 and 1999; with such Partnership profits calculated on a sliding scale of allocated profits ranging from 50% to 10% going to the General Partner;
 - b. Damages resulting from the forced closing of Wagener's position in British Petroleum(\$398,188), Linear Technology (\$413,813), Tellabs (\$634,934); and
 - c. A one third share of the lease receipts and proceeds from the sale of PCX Seat 129 as determined by an accounting.
6. That punitive damages be awarded against Wilson in an amount equal to the compensatory damages sought.

BY RESPONDENT:

1. That Wilson is entitled to an award of \$1,536,000 as a result of Wagener's unauthorized withdrawals of \$1,260,000 from his T48 trading account in 1999 and \$276,000 withdrawn from the Partnership's XPC cash account.

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DECISION

After the course of extensive hearings and considerable deliberation, the arbitrators have made the following determinations based on the evidence and testimony presented.

ON THE CLAIM.

1. The parties have demonstrated an inability to continue the trading partnership as intended by the Agreement of Limited Partnership of West Coast Capital, L.P. made on November 15, 1995 between Jeffrey T. Wilson, General Partner, and Clifford Wagener, Limited Partner. (The statement of Claim seeks dissolution of Partnership (p.2) and Respondent's Answer (p.11) seeks to remove Wagener as Limited Partner.)

Since the two parties to the Arbitration, Jeffrey Wilson, General Partner and Clifford Wagener, Limited Partner, are the only partners to the Partnership Agreement of the Limited Partnership of West Coast Capital, L.P. and the only signatories to it, the Partnership shall be dissolved and a full accounting shall be made. An independent CPA firm chosen by Claimant shall make an accounting.

2. a. The Arbitrators find the following sliding scale shall be used to calculate the percentages to be retained by traders and those allocated to General Partner:

Profits Withdrawn

Allocation

\$0 - \$500,000	50% Trader, 50% General Partner
\$500,000-\$1,000,000	60% Trader, 40% General Partner
\$1,000,000-\$1,500,000	70% Trader, 30% General Partner
\$1,500,000-\$2,000,000	80% Trader, 20% General Partner
\$2,000,000+	90% Trader, 10% General Partner

- b. As to realized cash profits, a nominee trader with a profitable account shall be entitled to withdraw the Trader's percentage from his trading account. The remaining percentage allocated to the General Partner shall be placed in the Partnership cash account; and
 - c. Wagner and Wilson shall split 50/50 the percentage trading profits allocated to the General Partner calculated on an annual basis for the years 1996, 1997, 1998, and 1999.
3. The arbitrators found Wilson to have acted negligently and in bad faith with regard to

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funding the account for trading purposes, particularly in light of Wilson's unlimited guarantee to FOC and refusal to provide funds to the account upon a capital call. Therefore, Wilson shall be fully responsible for the deficit in the West Coast Capital "Group" Account, estimated to be approximately between \$1,300,000 and \$1,400,000, as follows:

- a. Wilson shall make expedient payment of the deficit in the Group Account so that West Coast Capital nominee traders will be permitted to liquidate, or transfer their accounts to a new broker-dealer within 30 days upon date of the award; and
- b. Wilson shall not in any way impede nor prevent nominee traders from liquidating or transferring their accounts.
4. The Arbitrators do not award compensatory damages to West Coast Capital resulting from the forced closing of positions in Bankers Trust, Bowater, Gannett or Morgan Stanley Dean Witter.
5. The Arbitrators do not require rebates and overrides received by Wilson from the clearing firms to be returned to West Coast Capital.
6. The Arbitrators do not award compensatory damages to Clifford Wagener for damages resulting in forced closing of Wagener's position in British Petroleum, Linear Technology and Tellabs.
7. The Arbitrators do not award a one third share of the lease receipts and proceeds from the sale of PCX Seat 129 to the Partnership.
8. The Arbitrators do not to award punitive damages.
9. Respondent shall reimburse Claimant's filing fee and hearing session deposit in the total amount of \$1,300.
10. Respondent Jeffrey T. Wilson is assessed forum fees for 9 hearing sessions and for 1 pre-hearing conference held on November 19, 1999. Accordingly, Jeffrey T. Wilson shall remit to the Pacific Exchange the total amount of \$9,300.¹
11. The parties shall bear their own other costs of arbitration, including any and all member

¹ Forum fees are assessed at the rate of \$1,000 per hearing session. A pre-hearing conference fee in the amount of \$300 is assessed for the pre-hearing conference held on November 19, 1999.

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surcharge fees

ON THE COUNTERCLAIMS

1. The Arbitrators do not find Wagener's T-48 trading account to be subject to offset by trading losses of other traders
2. The Arbitrators do not find that Wagener's withdrawals of \$1,260,000 from his T-48 trading account from February through October 1999 were subject to the General Partner's consent. Therefore, the Arbitrators do not find these withdrawals to be unauthorized
3. The Arbitrators find that a net withdrawal of \$276,000 by Wagener from the Partnership cash account (which represents the net balance of \$1,000,000 withdrawn and repayments of \$500,000 and \$224,000) must be repaid to the Partnership

Date: 1/5/2000

Ruth Glick
Ruth Glick

Date: 1/5/00

Robert Fisher
Robert Fisher

Date: 1/7/2000

Kenneth Domingues
Kenneth Domingues