

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Thomas W. Averill and Linda A. Averill, Claimants v. U.S. Bancorp Piper Jaffray, Inc. n/k/a Piper Jaffray & Co., Respondent

Case Number: 02-06387

Hearing Site: Seattle, Washington

Nature of the Dispute: Customers v. Member Firm

REPRESENTATION OF PARTIES

For Claimants:

Jeffrey C. Grant, Esq.
Hellsell Fetterman LLP
Seattle, Washington

For Respondent:

Curt Himeline, Esq.
Dorsey & Whitney LLP
Seattle, Washington

CASE INFORMATION

Statement of Claim received: October 23, 2002

Claimants' Joint Uniform Submission Agreement signed: October 15, 2002

Statement of Answer filed by Respondent U.S. Bancorp Piper Jaffray, Inc.: April 2, 2003

Respondent U.S. Bancorp Piper Jaffray, Inc.'s Uniform Submission Agreement signed:
Not signed

CASE SUMMARY

Claimants' Statement of Claim alleged breach of contract, failure to execute, and breach of fiduciary duty. The allegations involved the sale of Aris Corporation securities.

Respondent's Statement of Answer denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted several affirmative defenses.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$500,000.00, interest in the amount of \$100,000.00, and costs, including attorney's fees.

Respondent requested dismissal of the Claimants' Statement of Claim in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent U.S. Bancorp Piper Jaffray, Inc. did not file with the NASD Dispute Resolution a properly executed submission agreement; however, Respondent U.S. Bancorp Piper Jaffray, Inc. is required to submit to arbitration and having answered the claim, appeared and testified at the hearing is bound by the determination of the Panel on all issues submitted.

On February 10, 2004, Respondent U.S. Bancorp Piper Jaffray, Inc. moved the Panel to Dismiss Claimants' claims based upon res judicata, failure to file the claims within the time period required under the applicable statute of limitations and lack of standing. After due deliberation, the panel decided as follows:

- 1) Claimants knew by November 23, 1998, that the sell order had not been executed, and the three-year statute of limitations applicable to each of Claimants' claims began to run.
- 2) Claimants filed their complaint in King County, Washington Superior Court (*Thomas W. Averill v. Ciber, Inc., U.S. Bancorp Piper Jaffray Inc., Jay Hershey, and Paul Y. Song*, Case No. 01-02031743-1-SEA) on November 19, 2001, four days prior to the running of the statute of limitations, thereby tolling the statute of limitations.
- 3) Judge Glenna Hall issued her Order Granting Defendant U.S. Bancorp Piper Jaffray, Inc.'s Motion for Stay of Proceedings on August 15, 2002, and included the following language: "If Plaintiff fails to file an arbitration suit against Defendants U.S. Bancorp Piper Jaffray, Inc. and Jay Hershey before a proper forum within 60 days of the date of this Order, then all claims filed against these Defendants in this case shall be dismissed with prejudice."
- 4) Claimants filed this NASD Arbitration on October 23, 2002, the 69th day after Judge Hall's Order.
- 5) On the 60th day following Judge Hall's Order, the tolling of the statute of limitations expired and, therefore, the statute of limitations ran on October 18, 2003, five days prior to the filing of this proceeding.
- 6) Therefore, Respondent's Motion to Dismiss is granted and Claimants' claims are denied in their entirety.

On February 17, 2004, Claimants moved the Panel to reconsider their decision to grant the Respondent's Motion to Dismiss. Respondent submitted an opposition to said motion on March 4, 2004. Claimants' reply in support of its motion was submitted on March 11, 2004. On March

25, 2004, a telephonic post-hearing conference was held to allow the parties the opportunity to provide argument on their submissions. After due deliberation, the Panel denied Claimant's Motion for Reconsideration and reaffirmed its order granting Respondent's Motion to Dismiss.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, testimony, evidence presented at the hearing, and post-hearing submissions the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent's Motion to Dismiss is granted and Claimants' claims are denied in their entirety.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 300.00
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Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm U.S. Bancorp Piper Jaffray, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,750.00</u>
Total Member Fees	= \$ 5,200.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair or the parties and the Panel. The following fees are assessed:

One (1) Pre-hearing conference session with the Panel @ \$1,125.00/session	= \$ 1,125.00
Pre-hearing conference: May 15, 2003 1 session	
One (1) Pre-hearing conference session with the Chair @ 450.00/session	= \$ 450.00
Pre-hearing conference: February 6, 2004 1 session	
One (1) Hearing session @ \$1,125.00/session	= \$ 1,125.00
Hearing: February 10, 2004 1 session	
One (1) Post-hearing conference session with the Panel @ 1,125.00/session	= \$ 1,125.00
Post-hearing conference: March 25, 2004 1 session	
Total Forum Fees	= \$ 3,825.00

- 1) The Panel assessed \$2,475.00 of the forum fees jointly and severally to Claimants.
- 2) The Panel assessed \$1,350.00 of the forum fees to Respondent.

Fee Summary

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 2,475.00
Total Fees	= \$ 2,775.00
Less payments	= \$ (1,575.00)
Balance Due NASD Dispute Resolution	= \$ 1,200.00

2. Respondent U.S. Bancorp Piper Jaffray, Inc. is charged with the following fees and costs:

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 1,350.00
Total Fees	= \$ 6,550.00
Less payments	= \$ (5,200.00)
Balance Due NASD Dispute Resolution	= \$ 1,350.00

All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Larry T. Coady

Richard L. Warner, Esq.

Mark D. Roth, Esq.

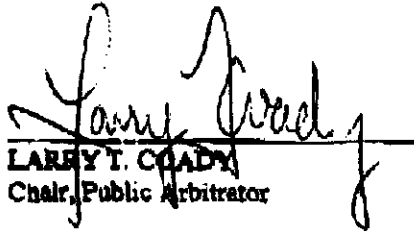
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Public Arbitrator, Presiding Chair

Public Arbitrator

Non-Public Arbitrator

Concurring Arbitrators' Signatures


LARRY T. COADY
Chair, Public Arbitrator

3/25/04
Signature Date

RICHARD L. WARNER, ESQ.
Public Arbitrator

Signature Date

MARK D. ROTH, ESQ.
Non-Public Arbitrator

Signature Date

3/25/04
Date of Service


ARBITRATION PANEL

Larry T. Coady	-	Public Arbitrator, Presiding Chair
Richard L. Warner, Esq.	-	Public Arbitrator
Mark D. Roth, Esq.	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

LARRY T. COADY
Chair, Public Arbitrator

Signature Date



RICHARD L. WARNER, ESQ.
Public Arbitrator

MARCH 25, 2004

Signature Date

MARK D. ROTH, ESQ.
Non-Public Arbitrator

Signature Date

3/25/04

Date of Service

ARBITRATION PANEL

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Richard L. Warner, Esq.	-	Public Arbitrator
Mark D. Roth, Esq.	-	Non-Public Arbitrator


Concurring Arbitrators' Signatures

LARRY T. COADY
Chair, Public Arbitrator

Signature Date

RICHARD L. WARNER, ESQ.
Public Arbitrator

Signature Date



MARK D. ROTH, ESQ.
Non Public Arbitrator

3-25-04

Signature Date

3/25/04

Date of Service