

NASD DISPUTE RESOLUTION AWARD
NASD DISPUTE RESOLUTION

CASE: 05-04299

Donald R. Carse, (Claimant) vs. UBS Financial Services Inc., (Respondent)

ATTORNEYS:

Claimant appeared pro se, London, England.

For Respondent appeared in-house counsel, Erin M. Naftali, Esq., Weehawken, NJ.

NATURE OF DISPUTE: Customer vs. Member

DATE FILED: August 10, 2005

CASE SUMMARY: Claimant alleged that Respondent failed to execute an order to transfer investments. Claimant maintained that due to Respondent's actions, he suffered a financial loss. Claimant's claim involved limited partnerships.

ARBITRATOR'S REPORT: See attached Exhibit A.

Claim Data

Claim: \$25,000.00

Award Data

Award: \$.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of the Claimant are dismissed in their entirety. 2) NASD Dispute Resolution shall retain the \$425.00 filing fee that the Claimant deposited previously.

OTHER FEES: Pursuant to Rule 10333 of the Code, Respondent has paid to NASD Dispute Resolution the \$425.00 Member Surcharge previously invoiced.

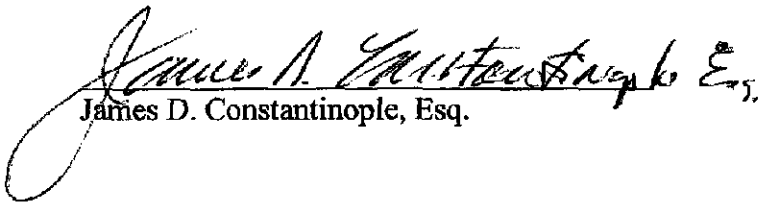
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Award 05-04299

James D. Constantinople, Esq.

Sole Public Arbitrator

AFFIRMATION

I, James D. Constantinople, Esq., do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument, which is my award.


James D. Constantinople, Esq.

Dec. 19, 2005
(Signature Date)

December 20, 2005
Date of Service (For NASD-DR office use only)

EXHIBIT A

NASD DISPUTE RESOLUTION, INC.

In the Matter of the Arbitration Between

Donald R. Carse, Jr. and

Case No.05-04299

UBS Financial Services, Inc.

Arbitrator's Decision & Order

I. The Claim

Claimant, Donald R. Carse, Jr., a resident of London, England, claims damages in the amount of \$25,000.00 from Respondent, UBS Financial Services, Inc. for failing to timely execute an order to transfer the funds in his IRA account in Peconic's Capital Fund LLP into another Peconic fund, Peconic Epic Offshore Fund LLP, during January, 2004 causing him to lose the profits earned by the Epic Fund in January and other losses. Claimant also contends that he was treated differently than three other investors in the same UBS branch office who were timely able to invest in the Fund.

Claimant and Respondent have had a brokerage relationship since the early 90s. In November, 2003, Claimant states that he advised his UBS broker, Charles Temel, that he wanted to transfer the funds in his IRA account from the Peconic Capital Fund LLP to Peconic Epic Offshore Fund LLP "to be effective as of January 1, 2004".

In an E-mail dated Dec. 24, 2003, Mr. Temel expressed reservations about the suitability of the Epic Fund as an IRA investment. On Dec. 29, 2003, Claimant E-mailed Mr. Temel thanking him for his advice and stating: "I have still decided to go forward with the Epic Fund at least for one year...I am not sure what, if anything, you need to do to effect this. I have previously sent in what I believe are all the necessary documents and authorizations to Peconic and to Fortis, their trustee." (Claimant's Attachment 7.)

On p.1 of his claim, Claimant further states: "At that time I was aware that the local branch manager needed to approve the switch, but I felt comfortable as he had adequate time to take a decision, and even if he refused to allow me to switch, I would still have time to transfer to another brokerage house."

In this regard, Claimant explains that "in order to obtain value as of Jan. 1, 2004, Peconic Capital had to pay funds into UBS and UBS had to pay the trustees of the Peconic Offshore anytime prior to the end of January, 2005." (See Claimant's Attachments 8-10.) Claimant further maintains that "UBS was fully aware of the timeline

and the steps necessary to achieve an investment date as of Jan. 1, 2004 because there were **3 other clients in the same UBS office** who were doing exactly the same thing with their IRA funds with exactly the same time constraints." (Boldface in original.) Claimant cites as authority for this assertion an E-mail to him from the Epic dated March 3, 2004. (Claimant's Attachment 16.) Claimant further states that each of the three other customers who wanted to transfer their funds to Peconic Offshore "were told sometime in December that they would have to move their funds to another brokerage house...", giving them an unfair advantage over him.

II. Respondent's Answer.

Respondent states in reply (1) that claimant "had no reasonable expectation that this investment would be made in January, 2004; that "UBS reasonably declined its approval for his request to invest in the Peconic offshore Fund; and, that Mr. Carse was not "disadvantaged" in relation to other clients. Respondent further states that the evidence demonstrates that "Mr. Carse never informed UBS that he expected this fund-to-fund transfer would be completed before the end of January, 2004; that he only requested UBS's approval of the Offshore Fund investment on Jan. 14, 2004; and, that he "acknowledged that fifteen business¹ days would be required to process his request."

Nor did claimant ever advise Mr. Temel that "time was of the essence" with regard to the proposed transfer. "Had Mr. Case told Mr. Temel that his investment had to be made in the Offshore Fund by sometime in January, 2004, Mr. Temel would have advised him that it would be impossible to assure that, and unlikely that it could be accomplished." (Emphasis in original.)

Respondent further states that none of the three other clients in the same UBS office had a relationship with Mr. Temel and that none of them requested UBS's approval to make the Offshore Fund investment in their accounts. Respondent states: "It is likewise counterintuitive to argue (as Mr. Carse does) that UBS deliberately delayed in informing him that it would not permit this investment out of 'fear of losing (his) other business.' Neither UBS nor Mr. Temel would gain anything by delaying the inevitable. On the contrary, if UBS could not accommodate him, it would gain good will by its candor with a valued client." (Answer, footnote 6, p. 6.)

Respondent requests that the claim be dismissed and that it be awarded its "costs and disbursements" for this proceeding.

¹ The term "business day" refers to the five days between Monday and Friday and does not include Saturdays or Sundays.

III. Claimant's Reply

Claimant replies that he is "absolutely certain" that Mr. Temel and his team knew how important it was that the transfer had to take place in January"; that he is certain "that at least one of the other investors mentioned the critical nature of the timing"; that "Epic Advisors absolutely knew the timing considerations...and would have mentioned it several times to UBS;" and, that, "having given clear and proper instructions and having full belief that **everyone** understood that time was of the essence, I was happy enough to let the professionals get on with it. I had other matters to deal with." (His emphasis.)

Claimant further reiterates that where the three other investors were told in December, 2003 that UBS would not effect the transfers, and thereafter had time to do so through another brokerage house, but claimant was not given a decision until Feb 3, 2004, that claimant was clearly treated differently than the three other similarly situated customers and should be compensated for his financial loss.

IV. Discussion

Based upon my review of the evidence, I find that Claimant has failed to prove by a preponderance of the evidence that UBS failed to execute his instructions in a timely manner; that it was dilatory in informing him that it would not approve the transfer, and that he was disadvantaged with respect to three other customers.

In the first instance, I find that *at no time* (my emphasis) did Claimant ever advise his broker, Mr. Temel, or any other UBS employee, that "time was of the essence". Rather, Claimant, whom I find to be an experienced and sophisticated investor, took the position that "having given clear and proper instructions and having full belief that **everyone** (boldface in original) understood that time was of the essence, I was happy enough to let the professionals get on with it. I had other matters to deal with."

While Mr. Temel was an experienced professional, he was not a mind reader. The proposed transfer was complex, involving critical timing issues. Not only did it require UBS's approval but, in the event approval was denied, there had to be sufficient time left to permit Claimant open an account at another brokerage house and receive their approval by Jan. 30, 2004 to invest in the Epic Fund in order for him to be deemed timely invested.

In view of the complexity of this transaction, I find that Claimant, as a reasonable and prudent investor, had a duty not only to inform himself about the timing issues involved, but to ensure that his broker and UBS were equally cognizant of them. By his own admission he failed to do this. In particular, there is no evidence that he advised UBS that he needed a decision, one way or the other, by a date certain so as to give him sufficient time to switch his IRA account to another brokerage house in the event approval was denied, which it was. Thus, he can not be heard to complain that UBS took the fifteen business days provided for in the approval request form to give him a decision.

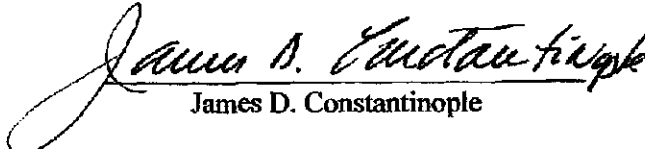
Moreover, while UBS provides no explanation why the approval request form was not sent to Claimant on Jan. 7, the same date he was asked to submit his authorization to UBS to transfer \$282,000.00 to the Peconic Epic Offshore Fund, Ltd., I find that, absent a request to expedite the decision-making process, that Claimant had no reasonable expectation under the facts of this case that he would have had sufficient time to open an account at another brokerage house and have the proposed transfer approved by that house by Jan. 30, 2004.

Thus, where Claimant opened his account with another brokerage house on Feb. 5, 2004, that house required additional information which was not submitted until Feb. 12. Approval was then given sometime between Feb. 12 and 20. (See Claimant's Attachment 11, an E-mail to Claimant from Epic dated Feb. 20, 2004.)

I also find that Claimant has not proved that he was "disadvantaged" by UBS in relation to the other three investors in the same UBS office who chose to switch their IRA accounts to another brokerage house in December, 2003. Even assuming that these three investors had been told by UBS that it would not permit the transfers, I would not find such advice binding with respect to Claimant. Each client must be treated as an individual, and a reasonable effort must be made to accommodate his or her instructions.

Thus, rather than the negative inference Claimant draws from UBS's failure to advise him immediately that it would not approve his transfer request, a favorable competing inference could be drawn that UBS tried to accommodate "a valued client" by seeing if there were some way the transaction could be effected. As Respondent points out in its Answer on p. 6 (footnote 6): "Neither UBS nor Mr. Temel would gain anything by delaying the inevitable. On the contrary, if UBS could not accommodate him, it would gain good will by its candor with a valued client". (Emphasis in original.)

I concur with this observation and find that Claimant was not deliberately disadvantaged with respect to the three other investors. Accordingly, the claim is dismissed in its entirety. However, I decline to award Respondent's its "costs and disbursements", including presumably its filing fee, where I find that Claimant, a non-lawyer and unrepresented by counsel, incurred unnecessary expense where he initially misfiled his claim in Small Claims Court. Each party shall pay its own costs and fees. Moreover, since neither of the parties have requested attorney's fees, none are awarded.


James D. Constantinople

New York, N.Y.
Dec. 15, 2005