

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Bernie Glannon

and

05-06246
Kansas City, Missouri

Name of Respondent

Piper Jaffray & Co. f/k/a U.S. Bancorp Piper Jaffray Inc.

Nature of the Dispute: Customer vs. Member.

REPRESENTATION OF PARTIES

Bernie Glannon ("**Claimant**") was represented by Michael E. Waldeck, Esq., Waldeck, Matteuzzi & Sloan, P.C., Leawood, Kansas.

Piper Jaffray & Co. f/k/a U.S. Bancorp Piper Jaffray Inc. ("**Respondent**") was represented by Mark S. Reed, Esq., Piper Jaffray & Co., Minneapolis, Minnesota.

CASE INFORMATION

The Statement of Claim was filed on or about December 2, 2005. Claimant's Reply to Respondent's Motion to Dismiss was filed on or about March 3, 2006. Submission Agreement of Claimant Bernie Glannon was signed on November 14, 2005.

Piper Jaffray & Co.'s Answer and Affirmative Defenses and Piper Jaffray & Co.'s Motion to Dismiss Statement of Claim were filed on or about February 16, 2006. Letter dated April 25, 2006 in further support of Motion to Dismiss was filed by Respondent. Submission Agreement of Respondent Piper Jaffray & Co. f/k/a U.S. Bancorp Piper Jaffray Inc. was signed on January 18, 2006.

CASE SUMMARY

Claimant alleged that he was unable to purchase Google stock in his account due to a breach of contract by Respondent. Specifically, Claimant alleged that:

By letter dated April 8, 2005, Terrance L. Wilson, Senior Vice President of Piper Jaffray wrote to me and indicated that I had until April 30, 2005 to transfer my account to a new brokerage firm [citation deleted]. The stated reason for this

demand was that my investment and business strategies were no longer compatible with Piper Jaffray.

Claimant further stated:

I was unable to find a new brokerage firm to take the accounts on the terms similar to Piper Jaffray until mid-May. The actual transfer of all of the accounts dragged on until mid-July. As a result of this delay where no trading was allowed, I was unable to purchase positions in the stock of Google, Inc. I had intended to purchase 300 shares of Google on May 4, 2005, when the price per share was \$228.50 a share. I had the requisite buying power available in my account but was unable to access or use it, as the only transactions Piper Jaffray would allow were closing my existing positions not the purchase of new positions. I contacted Piper Jaffray On May 4, 2005 and requested his transaction be executed. I was informed that even though I was still being charged margin interest and account handling fees at this time, I was not allowed to make this purchase. I did not have any funds available to me to make this purchase except through the holdings in my account at Piper Jaffray.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated:

The Statement of Claim asserts unspecified claims concerning Piper Jaffray's April 8, 2005 request that Claimant transfer his account relationship to another brokerage firm by April 30, 2005. Piper Jaffray agreed on April 27, 2005 to extend the deadline for the transfer of Claimant's account to May 31, 2005 and advised him that it would only accept closing transactions beginning May 1, 2005. These claims are based upon allegations that Claimant was prevented from purchasing 300 shares of Google Inc. common stock on May 4, 2005 at a price of \$228.50/share. Claimant further alleges that he would have subsequently sold those Google shares when his "target price" of \$300.00/share was reached. Claimant seeks to recover compensatory damages of \$21,450.00, consisting of the profit he would have enjoyed had he purchased 300 Google shares on May 4, 2005 at a cost of \$228.50/share and sold them at some unspecified future date for proceeds of \$300.00/share.

The Statement of Claim understandably presents far less than a complete picture of the facts and circumstances surrounding Claimant's account relationship and the requested transfer of his account because consideration of the omitted information will establish that he is not entitled to recover in this arbitration proceeding. Noticeably absent in the first instance are any allegations from which it can be determined why Claimant delayed the transfer of his account by approximately 30 days following Piper Jaffray's request. Although Claimant suggests that the delay resulted from his attempts to negotiate favorable account fees and margin interest

rates, it is beyond dispute that he did not initiate the transfer of his account until May 3, 2005. Consequently, Claimant's purported inability to purchase Google shares in his Piper Jaffray account on May 4, 2005 resulted in the first instance from his own month long delay before initiating the transfer of his account.

Conveniently absent from the Statement of Claim are any allegations as to why Claimant did not purchase any Google shares for his account on or before April 30, 2005. Understandably absent are any allegations that would establish that Claimant had a outstanding margin loan balance of \$159,489.14 as of April 30, 2005. The significance of that omission is apparent because Piper Jaffray would have necessarily funded any purchase of Google shares on May 4, 2005. Claimant's allegation that he "had the requisite buying power available in [his] account but was unable to access or use it" is unavailing and simply ignores: 1) Piper Jaffray's clear contractual right to refuse the extension of additional loans; and 2) that Piper Jaffray's April 27, 2005 letter is incapable of any interpretation other than Claimant would not be extended additional credit.

Also absent are any allegations confirming that Claimant initiated the transfer of his account to Merrill Lynch on May 3, 2005 and Piper Jaffray froze his account to new transactions on May 10, 2005 pursuant to NASD Rule 11870, when it was validated for transfer. Beginning on May 10, 2005, Claimant only had the ability to enter trades through Merrill Lynch. Claimant's account transferred in its entirety to Merrill Lynch by May 13, 2005. Claimant apparently chooses to provide no allegations as to why he did not simply purchase Google shares at Merrill Lynch on or after May 10, 2005. **Claimant similarly chooses to either conceal or ignore for purposes of his Statement of Claim that he could have purchased Google shares at Merrill Lynch for \$228.50/share or less on May 10, 11, 12, and 13, 2005. [emphasis in original].**

Piper Jaffray submits that it acted properly at all times with respect to Claimant's account and the circumstances at issue in this arbitration proceeding. It specifically denies each and every allegation of wrongdoing and affirmatively alleges that it acted appropriately in connection with the request that Claimant transfer his account and imposed restrictions that were consistent with the terms of its customer agreement and reasonable in all respects. Piper Jaffray further submits that Claimant has not sustained any damages, losses or lost opportunity as the result of those restrictions because he could have purchased Google shares through Merrill Lynch at \$228.50/share or less during the relevant time period.

RELIEF REQUESTED

Claimant requested an award in the amount of \$21,450.00, interest, attorneys' fees and costs.

Respondent requested that the Statement of Claim and all claims asserted therein be immediately dismissed in their entirety and it be awarded its costs, expenses and all member surcharges, hearing session deposits and other forum fees incurred in defending this matter.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in 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 original(s) remain on file with the NASD Dispute Resolution (the "NASD").

AWARD

After considering the pleadings, and the arguments of the parties presented at the hearing conducted on May 5, 2006, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. For the reasons stated herein, the Motion to Dismiss filed by Respondent is granted. This case is dismissed with prejudice and all costs are taxed against Claimant.

Claimant alleges that Respondent breached the Account Management Agreement (the "Agreement") entered into between them "by accepting the account and then denying access without any justification or right and then freezing the account pending the completion of a transfer to another brokerage firm". (Statement of Claim). Specifically, Claimant alleges that Respondent notified him by letter dated April 8, 2005 that it was terminating the Agreement and that he had until April 30, 2005 to transfer his account. He further alleges that Respondent, by letter dated April 27, 2005, extended the deadline for transfer to May 31, 2005 and also advised him that "there would not be any trading other than closing transactions allowed in the account" during the period of the extension. (Statement of Claim). Claimant alleges that he was not able to transfer his account until mid-May and, as a consequence, he was unable to purchase 300 shares of Google on May 4, 2005. He further alleges that, had he been able to purchase these shares he would have sold them for a profit at a later date. He seeks damages for the loss of this anticipated gain. (Statement of Claim).

Respondent argues in its Motion to Dismiss that Claimant has failed to state a claim because Respondent had a right not to extend the credit that would have been necessary for Claimant to purchase the Google shares, citing paragraph 4(a) of the Agreement. Respondent further argues that it was required to freeze Claimant's account on May 10, 2005 pursuant to NASD Rule 11870 as a result of the transfer

of Claimant's account. (Respondent's Answer and Motion to Dismiss).

The Statement of Claim does not specify the provision of the Agreement Respondent is alleged to have breached. In a telephone conference held on Respondents' motion on May 5, 2006, Claimant was asked to specify the provision(s) of the Agreement which Claimant alleges Respondent to have breached. By letter dated May 11, 2006, counsel for Claimant stated that Respondent breached paragraph 14 of the Agreement which provides:

14. Transactions Subject to Applicable Rules, Customs of Trade and Laws.

All transactions made by you for me are subject to the constitutions, rules, customs and practices of the exchanges, boards or markets where executed and of their respective clearing houses and are subject to state and federal laws.

An arbitrator has the authority to dismiss claims in a NASD arbitration so long as the dismissal does not deny a party fundamental fairness. *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001). The court held:

We also find that Sheldon was provided with a fundamentally fair arbitration proceeding in that he was provided with the opportunity to fully brief and argue the motions to dismiss, and there is no indication that the arbitration panel engaged in any misconduct in conducting the arbitration proceeding. As we have previously recognized, "a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present *relevant and material evidence* and argument before the decision makers..." *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994) (emphasis added). In other words, if a party's claims are facially deficient and the party therefore has no relevant material evidence to present at an evidentiary hearing, the arbitration panel has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing. *Id.*, at 1206.

In *Vento v. Quick & Reilly*, 128 Fed. Appx. 719 (10th Cir. 2005), the Court reaffirmed the arbitrator's authority to grant a motion to dismiss based solely on the pleadings so long as the dismissal does not deny a party fundamental fairness. Here, Claimant was afforded the requisite fundamental fairness of responding to Respondent's motion, an oral argument on the motion and an opportunity to supplement his response to the motion through the letter of May 11, 2006.

Claimant makes only one claim – that Respondent's refusal to allow him to purchase the Google shares on May 4, 2005 was a breach of the Agreement. The terms of the Agreement do not support that claim. Rather, the terms of the

Agreement establish that Respondent was under no contractual obligation to extend the credit that would have been required to execute the Google transaction.

Claimant states in his Statement of Claim that "I did not have any funds available to me to make this purchase except through the holdings in my account at Piper Jaffray". (Statement of Claim). Claimant was present and participated in the oral argument on May 5, 2006. In response to the Arbitrator's question, Claimant confirmed that he could not have purchased the Google shares unless Respondent extended credit to him for that purpose.

Paragraph 4 of the Agreement allows Claimant to use the account to buy and sell securities. Section (a) of the Agreement permits Respondent to exercise its discretion whether to extend credit to Claimant. By his own admission, Claimant could not have purchased the Google shares without the extension of credit.

Claimant makes two arguments. First, that paragraph 14 of the Agreement required Respondent to extend credit. Paragraph 14 incorporates into the Agreement the constitutions, rules, customs and practices of the various exchanges, boards or markets where Respondent does business. Claimant argues that NASD Rule 2110, requiring a member to "observe high standards of commercial honor and just and equitable principles of trade", in effect, imposes a contractual obligation to extend credit when Respondent has elected not to do so as permitted under paragraph 4 of the Agreement. Paragraph 14 and NASD Rule 2110 cannot be read so broadly.

Claimant's second argument is that paragraph 5 of the Agreement implies a contractual obligation to extend credit based on the "long-standing pattern" of prior extensions of credit. Paragraph 5 does not create such a right. Paragraph 5 sets forth the terms of credit extensions. It begins with the provisional statement "If you extend me a loan...", implying that there is no automatic right to a loan. That interpretation is consistent with paragraph 4 of the Agreement which states that Respondent "may extend credit to me". Respondent is under no contractual obligation to extend credit to Claimant.

Both Claimant and Respondent cite NASD Rule 11870 in support of their positions. Respondent cites section (d) of this Rule which requires Respondent to freeze Claimant's account upon validation of Claimant's instruction to transfer the account. Respondent argues that it could not extend credit to Claimant for the purchase of the Google shares after validation was received on May 10, 2005. Claimant argues that it was forced to transfer the account by Respondent's termination of the Agreement and, therefore, this provision somehow does not apply.

Claimant does not allege that Respondent's termination of the Agreement was wrongful. Once the Agreement was terminated, both Claimant and Respondent had

to follow the appropriate procedures for transfer of the account, including the requirements of Rule 11870.

Claimant's Statement of Claim for breach of contract based on Respondent's refusal to extend credit for the purchase of the Google shares is facially defective. Respondent terminated the Agreement and exercised its contractual right not to extend credit to Claimant. Upon validation of the transfer, Respondent was required to freeze Claimant's account. Respondent's Motion to Dismiss can be determined on the face of the Claim and the clear and unambiguous language in the Agreement. No further evidence is required.

Claimant makes various allegations regarding Respondent's communications with certain of Claimant's clients. No claim for damages is made in connection with those allegations and, therefore, they are not relevant to this claim.

Accordingly, Respondent's Motion to Dismiss is granted.

2. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees, not specifically awarded or otherwise provided for above.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee = \$125.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is Piper Jaffray & Co. f/k/a U.S. Bancorp Piper Jaffray Inc.

Member surcharge	\$	425.00
Total Member Fees	\$	<u>425.00</u>

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

2	Pre-hearing session(s) with a single arbitrator	x	\$450.00	\$	900.00
	April 24, 2006	1	session		
	May 5, 2006	1	session		
	Total Forum Fees			\$	<u>900.00</u>

The Arbitration Panel has assessed \$900.00 of the forum fees to Bernie Glannon.

Fee Summary

Claimant, Bernie Glannon, is liable for:

Initial Filing Fee	= \$	125.00
<u>Forum Fees</u>	= \$	<u>900.00</u>
Total Fees	= \$	1,025.00
<u>Less payments</u>	= \$	<u>-575.00</u>
Balance Due NASD Dispute Resolution	= \$	450.00

Respondent, Piper Jaffray & Co. f/k/a U.S. Bancorp Piper Jaffray Inc., is liable for:

Member Fees	= \$	425.00
Total Fees	= \$	<u>425.00</u>
<u>Less payments</u>	= \$	<u>-425.00</u>
Balance Due NASD Dispute Resolution	= \$	0.00

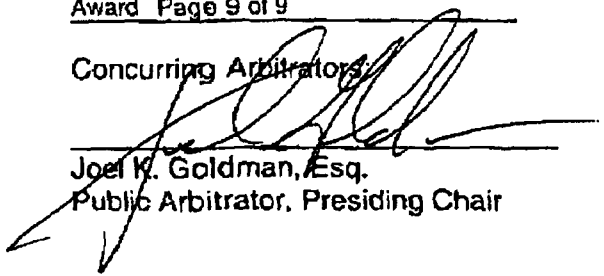
All balances are due to NASD Dispute Resolution

ARBITRATION PANEL

Joel K. Goldman, Esq. - Public Arbitrator, Presiding Chair

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Concurring Arbitrators


Joel K. Goldman, Esq.
Public Arbitrator, Presiding Chair

5/18/06
Signature Date

Date of Service (For NASD office use only)