

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Brian Gayman (Claimant) vs. Oppenheimer & Co., Inc., Josephthal & Co., Inc., Fahnestock & Co., Inc., and Michael Fasciglione (Respondents)

Case Number: 06-01431

Hearing Site: New York, New York

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Nature of the Dispute: Customer vs. Members and Associated Person

**REPRESENTATION OF PARTIES**

Claimant Brian Gayman hereinafter referred to as "Claimant": Carlton R. Asher, Jr., Esq., Law Offices of Carlton R. Asher, Jr., and Christine M. Bae, Esq., Kim & Bae, P.C., New York, NY.

Respondents Oppenheimer & Co., Inc. ("Oppenheimer"), Josephthal & Co., Inc. ("Josephthal"), Fahnestock & Co., Inc. ("Fahnestock"), and Michael Fasciglione ("Fasciglione") hereinafter collectively referred to as "Respondents": Edward J. Boyle, Esq., Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: March 20, 2006.

Claimant signed the Uniform Submission Agreement: March 20, 2006.

Joint Statement of Answer and Motion to Dismiss filed by Respondents on or about: April 20, 2006.

Josephthal signed the Uniform Submission Agreement: April 25, 2006.

Fahnestock did not submit a Uniform Submission Agreement.

Oppenheimer did not submit a Uniform Submission Agreement.

Fasciglione did not submit a Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: violations of NYSE and NASD Rules, misrepresentations, negligence, breach of fiduciary duty, breach of contract, breach of implied covenant of fair dealing, unauthorized trading, failure to supervise, loss of financial opportunity, and intentional infliction of emotional distress. The causes of action relate to unspecified technology and telecommunication stocks.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested compensatory damages in an amount not less than \$300,000.00 plus interest, punitive damages in an amount not less than \$200,000.00, costs, disbursements, attorneys' fees, accountant fees, expert fees, and such other, further, or different relief as the Panel may deem just, proper, and equitable.

Respondents requested dismissal of the Statement of Claim in its entirety, costs, and attorneys' fees.

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

Respondents Fahnestock, Oppenheimer, and Fasciglione did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

During the hearing, Respondent Fasciglione requested expungement of this matter from his CRD record. After due deliberation, the Panel denied Respondent Fasciglione's Request for Expungement.

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.

### **AWARD**

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

1. Claimant's claims are denied in their entirety.
2. Respondents are jointly and severally liable for and shall pay to NASD sanctions in the amount of \$5,000.00 for failure to comply with the Panel's October 10, 2006 Discovery Order.
3. Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **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	= \$	300.00
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**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Oppenheimer & Co., Inc. is a party.

Member Surcharge	= \$ 1,700.00
Pre-hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 2,750.00

**Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel @ \$1,125.00	= \$ 2,250.00
Pre-hearing conference: July 18, 2006 1 session	
October 3, 2006 1 session	

Six (6) Hearing sessions with Panel @ \$1,125.00	= \$ 6,750.00
Hearing Dates: October 24, 2006 2 sessions	
October 25, 2006 2 sessions	
October 26, 2006 2 sessions	

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Total Forum Fees	= \$ 9,000.00
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1. The Panel has assessed \$3,000.00 of the forum fees to Claimant.
2. The Panel has assessed \$3,000.00 of the forum fees to Respondent Oppenheimer.
3. The Panel has assessed \$3,000.00 of the forum fees to Respondent Fasciglione.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 3,300.00
Less payments	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 1,875.00
2. Respondent Oppenheimer is solely liable for:

Member Fees	= \$ 5,200.00
Forum Fees	= \$ 3,000.00
Total Fees	= \$ 8,200.00
Less payments	= \$10,700.00
Refund Due Respondent Oppenheimer	= \$ 2,500.00
3. Respondent Fasciglione is solely liable for:

Forum Fees	= \$ 3,000.00
Total Fees	= \$ 3,000.00

<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 3,000.00

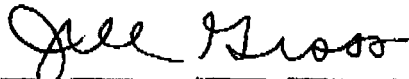
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Jill I. Gross, Esq.	-	Public Arbitrator, Presiding Chairperson
Roger L. Crossland, Esq.	-	Public Arbitrator
Eric J. Sussman, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, 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.



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Jill I. Gross, Esq.  
Public Arbitrator, Presiding Chairperson

11/2/06

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Signature Date

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Roger L. Crossland, Esq.  
Public Arbitrator

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Signature Date

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Eric J. Sussman, Esq.  
Non-Public Arbitrator

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Signature Date

November 2, 2006  
Date of Service (For NASD Dispute Resolution use only)

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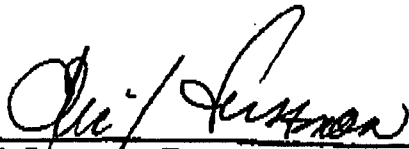
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