

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Hunter, Keith Industries, Inc.,

Claimant,

v.

No. 95-03491

Piper Jaffray, Inc., and
Piper Capital Management, Inc.,

Respondents.

REPRESENTATION OF PARTIES

Claimant Hunter, Keith Industries, Inc. was represented by Lewis A. Remele, Jr., Esquire of Bassford, Lockhart, Truesdell & Briggs located in Minneapolis, Minnesota.

Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. were represented by Lawrence J. Field of Leonard, Street and Deinard located in Minneapolis, Minnesota.

CASE INFORMATION

Claimant Hunter, Keith Industries, Inc.'s Statement of Claim was filed on or about July 19, 1995.

Claimant Hunter, Keith Industries, Inc.'s Submission Agreement was signed on July 13, 1995 by Robert J. Keith, President of Hunter, Keith Industries, Inc.

Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc.'s Statement of Answer was filed on or about September 8, 1995.

Respondent Piper Jaffray, Inc.'s Submission Agreement was signed on July 28, 1995 by AnnDrea M. Benson, Managing Director and Deputy General Counsel of Piper Jaffray, Inc.

The NASD has no record of a properly executed Submission Agreement from Respondent Piper Capital Management, Inc.

HEARING INFORMATION

Prehearing sessions were held on: February 7, 1996 for one (1) session; and
May 30, 1996 for one (1) session.

The hearing was held on: July 16, 1996 for two (2) sessions;
July 17, 1996 for two (2) sessions;
July 18, 1996 for two (2) sessions;
July 19, 1996 for two (2) sessions;
July 29, 1996 for two (2) sessions;
July 30, 1996 for two (2) sessions;
July 31, 1996 for two (2) sessions; and
August 1, 1996 for two (2) sessions.

The hearing was held in Minneapolis, Minnesota.

CASE SUMMARY

Claimant Hunter, Keith Industries, Inc. ("Claimant") alleged that Respondent Piper Capital Management ("Respondent"), an affiliate of and associated with Piper Jaffray, Inc., breached its fiduciary duties under the Employee Retirement Income Security Act ("ERISA") of 1974, 29 U.S.C. § 1001 et. seq., and violated numerous laws including federal and state securities laws, causing Claimant to lose money from their retirement accounts. Claimant asserted that it established two identical funds (the "Funds") with Respondent, that each Fund had market values of \$1,254,679.00, and that Claimant informed Respondent of its continuing desire to maintain investments with an average life of three to five years with AAA ratings. Claimant also asserted that it understood that any interest rate sensitive securities would be held in a hedged position. Claimant alleged, however, that Respondent disregarded the terms of an Investment Manager Agreement and Claimant's written and oral objectives. Claimant also alleged that Respondent failed to disclose to Claimant the nature and volatility of the securities purchased and held by Respondent in Claimant's retirement account. Claimant specifically alleged that Respondent: invested in unrated derivatives; invested in derivatives without prior approval as required under the Statement of Investment Objectives, which Respondent signed; deliberately purchased derivatives of the most speculative nature, which were highly sensitive to market changes; failed to inform Claimant of the highly risky nature of these derivatives, which was inconsistent with the conservative investment objectives given to Respondent; and failed to maintain a core portfolio with an average life of three to five years and instead invested nearly 80% of the Funds in derivatives of the most volatile type, all of which were unrated and reacted in the same fashion to changes in interest rates, which was directly contrary to Claimant's written and oral investment directions given to Respondent. Consequently, Claimant asserted that the Funds have incurred a dramatic drop in value and that it has had to maintain the derivatives in its new plan because they are not marketable.

Claimant made the following legal claims: (1) Respondent breached its fiduciary duty under ERISA and federal securities law; (2) Respondent breached its contract with Claimant; (3) Respondent violated state securities laws Minn. Stat. §§ 80A.01, 80A.02, and 80A.03; (4) Respondent violated Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78(a), et. seq., and Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2); (5) Respondent violated the Federal Investment Advisers Act of 1940, 15 U.S.C. § 80b-6; (6) Respondent was negligent; (7) Respondent breached its fiduciary duty under Minnesota law; (8) Respondent committed common law fraud; (9) Respondent is liable under respondeat superior; and (10) Respondent should be held liable for punitive damages.

Respondents Piper Capital Management, Inc., and Piper Jaffray, Inc. (hereinafter collectively referred to as "Respondents") denied all claims made in the Statement of Claim in their entirety. Respondents specifically stated that Claimant hired them to increase the returns of its retirement accounts under an active management approach, and that is what they did. Respondents asserted that Claimant is a sophisticated investor with professional experience and that it was familiar with derivatives and was well aware of their use in the portfolios. Respondents further asserted that: Claimant was regularly provided with information about what was in the portfolio explaining both the securities and Respondents' management approach; that Claimant did not once object to the use of derivatives in the portfolio; and that Claimant's primary investment objective was "highest risk adjusted income." Respondents contended that the derivatives at issue include only collateralized mortgage obligations, which are securities and not contracts. Respondents made the following defenses: (1) Claimant is a net winner due to Respondents because Claimant ended up with more money than it started with; (2) Respondents complied with Claimant's stated investment objectives; (3) because Claimant knew what securities Respondents were buying on its behalf and did not promptly complain about the purchase of those securities, Claimant is contractually precluded from complaining now about the performance of those securities; (4) the cause of any of Claimant's alleged losses are the result of market conditions, not Respondents fraud or breach of fiduciary duty; and (5) Claimant's delay has resulted in both the failure to mitigate damages and a failure to comply with numerous applicable statutes of limitations.

RELIEF REQUESTED

Claimant Hunter, Keith Industries, Inc. requested: an award in excess of \$500,000 for actual damages, the exact amount to be determined at the hearing; an award for excess management fees paid; an award for attorneys' fees; punitive damages; and an award for costs of arbitration.

Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. requested that the Statement of Claim be denied in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Piper Capital Management, Inc. did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to §12 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASD.

AWARD

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

(1) That Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. are jointly and severally liable for and shall pay Claimant Hunter, Keith Industries, Inc. compensatory damages in the amount of \$303,724.00, plus interest at the statutory rate that begins to accrue from May 1, 1995;

(2) That Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. are jointly and severally liable for and shall pay Claimant Hunter, Keith Industries, Inc. punitive damages in the amount of \$1,000,000.00, pursuant to the authorities submitted including state law, federal law and ERISA statutes;

(3) That Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. are jointly and severally liable for and shall pay Claimant Hunter, Keith Industries, Inc. its attorneys' fees and costs in the amount of \$170,000.00;

(4) That Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. are jointly and severally liable for and shall be obliged to purchase from Claimant Hunter, Keith Industries, Inc. all collateralized mortgage obligations securities purchased by Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. in Claimant Hunter, Keith Industries, Inc.'s account prior to April 30, 1995, that remain in the possession of Claimant Hunter, Keith Industries, Inc. at a price that shall be determined by an independent pricing service on the day on which the transaction takes place, which shall be no later than September 30, 1996; and

(5) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were two (2) prehearing sessions x \$300 = \$600 in forum fees, and there were sixteen (16) hearing sessions x \$1,000 = \$16,000 in forum fees. Total forum fees are \$600 + \$16,000 = \$16,600. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a prehearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by Claimant Hunter, Keith Industries, Inc.

Pursuant to §45 of the Code, the NASD shall **retain** the member surcharge fee in the amount of \$500 previously paid by Respondent Piper Jaffray, Inc.

Additional forum fees in the amount of \$15,600 are assessed jointly and severally against Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc.

Respondents Piper Jaffray, Inc. and Piper Capital Management, Inc. are jointly and severally liable for and shall reimburse Claimant Hunter, Keith Industries, Inc. for its hearing session deposit in the amount of \$1,000.

Fees are payable to the National Association of Securities Dealers, Inc.

Signatures of concurring arbitrators:

Dated:

/s/ Richard A. Mosman

Richard A. Mosman, Esquire
Public Arbitrator, Presiding Chair

August 12, 1996

/s/ Christine C. DeMoss

Christine C. DeMoss, Esquire
Public Arbitrator

8/12/96

/s/ Kenneth D. Waggoner

Kenneth D. Waggoner
Industry Arbitrator

8/14/96

Date of Service by NASD: August 15, 1996