

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Charles J. Cernansky and Sharon L. Burley, (Claimants) vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Respondent)

Case Number: 00-04054

Hearing Site: New York, New York

REPRESENTATION OF PARTIES

Claimants Charles J. Cernansky ("Cernansky") and Sharon L. Burley ("Burley"), hereinafter collectively referred to as "Claimants": Leonard Weintraub, Esq., Paduano & Weintraub LLP, New York, NY.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., hereinafter referred to as "Respondent": Barry Y. Weiner, Esq., Ruberto, Israel & Weiner, P.C. (formerly Shapiro, Israel & Weiner, P.C.), Boston, MA.

CASE INFORMATION

Statement of Claim filed on or about: September 15, 2000.

Answer to Counterclaim filed by Claimants on or about: December 15, 2000.

Cernansky signed the Uniform Submission Agreement: August 11, 2000.

Burley signed the Uniform Submission Agreement: August 11, 2000.

Statement of Answer and Counterclaim filed by Respondent on or about: November 22, 2000.

Respondent signed the Uniform Submission Agreement: November 20, 2000.

CASE SUMMARY

Claimants asserted the following causes of action: unauthorized trades; excessive commissions; breach of fiduciary duty; negligent failure to satisfy duty of due diligence; violations of federal securities laws; and violations of the rules and regulations of the NASD. Claimants' claim involved the stock of TrackPower, Inc. f/k/a American Digital Communications.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim should be dismissed as it fails to state a basis for recovery; Respondent complied with its obligations under Rule 144; Claimants are barred from recovery by the doctrine of *in pari delicto*; Claimants are barred from recovery by the doctrines of estoppel, ratification, and waiver; Claimants are barred from recovery in whole or in part by the doctrines of comparative and contributory negligence; and Claimants cannot recover for the alleged violations of SEC rules as there exist no private causes of action for such violations.

In its Counterclaim, Respondent asserted the following cause of action: failure to satisfy debit balance in account.

Unless specifically admitted in their Answer, Claimants denied the allegations made in the Counterclaim and asserted the following defenses: the Counterclaim fails to state a claim for relief; the Counterclaim should be denied in its entirety because Respondent engaged in unauthorized trading in Claimants' account; the Counterclaim should be denied in its entirety because Respondent violated the securities laws and rules and regulations of the NASD; the Counterclaim should be denied in its entirety because Respondent negligently handled Claimants' account and breached its fiduciary duty to Claimants; Respondent failed to mitigate its damages; and the Counterclaim should be denied in its entirety because Respondent resorted to self help.

RELIEF REQUESTED

Claimants requested:

- a. Compensatory damages in an amount of at least \$500,000.00;
- b. Punitive damages in the amount of \$500,000.00;
- c. Reasonable attorneys's fees and the costs of this action; and
- d. Such other and further relief as the Panel deems just and proper.

Respondent requested that the Statement of Claim be dismissed in its entirety, and that Respondent be awarded its counsel fees and costs incurred in defending these frivolous claims.

In its Counterclaim, Respondent requested compensatory damages in the approximate amount of \$18,024.00, together with its fees and expenses.

In their Answer, Claimants requested that the Counterclaim be denied in its entirety.

OTHER ISSUES CONSIDERED AND 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.

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. Respondent be and hereby is liable for and shall pay to Claimants compensatory damages in the amount of \$287,799.00 plus interest at the rate of 5% per annum from

March 1, 2000 until the date of service of this award.

2. Respondent's counterclaims are hereby denied. Notwithstanding the denial of said counterclaims, Claimants are directed to execute such documents as are necessary to deliver the remaining TrackPower stock in Claimants' accounts maintained with Respondent to Respondent, such that said stock becomes the property of Respondent.

3. All other requests for relief are hereby denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 500.00
Counterclaim filing fee	= \$ 750.00

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. In this matter, Merrill Lynch, Pierce, Fenner & Smith, Inc. is a party.

Member surcharge	= \$ 2,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 4,500.00

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing 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 a single arbitrator x \$450.00	= \$ 900.00
Pre-hearing conferences: December 17, 2001	1 session
February 12, 2002	1 session

Four (4) Pre-hearing sessions with Panel x \$1,200.00	= \$ 4,800.00
Pre-hearing conferences: March 19, 2001	1 session
May 14, 2001	1 session
May 25, 2001	1 session
November 20, 2001	1 session

Fourteen (14) Hearing sessions x \$1,200.00	= \$16,800.00
---	---------------

Hearing Dates:	July 31, 2001	2 sessions
	December 5, 2001	2 sessions
	December 6, 2001	2 sessions
	February 1, 2002	2 sessions
	February 26, 2002	2 sessions
	February 27, 2002	2 sessions
	March 20, 2002	2 sessions
Total Forum Fees		= \$22,500.00

1. The Panel has assessed \$22,500.00 of the forum fees against Respondent.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested tapes, \$ 60.00.
2. Respondent requested tapes, \$300.00.

Fee Summary

1. Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
<u>Administrative Costs</u>	= \$ 60.00
Total Fees	= \$ 560.00
<u>Less payments</u>	= \$ 1,760.00
Refund Due Claimants	= \$ 1,200.00

2. Respondent be and hereby is solely liable for:

Counterclaim Filing Fee	= \$ 750.00
Member Fees	= \$ 7,600.00
Forum Fees	= \$22,500.00
<u>Administrative Costs</u>	= \$ 300.00
Total Fees	= \$31,150.00
<u>Less payments</u>	= \$ 9,205.00
Balance Due NASD Dispute Resolution, Inc.	= \$21,945.00

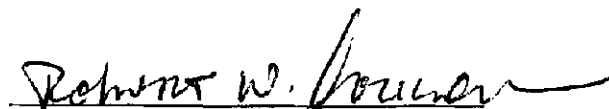
All balances are due and payable to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

Robert W. Cockren, Esq.	-	Public Arbitrator, Presiding Chair
Ted M. Rosen, Esq.	-	Public Arbitrator
David W. Haynes	-	Industry 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.



Robert W. Cockren, Esq.
Public Arbitrator, Presiding Chair

Apr. 16, 2002
Signature Date

Ted M. Rosen, Esq.
Public Arbitrator

Signature Date

David W. Haynes
Industry Arbitrator

Signature Date

April 25, 2002
Date of Service (For NASD office use only)

ARBITRATION PANEL

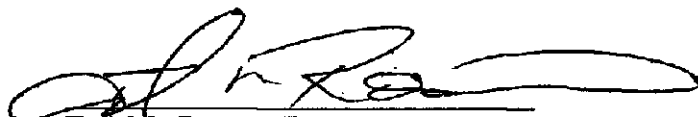
Robert W. Cockren, Esq.	-	Public Arbitrator, Presiding Chair
Ted M. Rosen, Esq.	-	Public Arbitrator
David W. Haynes	-	Industry Arbitrator

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.

Robert W. Cockren, Esq.
Public Arbitrator, Presiding Chair

Signature Date



Ted M. Rosen, Esq.
Public Arbitrator

4-19-02
Signature Date

David W. Haynes
Industry Arbitrator

Signature Date

April 25, 2002

Date of Service (For NASD office use only)

ARBITRATION PANEL

Robert W. Cockren, Esq.	-	Public Arbitrator, Presiding Chair
Ted M. Rosen, Esq.	-	Public Arbitrator
David W. Haynes	-	Industry 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.

Robert W. Cockren, Esq.
Public Arbitrator, Presiding Chair

Signature Date

Ted M. Rosen, Esq.
Public Arbitrator

Signature Date



David W. Haynes
Industry Arbitrator



Signature Date

April 25, 2002
Date of Service (For NASD office use only)