

Award
NASD Dispute Resolution

COPY

In the Matter of the Arbitration Between:

Devon Investment Advisors, Inc. and Devon Management & Consulting, Inc., Claimants v.
Merrill Lynch, Pierce, Fenner & Smith Incorporated, Fredrick S. Berger, Stifel, Nicolaus & Co.,
Incorporated, Hanifen, Imhoff Inc., Smith, Benton & Hughes, Inc., and Neidiger, Tucker, Bruner,
Inc., Respondents

Case Number: 01-01030

Hearing Site: Las Vegas, Nevada

Nature of the Dispute: Customers v. Members and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

Frank L. O'Bryan
Representative
Greenwood Village, Colorado

For Respondents Merrill Lynch, Pierce,
Fenner & Smith Incorporated and
Fredrick S. Berger:

Kenneth C. Mennemeier, Esq.
Mennemeier, Glassman & Stroud LLP
Sacramento, California

For Respondents Stifel, Nicolaus & Co.,
Incorporated and Hanifen, Imhoff Inc.:

Sven C. Collins, Esq.
Holme Roberts & Owen LLP
Denver, Colorado

For Respondent Smith, Benton & Hughes, Inc.:

Mike Zaman
Smith, Benton & Hughes, Inc.
Los Angeles, California

For Respondent Neidiger, Tucker, Bruner, Inc.:

D. Laird Blue, Esq.
Law Offices of Jones & Keller
Denver, Colorado

CASE INFORMATION

Statement of Claim filed: February 20, 2001

Claimants' Uniform Submission Agreement signed: February 4, 2001

Statement of Answer filed by Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Fredrick S. Berger: August 6, 2002

Statement of Answer filed by Respondents Stifel, Nicolaus & Co., Incorporated and Hanifen, Imhoff Inc.: October 23, 2002

Statement of Answer filed by Respondent Neidiger, Tucker, Bruner, Inc.: November 4, 2002

Statement of Answer to Amended Statement of Claim filed by Respondent Neidiger, Tucker, Bruner, Inc.: May 6, 2004

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated's Uniform Submission Agreement signed: July 30, 2002

Respondent Fredrick S. Berger's Uniform Submission Agreement signed: August 6, 2002

Respondent Stifel, Nicolaus & Co., Incorporated's Uniform Submission Agreement: Not Filed

Respondent Hanifen, Imhoff Inc.'s Uniform Submission Agreement: Not Filed

Respondent Smith, Benton & Hughes, Inc.'s Uniform Submission Agreement: Not Filed

Respondent Neidiger, Tucker, Bruner, Inc.'s Uniform Submission Agreement signed: November 2, 2002

CASE SUMMARY

Claimants alleged negligence, breach of fiduciary duty, unauthorized trading, unauthorized transfers, and manipulation. Claimants' allegations involved transactions in Hollywood Trenz, Inc. stock.

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Fredrick S. Berger denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

Respondents Stifel, Nicolaus & Co., Incorporated and Hanifen, Imhoff Inc. denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

Respondent Neidiger, Tucker, Bruner, Inc. denied the allegations of wrongdoing set forth in the Claimants' Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$1,584,411.00 and punitive damages in the amount of \$792,000.00 from Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Fredrick S. Berger; compensatory damages in the amount of \$8,221,274.00 from Respondents Stifel, Nicolaus & Co., Incorporated, Hanifen, Imhoff Inc., and Smith, Benton & Hughes, Inc.; and, compensatory damages in the amount of \$290,096.00 from Respondent Neidiger, Tucker, Bruner, Inc. Claimants also requested interest and costs.

Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated and Fredrick S. Berger requested dismissal of the Claimants' Statement of Claim in its entirety, a motion to sever, and costs.

Respondents Stifel, Nicolaus & Co., Incorporated and Hanifen, Imhoff Inc. requested dismissal of the Claimants' Statement of Claim in its entirety.

Respondent Neidiger, Tucker, Bruner, Inc. requested dismissal of the Claimants' Statement of Claim in its entirety, a motion to sever, and costs.

OTHER ISSUES CONSIDERED AND DECIDED

On October 26, 2002, Claimants' representative signed a Waiver Agreement on behalf of Claimants expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On January 9, 2003, Claimants requested the venue be changed from Los Angeles, California to Las Vegas, Nevada with the understanding that the venue would remain in that hearing location for the duration of the case and would not be moved to California or any other location under any circumstances without the express, written approval of the Director of Arbitration.

Respondents Stifel, Nicolaus & Co., Incorporated and Hanifen, Imhoff Inc., Inc. did not file with the NASD Dispute Resolution, properly executed submission agreements; however, all said Respondents are required to submit to arbitration and, Respondent Stifel, Nicolaus & Co., Incorporated and Hanifen, Imhoff Inc., Inc. having answered the claim are bound by the determination of the Panel on all issues submitted.

Respondent Smith, Benton & Hughes, Inc. did not file with the NASD Dispute Resolution a properly executed submission agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure and is bound by the determination of the Panel on all issues submitted.

On May 17, 2004, the Panel heard oral argument on Respondents Merrill Lynch, Pierce, Fenner & Smith Incorporated's, Fredrick S. Berger's, Stifel, Nicolaus & Co., Incorporated's, Hanifen, Imhoff Inc.'s and Neidiger, Tucker, Bruner, Inc.'s Motions to Dismiss. After due deliberation, the Panel granted the motions and dismissed Claimants' claims with prejudice.

FINDINGS AND CONCLUSIONS

All Respondents, except Smith, Benton & Hughes, Inc., have moved, on various grounds, for dismissal of all claims, with prejudice, without an evidentiary hearing.

Numerous written statements in support, and in opposition to, these motions were filed. The Panel Members have read and considered all these writings.

On May 17, 2004, the Panel conducted a Pre-hearing Telephone Conference during which it heard oral argument in support of, and in opposition to, the Motions to Dismiss.

Having considered the arguments, written and oral, submitted by the Parties, and all pleadings on file, the Panel finds that each one of the following reasons supports, and requires, dismissal of all claims, with prejudice.

1. Claimants failed to timely file, as ordered by the Panel, an Amended Statement of Claim. Claimants were ordered to file such Amended Statement of Claim on or before February 16, 2004; they failed to do so. Without a request from Claimants to do so, the Panel, on its own motion, extended the time for Claimants to file an Amended Statement of Claim to March 8, 2004; Claimants again failed to file an Amended Statement of Claim within the time as extended. By fax dated March 8, 2004, Claimants requested a further extension of time to March 17, 2004. However, no Amended Statement of Claim was filed until April 3, 2004. In extending the time, the Panel specifically warned the Claimants that if they failed to file an Amended Statement of Claim within the time as extended, they were ordered to show cause, at the May 17, 2004 telephone conference, why the Panel should not dismiss all claims based on their willful and intentional material failure to comply with the Panel's orders as provided in NASD Code of Arbitration, 10305(b). The Panel finds that Claimants have failed to show any justifiable cause for their repeated and intentional material failures to comply with the Panel's orders that they file an Amended Statement of Claim by specified dates, and that such failures justify dismissal of all their claims, with prejudice.

2. The un rebutted evidence in the Declaration of Stephan Lau, shows that neither Devon Investment Advisors, Inc. nor Devon Management & Consulting, Inc. are, or were, at times material, corporations in fact, since they did not have valid Articles of Incorporation on file with the Secretary of State for Colorado. In argument to the Panel, Claimants Devon Investment Advisors, Inc.'s and Devon Management & Consulting, Inc.'s representative, Frank O'Bryan, admitted that at the time these claims were filed with NASD, the corporations no longer had valid Articles of Incorporation on file. A purported, or no longer legally qualified, corporation has no legal capacity to sue or be sued in court under Colorado and California law. Therefore, Claimants are legally incapable of asserting these claims in NASD Arbitration.
3. In this proceeding, the Statement of Claims were signed by Frank O'Bryan who admits he is not an attorney at law admitted to practice law in any state or federal court. Assuming that either Devon Investment Advisors, Inc. or Devon Management & Consulting, Inc., is a validly existing corporation, even a valid corporation cannot bring or defend claims in a law court except through representation by a licensed attorney. A layperson can only appear as his or her own representative (i.e., pro se) in bringing, or defending against, claims made by, or against himself/herself personally in legal forums. Frank O'Bryan's efforts to represent corporate claimants in this NASD Arbitration are a legally nullity, as they would be if he had attempted to bring the claims of the corporations in a court of law.

The parties 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, Respondents' Motions to dismiss, and Claimants' Oppositions thereto, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. In accordance with the Panel's findings above, the Panel has determined that Frank L. O'Bryan is the real Claimant in interest.
2. Respondents' Motions to Dismiss have been granted.
3. Claimants' claims are dismissed with prejudice.
4. The parties shall bear their respective costs, including attorney's fees.
5. All other relief requested and not expressly granted is denied.

FEES

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

Filing Fees

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

Initial claim filing fee = \$ 600.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy.

The member firm Merrill Lynch, Pierce, Fenner & Smith Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$ 2,500.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	= \$ 4,500.00
Total Member Fees	= \$ 7,600.00

The member firm Stifel, Nicolaus & Co., Incorporated is a party and the following fees are assessed:

Member Surcharge	= \$ 3,000.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	= \$ 5,000.00
Total Member Fees	= \$ 8,600.00

The member firm Hanifen, Imhoff Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 3,000.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	= \$ 5,000.00
Total Member Fees	= \$ 8,600.00

The member firm Neidiger, Tucker, Bruner, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	= \$ 2,500.00
Total Member Fees	= \$ 4,600.00

Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Panel. The following fees are assessed:

Two (2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 2,400.00
Pre-hearing conferences: February 4, 2004	1 session
May 17, 2004	1 session

Total Forum Fees	= \$ 2,400.00
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The Panel assessed \$2,400.00 of the forum fees jointly and severally to Claimants Devon Investment Advisors, Inc., Devon Management & Consulting, Inc., and to their purported representative, Frank L. O'Bryan.

Fee Summary

1. Claimants and their purported representative, Frank L. O'Bryan, are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 2,400.00
Total Fees	= \$ 3,000.00
Less payments	= \$ (0.00)
Balance Due NASD Dispute Resolution	= \$ 3,000.00

2. Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is charged with the following fees and costs:

Member Fees	= \$ 7,600.00
Total Fees	= \$ 7,600.00
Less payments	= \$ (9,700.00)
Refund owed to Merrill Lynch, Pierce, Fenner & Smith Incorporated	= \$ (2,100.00)

3. Respondent Stifel, Nicolaus & Co., Incorporated is charged with the following fees and costs:

Member Fees	= \$ 8,600.00
Total Fees	= \$ 8,600.00
Less payments	= \$ (9,700.00)
Refund owed to Stifel, Nicolaus & Co., Incorporated	= \$ (1,100.00)

4. Respondent Hanifen, Imhoff Inc. is charged with the following fees and costs:

Member Fees	= \$ 8,600.00
Total Fees	= \$ 8,600.00
Less payments	= \$ (0.00)
Balance due NASD Dispute Resolution	= \$ 8,600.00

5. Respondent Neidiger, Tucker, Bruner, Inc. is charged with the following fees and costs:

<u>Member Fees</u>	= \$ 4,600.00
<u>Total Fees</u>	= \$ 4,600.00
<u>Less payments</u>	= \$ (9,200.00)
Refund due Neidiger, Tucker, Bruner, Inc.	= \$ (4,600.00)

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

ARBITRATION PANEL

Eugene R. Nielson	-	Public, Presiding Chair
Charles B. Shryock	-	Public Arbitrator
Dwight E. Gould	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Eugene R. Nielson
Chair, Public Arbitrator

Signature Date

Charles B. Shryock
Public Arbitrator

Signature Date

Dwight E. Gould
Non-Public Arbitrator

Signature Date

Date of Service

ARBITRATION PANEL

Eugene R. Nielson	-	Public, Presiding Chair
Charles B. Shryock	-	Public Arbitrator
Dwight E. Gould	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures


Eugene R. Nielson
Chair, Public Arbitrator

June 9, 2004
Signature Date

Charles B. Shryock
Public Arbitrator

Signature Date

Dwight E. Gould
Non-Public Arbitrator

Signature Date

6/10/04
Date of Service

ARBITRATION PANEL

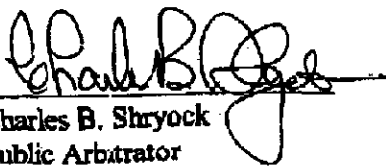
Eugene R. Nielson
Charles B. Shryock
Dwight E. Gould

Public, Presiding Chair
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures

Eugene R. Nielson
Chair, Public Arbitrator

Signature Date


Charles B. Shryock
Public Arbitrator

JUNE 9, 2004
Signature Date

Dwight E. Gould
Non-Public Arbitrator

Signature Date

6/10/04
Date of Service

ARBITRATION PANEL

Eugene R. Nielson	-	Public, Presiding Chair
Charles B. Shryock	-	Public Arbitrator
Dwight E. Gould	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Eugene R. Nielson
Chair, Public Arbitrator

Signature Date

Charles B. Shryock
Public Arbitrator

Signature Date


Dwight E. Gould
Non-Public Arbitrator

6-12-04
Signature Date

6-12-04
Date of Service