

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

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In the Matter of the Arbitration Between:

Mark Karpilovsky and the Mark Karpilovsky Family Trust, (Claimants) vs. Herzog, Heine, Geduld, Inc., Track Data Securities Corp., Track Securities Corp., Track Data Corp., Jack Spiegelman, and Barry I. Hertz, (Respondents)

Case Number: 01-01787

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimants Mark Karpilovsky ("Karpilovsky") and the Mark Karpilovsky Family Trust ("Karpilovsky Trust"), hereinafter collectively referred to as "Claimants": Guy L. Heinemann, Esq., Guy L. Heinemann, P.C., New York, NY.

Respondent Herzog, Heine, Geduld, Inc. ("Herzog"): Brian F. Amery, Esq., Bressler, Amery & Ross, Florham Park, NJ.

Respondents Track Data Securities Corp. ("TDSC"), Track Securities Corp. ("TSC"), Track Data Corp. ("TDC"), Jack Spiegelman ("Spiegelman"), and Barry I. Hertz ("Hertz"): Robert P. Bramnik, Esq., Wildman, Harrold, Allen & Dixon, Chicago, IL.

**CASE INFORMATION**

Statement of Claim filed on or about: April 6, 2001.

Memorandum of Law in Opposition to the Motion to Dismiss of TDC, Spiegelman, and Hertz filed by Claimants on or about: July 19, 2001.

Karpilovsky signed the Uniform Submission Agreement: April 6, 2001.

Karpilovsky Trust signed the Uniform Submission Agreement: April 6, 2001.

Statement of Answer filed by Herzog on or about: June 22, 2001.

Herzog did not sign a Uniform Submission Agreement.

Joint Statement of Answer filed by TDSC, TSC, TDC, Spiegelman, and Hertz on or about: June 12, 2001.

Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss filed by TDC, Spiegelman, and Hertz on or about: June 12, 2001.

Reply in Support of Motion to Dismiss filed by TDC, Spiegelman, and Hertz on or about: August 10, 2001.

TDSC signed the Uniform Submission Agreement: July 12, 2001.

TSC signed the Uniform Submission Agreement: July 12, 2001.

TDC signed the Uniform Submission Agreement: July 12, 2001.

Spiegelman signed the Uniform Submission Agreement: July 12, 2001.

Hertz signed the Uniform Submission Agreement: July 12, 2001.

### **CASE SUMMARY**

Claimants asserted the following causes of action: breach of fiduciary duties; negligence; federal securities fraud; negligent misrepresentation; common law fraud; breach of contract; breach of the covenant of good faith and fair dealing; wrongful liquidation; violation of SEC Rule 10b-16; failure to supervise; control person liability; and respondeat superior. Claimants' claim involved the stock of Staffmark, Inc.

Unless specifically admitted in its Answer, Herzog denied the allegations made in the Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief can be granted; Herzog did not breach any duty to Claimants imposed by operation of law or contract; Herzog acted in good faith and without malice or reckless indifference to Claimants; whatever damages, if any, that were allegedly sustained by Claimants were not caused by Herzog; Claimants failed to mitigate any alleged damages and therefore Claimants' claim for damages is barred or reduced pro tanto; Claimants are not entitled to punitive damages and costs of suit; Claimants' injuries or damages are due to the acts or omissions of third parties over whom Respondent had no control or right to control; and whatever damages, if any, that were allegedly sustained by Claimants as alleged in the Statement of Claim were caused in whole or in part, or were contributed to, by the negligence of Claimants.

Unless specifically admitted in their Answer, TDSC, TSC, TDC, Spiegelman, and Hertz denied the allegations made in the Statement of Claim and asserted the following defenses: Karpilovsky was an active trader, taking high-risk positions in extremely volatile NASDAQ stocks during a time of historic market volatility and appreciation; even if one or more of the Respondents violated some agreement with Karpilovsky, which they did not, Claimants suffered no damages; none of the losses in Claimants' accounts could have been caused by anyone but the person making the trading decisions for the accounts - Karpilovsky; Claimants' alleged damages were not caused by margin calls or subsequent liquidations; the Track Respondents are not liable or responsible for any of Claimants' losses or damages; and the claims against TDC, Spiegelman, and Hertz are nothing more than economic blackmail.

### **RELIEF REQUESTED**

Claimants requested:

- a. For damages to Karpilovsky's account, actual damages in the approximate amount of \$1,100,000.00;
- b. For damages to the Karpilovsky Trust account, actual damages in the approximate amount of \$200,000.00;
- c. Punitive damages of not less than three times the actual damages awarded to

each Claimant;

- d. Pre-award interest on actual damages from the date of the wrongdoing and post-award interest; and
- e. Such other relief as may be just and proper.

Herzog requested that Claimants' Statement of Claim be dismissed, with prejudice in its entirety, and that the Panel award Herzog costs and other further relief as they deem just and proper.

TDSC, TSC, TDC, Spiegelman, and Hertz requested that the Statement of Claim be dismissed and denied in its entirety.

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

In accordance with Rule 10313 of the NASD Code of Arbitration Procedure, the parties agreed to proceed with a Panel of two arbitrators following the death of arbitrator Francis V. Elias, Esq.

Herzog did not file with NASD Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

During the hearings conducted in this matter, Claimants withdrew all claims against Respondents Herzog, Spiegelman, and Hertz.

By letter dated January 10, 2003, Claimants' counsel confirmed that Claimants, jointly and severally, and Respondents TDSC, TSC, and TDC, jointly and severally, agreed to reimburse NASD Dispute Resolution for the cost of a round trip coach fare (and incidental ground travel expenses, including reasonable hotel expenses) to enable Chairman Claus Z. Pappenheimer to attend a final hearing session prior to April, 2003.

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. TDSC, TSC, and TDC are jointly and severally liable for and shall pay to Karpilovsky the sum of \$181,000.00 as compensatory damages, plus interest at the rate of 5% accruing from May 1, 2003 until date of payment.

2. TDSC, TSC, and TDC are jointly and severally liable for and shall pay to Karpilovsky Trust the sum of \$45,250.00 as compensatory damages, plus interest at the rate of 5% accruing from May 1, 2003 until date of payment.
3. Claimants' request for punitive damages is hereby denied.
4. Based upon Claimants' withdrawal of their claims against Herzog, Spiegelman, and Hertz, the arbitrators dismissed all claims against Herzog, Spiegelman, and Hertz in their entirety.
5. Each party shall bear its own attorneys' fees.
6. All other requests for relief are hereby 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	= \$ 600.00
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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 firms that employed the associated persons at the time of the events giving rise to the dispute. In this matter, Herzog, Heine, Geduld, Inc., Track Data Securities Corp., and Track Securities Corp. are parties.

#### **Herzog, Heine, Geduld, Inc.**

Member surcharge	= \$ 3,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 5,000.00

#### **Track Data Securities Corp.**

Member surcharge	= \$ 3,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 5,000.00

#### **Track Securities Corp.**

Member surcharge	= \$ 3,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 5,000.00

#### **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:

One (1) Pre-hearing session with a single arbitrator x \$450.00 = \$ 450.00  
Pre-hearing conference: April 17, 2002 1 session

One (1) Pre-hearing session with Panel x \$1,200.00 = \$ 1,200.00  
Pre-hearing conference: January 23, 2002 1 session

Twenty-four (24) Hearing sessions x \$1,200.00 = \$28,800.00  
Hearing Dates: July 1, 2002 2 sessions  
July 2, 2002 2 sessions  
July 10, 2002 2 sessions  
July 11, 2002 2 sessions  
July 12, 2002 2 sessions  
August 27, 2002 2 sessions  
August 28, 2002 2 sessions  
August 29, 2002 2 sessions  
November 19, 2002 2 sessions  
November 20, 2002 2 sessions  
November 21, 2002 2 sessions  
March 5, 2003 2 sessions

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Total Forum Fees = \$30,450.00

1. The Panel has assessed \$15,225.00 of the forum fees jointly and severally against Claimants Karpilovksy and Karpilovksy Trust.
2. The Panel has assessed \$15,225.00 of the forum fees jointly and severally against TDSC, TSC, and TDC.

#### **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 \$180.00
2. In accordance with the "Other Issues Considered and Decided" section above, Claimants, jointly and severally, and Respondents TDSC, TSC, and TDC, jointly and severally, agreed to reimburse NASD Dispute Resolution for the travel expenses incurred by arbitrator Pappenheimer in association with the March 5, 2003 hearing. In association with the March 5, 2003 hearing, arbitrator Pappenheimer submitted a request for reimbursement for the sum of \$1328.27. Accordingly, the parties are assessed the following administrative costs:

a. Claimants, jointly and severally, are liable for and shall pay to NASD Dispute Resolution \$664.13.

b. Respondents TDSC, TSC, TDC, jointly and severally are liable for and shall pay to NASD Dispute Resolution \$664.14.

**Fee Summary**

1. Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$15,225.00
<u>Administrative Costs</u>	= \$ 844.13
Total Fees	= \$16,669.13
<u>Less payments</u>	= \$ 1,980.00
Balance Due NASD Dispute Resolution	= \$14,689.13

2. Herzog is solely liable for:

<u>Member Fees</u>	= \$ 8,600.00
Total Fees	= \$ 8,600.00
<u>Less payments</u>	= \$ 8,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. TDSC is solely liable for:

<u>Member Fees</u>	= \$ 8,600.00
Total Fees	= \$ 8,600.00
<u>Less payments</u>	= \$ 8,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

4. TSC is solely liable for:

<u>Member Fees</u>	= \$ 8,600.00
Total Fees	= \$ 8,600.00
<u>Less payments</u>	= \$ 8,600.00
Balance Due NASD Dispute Resolution	= \$ 0.00

5. TDSC, TSC, and TDC are jointly and severally liable for:

Administrative Costs	= 664.14
Forum Fees	= \$15,225.00
Total Fees	= \$15,889.14
<u>Less payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$15,889.14


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

**ARBITRATION PANEL**

Claus Z. Pappenheimer	-	Public Arbitrator, Presiding Chair
James J. Noone	-	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.



Claus Z. Pappenheimer  
Public Arbitrator, Presiding Chair

April 8, 2003  
Signature Date

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James J. Noone  
Non-Public Arbitrator

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Signature Date

April 11, 2003  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

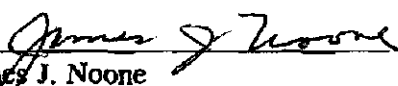
Claus Z. Pappenheimer	-	Public Arbitrator, Presiding Chair
James J. Noone	-	Non-Public Arbitrator

**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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Claus Z. Pappenheimer  
Public Arbitrator, Presiding Chair

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Signature Date

  
\_\_\_\_\_  
James J. Noone  
Non-Public Arbitrator

4-9-03  
\_\_\_\_\_  
Signature Date

April 11, 2003  
Date of Service (For NASD Dispute Resolution use only)

**RECIPIENTS:**

James J. Noone  
Claus Z. Pappenheimer