

---

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

---

In the Matter of the Arbitration Between:

Names of the Claimants

Case Number: 02-07211

Herman J. Fox, Individually and as Trustee  
of the Herman J. Fox Trust UDA 5/9/96  
Clover G. Fox, Individually and as Trustee  
of the Clover G. Fox Trust UDA 5/9/96

Names of the Respondents

Hearing Site: Tampa, FL

Prime Charter, Ltd. n/k/a Fahnestock & Co., Inc.  
Richard Thomas Jean

---

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

**REPRESENTATION OF PARTIES**

For Herman J. Fox, Individually and as Trustee of the Herman J. Fox Trust UDA 5/9/96 and Clover G. Fox, Individually and as Trustee of the Clover G. Fox Trust UDA 5/9/96, hereinafter collectively referred to as "Claimants": Roger G. McMorrow, Esq., McMorrow & Dillon, P.A., Naples, FL and Christopher T. Vernon, Esq., Treiser, Collins & Vernon, P.L., Naples, FL.

For Respondents Prime Charter, Ltd. n/k/a Fahnestock & Co., Inc. ("Prime") and Richard Thomas Jean ("Jean"), hereinafter collectively referred to as "Respondents": Cory M. Sobel, Of Counsel, Prime, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: November 27, 2002.

Claimants' Clarification of Statement of Claim filed on or about: December 11, 2003.

Claimants signed the Uniform Submission Agreement: November 13, 2002.

Statement of Answer filed by Respondents on or about: September 2, 2003.

Respondent Prime signed the Uniform Submission Agreement: September 11, 2003.

Respondent Jean signed the Uniform Submission Agreement: August 25, 2003.

Motion to Dismiss filed by Respondents on or about: May 15, 2003.

Response to Motion to Dismiss filed by Claimants on or about: June 6, 2003.

Motion For More Definite Statement of Claim filed by Respondents on or about: November 12, 2003.

Response to Motion For More Definite Statement of Claim filed by Claimants on or about: November 18, 2003.

Claimants' Request for Adverse Inferences and Monetary Sanctions Against Respondents filed on or about: January 19, 2004.

### **CASE SUMMARY**

Claimants asserted the following causes of action: violations of Florida Statutes Chapter 517; unsuitability; negligence; gross negligence; violations of NASD Rule 2310, NYSE Rule 405, and Florida Administrative Rule 3E-600.013(1)(c); churning; lack of supervision; and, breach of fiduciary duty. The causes of action relate to the purchase of unspecified securities products in Claimants' accounts.

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

### **RELIEF REQUESTED**

Claimants requested rescissory damages of \$992,494.90, disgorgement of commissions and margin interest, compensatory damages, costs, interest, punitive damages, a specific finding that Respondents violated Florida Statutes Chapter 517, and attorneys' fees pursuant to Florida Statutes section 517.211.

Respondents requested dismissal of the Statement of Claim, and that attorneys' fees and disbursements be assessed against the Claimants.

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

On or about June 23, 2003, the undersigned arbitrators (the "Panel") issued an order which denied Respondents' Motion to Dismiss.

On or about December 11, 2003, the Panel issued an order which granted Respondents' Motion For More Definite Statement of Claim.

During the evidentiary hearing, the Panel denied Claimants' Request for Adverse Inferences and Sanctions.

During the evidentiary hearing, Respondents made an ore tenus motion for sanctions. Claimants opposed the motion. Following the argument of counsel, the Panel denied Respondents' motion for sanctions.

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, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Respondents are liable for negligence under common law and Respondent Prime is solely liable for lack of supervision and shall pay to Claimant Clover G. Fox as Trustee of the Clover G. Fox Trust UDA 5/9/96 compensatory damages in the sum of \$226,300.00 plus interest at the Florida statutory rate accruing from January 24, 2004 until the date of payment of the Award. Ninety percent (90%) of the total sum is to be paid by Respondent Prime. Ten percent (10%) of the total sum is to be paid by Respondent Jean.

Respondents are liable for negligence under common law and Respondent Prime is solely liable for lack of supervision and shall pay to Claimant Herman J. Fox as Trustee of the Herman J. Fox Trust UDA 5/9/96 compensatory damages in the sum of \$116,955.00 plus interest at the Florida statutory rate accruing from January 24, 2004 until the date of payment of the Award. Ninety percent (90%) of the total sum is to be paid by Respondent Prime. Ten percent (10%) of the total sum is to be paid by Respondent Jean.

Respondent Prime is liable and shall pay to Claimant Herman J. Fox as Trustee of the Herman J. Fox Trust UDA 5/9/96 costs in the sum of \$6,000.00.

Respondent Prime is liable and shall pay to Claimant Clover G. Fox as Trustee of the Clover G. Fox Trust UDA 5/9/96 costs in the sum of \$6,000.00.

The claims of Herman J. Fox, individually and Clover G. Fox, individually are denied.

Claimants' and Respondents' requests for attorneys' fees are denied.

Any and all claims for relief not specifically addressed herein, including Claimants' claims for relief pursuant to Florida Chapter 517 and Claimants' request for punitive damages, are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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	= \$ 375.00
--------------------------	-------------

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent Prime is a member firm and a party.

Member surcharge	= \$ 2,250.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 4,000.00
Total Member Fees	= \$ 7,000.00

### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

No requests for adjournments were granted during these proceedings for which fees were assessed.

### **Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

No injunctive relief fees were assessed during these proceedings.

### **Forum Fees and Assessments**

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: November 6, 2003 1 session	
Two (2) Pre-hearing sessions with the Panel @ \$1,200.00	= \$ 2,400.00
Pre-hearing conferences: July 29, 2003 1 session	
December 8, 2003 1 session	
Seven (7) Hearing sessions @ \$1,200.00	= \$ 8,400.00
Hearing Dates: January 20, 2004 2 sessions	
January 21, 2004 2 sessions	
January 22, 2004 2 sessions	
January 23, 2004 1 session	
Total Forum Fees	= \$11,250.00

The Panel has assessed \$5,625.00 of the forum fees jointly and severally to Herman J. Fox as Trustee of the Herman J. Fox Trust UDA 5/9/96 and Clover G. Fox as Trustee of the Clover G. Fox Trust UDA 5/9/96.

The Panel has assessed \$5,625.00 of the forum fees to Respondent Prime.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

No administrative costs were incurred during this proceeding.

**Fee Summary**

Claimants are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 375.00
Total Fees	= \$ 375.00
<u>Less payments</u>	= \$ 375.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Claimants Herman J. Fox as Trustee of the Herman J. Fox Trust UDA 5/9/96 and Clover G. Fox as Trustee of the Clover G. Fox Trust UDA 5/9/96 are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 5,625.00
Total Fees	= \$ 5,625.00
<u>Less payments</u>	= \$ 1,425.00
Balance Due NASD Dispute Resolution	= \$ 4,200.00

Respondent Prime is solely liable for:

Member Fees	= \$ 7,000.00
<u>Forum Fees</u>	= \$ 5,625.00
Total Fees	= \$12,625.00
<u>Less payments</u>	= \$ 4,450.00
Balance Due NASD Dispute Resolution	= \$ 8,175.00

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

**ARBITRATION PANEL**

Richard Hoffman, CFP	-	Public Arbitrator, Presiding Chairperson
John P. Cullem, Esq.	-	Public Arbitrator
Charles R. Newcomer	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/  
Richard Hoffman, CFP  
Public Arbitrator, Presiding Chairperson

\_\_\_\_\_  
Signature Date

\_\_\_\_\_/s/  
John P. Cullem, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

/s/  
Charles R. Newcomer  
Non-Public Arbitrator

Signature Date

February 13, 2004  
Date of Service (For NASD Dispute Resolution office use only)

No administrative costs were incurred during this proceeding.

### Fee Summary

Claimants are jointly and severally liable for:

Initial Filing Fee	\$ 375.00
Total Fees	\$ 375.00
Less payments	\$ 375.00
Balance Due NASD Dispute Resolution	\$ 0.00

Claimants Herman J. Fox as Trustee of the Herman J. Fox Trust 197A 5-9-96 and Cheryl G. Fox as Trustee of the Cheryl G. Fox Trust 197A 5-9-96 are jointly and severally liable for:

Forum Fees	\$ 5,625.00
Total Fees	\$ 5,625.00
Less payments	\$ 4,400.00
Balance Due NASD Dispute Resolution	\$ 1,225.00

Respondent Prime is solely liable for:

Member Fees	\$ 7,000.00
Forum Fees	\$ 5,625.00
Total Fees	\$ 12,625.00
Less payments	\$ 8,450.00
Balance Due NASD Dispute Resolution	\$ 4,175.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 1785(b)(1) of the Rules.

### ARBITRATION PANEL

Richard Hoffman, CFP	Public Arbitrator, Presiding Chairperson
John P. Culbert, Esq.	Public Arbitrator
Charles R. Newcomer	Non-Public Arbitrator

### Concurring Arbitrators' Signatures

*Richard Hoffman*

Richard Hoffman, CFP  
Public Arbitrator, Presiding Chairperson

*2/13/04*  
Signature Date

John P. Culbert, Esq.  
Public Arbitrator

Signature Date

Feb. 12, 2004 10:35AM

NASD BOCA RATON

NO. 016

P. 6

NASD Dispute Resolution

Arbitration No. 02-07211

Award Page 5 of 6

No administrative costs were incurred during this proceeding.

Fee Summary

Claimants are jointly and severally liable for:

<u>Initial Filing Fee</u>	= \$ 375.00
<u>Total Fees</u>	= \$ 375.00
<u>Less payments</u>	= \$ 375.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 0.00

Claimants Herman J. Fox as Trustee of the Herman J. Fox Trust UDA 5/9/96 and Clover G. Fox as Trustee of the Clover G. Fox Trust UDA 5/9/96 are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 5,625.00
<u>Total Fees</u>	= \$ 5,625.00
<u>Less payments</u>	= \$ 1,425.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 4,200.00

Respondent Prime is solely liable for:

<u>Member Fees</u>	= \$ 7,000.00
<u>Forum Fees</u>	= \$ 5,625.00
<u>Total Fees</u>	= \$12,625.00
<u>Less payments</u>	= \$ 4,450.00
<u>Balance Due NASD Dispute Resolution</u>	= \$ 8,175.00

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

ARBITRATION PANEL

Richard Hoffman, CFP	-	Public Arbitrator, Presiding Chairperson
John P. Cullem, Esq.	-	Public Arbitrator
Charles R. Newcomer	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Richard Hoffman, CFP  
Public Arbitrator, Presiding Chairperson


Signature Date

  
John P. Cullem, Esq.  
Public Arbitrator

  
Signature Date



NASD Dispute Resolution  
Arbitration No. 02-07211  
Award Page 6 of 6



Charles R. Newcomer  
Non-Public Arbitrator

2/12/04  
Signature Date

---

Date of Service (For NASD Dispute Resolution office use only)