

**Award**  
**NASD Dispute Resolution, Inc.**

---

In the Matter of the Arbitration Between

Name of Claimants

John J. and Susan N. Brown

Case No. 99-04175

Name of Respondent

Respondent Pierce Fenner & Smith Inc

Hearing Location: Philadelphia, PA

---

**REPRESENTATION OF PARTIES**

Claimants John J. and Susan N. Brown ("Claimants") were represented by George J. D'Ambrosio, Esq., of the law firm of Owens, D'Ambrosio & Nescio, West Chester, PA.

Respondent Respondent Pierce Fenner & Smith ("Respondent") was represented by William E. Mahoney, Jr., Esq. of the law firm of Stradley, Ronon Stevens & Young, LLP, Philadelphia, PA.

**CASE INFORMATION**

Statement of Claim was filed on September 7, 1999.

Claimants signed the Uniform Submission Agreement on September 4, 1999.

Statement of Answer was filed by Respondent on December 3, 1999.

Respondent's Uniform Submission Agreement was executed by Ralph M. Cursio, Esq., Director and Senior Counsel of Respondent Pierce Fenner & Smith on December 3, 1999.

**ARBITRATORS' CASE SUMMARY**

Claimants sought award of \$188,464.76 representing the gain made when on or about April 9, 1999, Respondent withdrew \$616,410.22 from the Claimants' Respondent CMA Account to cover a series of Rom Tech/E-Games purchases made totaling \$427,945.46 in early April, 1999.

The \$616,410.22 sum represented the net proceeds of sales between February 19, 1999 and March 3, 1999 by Respondent on the Claimants behalf, involving sixty-eight separate trades of Rom Tech, Inc., that Respondent subsequently "busted" and repurchased in the market in the series of early April, 1999 transactions for \$427,945.46. The Rom Tech stock in question

had been acquired by the Claimants pursuant to the Claimants' exercise of a warrant for the purchase of those shares issued to Claimant John Brown by Rom Tech. A copy of that warrant had been faxed by the Claimants on February 14, 1999 to a representative of Respondent who, on February 16, 1999, advised the Claimants that they could exercise the warrant(s) and sell the stock in question immediately. Claimants did so, hand delivering the Rom Tech share certificate obtained to Respondent on February 19, 2000. Those Rom Tech shares were sold as noted above, after commissions of \$7,725.69 netting Claimants \$616,410.22 in their CMA account. The exercise price that Claimants paid to acquire the stock was \$72,164.

Some three weeks after the last of the sales, Respondent advised the Claimants that there was a Rule 144 problem with the Claimants' sale of the stock within one year of its purchase. On April 9, 1999, Respondent withdrew \$616,410.22 from the Claimants' CMA account as noted above and repurchased 144,328 of E-Games, Inc., the new name for Rom Tech, in the open market for \$427,945.46, creating a net profit of \$188,646.76. The dispute between the parties was who is entitled to this profit. Respondent retained it pending the outcome of this arbitration.

In subsequent transactions on or after February 19, 2000, Claimants resold the 144,328 of E-Games/Rom Tech at a profit of \$114,837.11.

By a filing on or about December 18, 2000, Claimants withdrew their claim for interest on the \$72,164 that they had risked on the stock in question and, their provisional claim for any loss on those 144,328 shares sold after February 16, 2000 (the latter being moot since there was no such loss).

### **RELIEF REQUESTED**

Claimants, in their Statement of Claim requested:

Compensatory Damages	\$256,410.22
Interest on \$72,164 at risk as a result of Respondents advising Claimant that they could sell the stock;	
Interest	unspecified
Attorneys' Fees	unspecified
Arbitration Costs	unspecified

Respondent requested that the Claimants' Statement of Claim be dismissed in its entirety, that the costs of this proceeding be assessed against Claimants and that Respondent be awarded such other relief, including its attorneys' fees and expenses, as the Arbitration Panel deems just and proper.

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

At the hearing, the parties contested whether the Respondent timely filed a defense that it "assumed market risk" in its April, 1999 repurchase and whether it in fact such a risk assumption occurred in the circumstances presented here. The Arbitrators find that question arbitrable, but in the circumstances presented here, that Respondent did not assume such a market risk.

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. That Respondent is liable to Claimants and shall pay Claimants the sum of \$73,927.05; no pre-judgment interest is assessed on this amount.
2. That the parties shall bear their own costs and attorneys' fees except as Fees are specifically addressed below.
3. That any and all claims for relief not specifically addressed herein are denied in their entirety.

### **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	= \$300
--------------------------	---------

#### **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, the member firm is a party.

Member surcharge	= \$1,500
Pre-hearing process fee	= \$ 600
Hearing process fee	= \$2,500

#### **Forum Fees and Assessments**

The Arbitrator(Panel) assesses forum fees for each hearing session conducted. A hearing 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 x \$450	= \$ 450
Pre-hearing conference: November 3, 2000	1 session
One (1) Pre-hearing session with Panel x \$1,125	= \$1,125
Pre-hearing conference: September 27, 2000	1 session
Six (6) Hearing sessions x \$1,125	= \$6,750
Hearing Dates: December 20, 2000	2 sessions
December 21, 2000	2 sessions
<u>March 1, 2001</u>	<u>2 sessions</u>
Total Forum Fees	= \$8,325

The Panel has assessed forum fees in this matter as follows:

1. Claimants are assessed forum fees in the amount of \$4,162.50.
2. Respondent is assessed forum fees in the amount of \$4,162.50

#### Fee Summary

Claimants are assessed the following fees:

Initial Filing Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$4,162.50</u>
Total Fees	= \$4,462.50
<u>Less payments</u>	<u>= \$1,425.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$3,037.50

Respondent is assessed the following fees:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	<u>= \$4,162.50</u>
Total Fees	= \$8,762.50
<u>Less payments</u>	<u>= \$7,637.50</u>
Balance Due NASD Dispute Resolution, Inc.	= \$1,125.00

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

Arbitration No. 99-04175

Award Page 5

Concurring Arbitrators' Signatures



Robert A. Alston, Esq, Chairperson  
Public Arbitrator

4/25/01

Signature Date

Robert F. Sanville, Panelist  
Public Arbitrator

Signature Date

Patricia Bird Reed, Panelist  
Non Public Arbitrator

Signature Date

April 26, 2001

Date of Service (For NASD-DR office use only)

04-25-01

16:58

From NASD

2027286852

T-682 P.008/008 F-703

NASD DISPUTE RESOLUTION, INC.

Arbitration No. 99-04175

Award Page 5

Concurring Arbitrators' Signatures

Robert A. Alston, Esq., Chairperson  
Public Arbitrator

Signature Date

Robert F. Sanville  
Robert F. Sanville, Panelist  
Public Arbitrator

4/25/01  
Signature Date

Patricia Bird Reed, Panelist  
Non Public Arbitrator

Signature Date

April 26, 2001  
Date of Service (For NASD-DR office use only)

04-25-01

16:59

From NASD

2027288952

T-551 P.008/008 F-702

NASD DISPUTE RESOLUTION, INC.

Arbitration No. 99-04175

Award Page 3

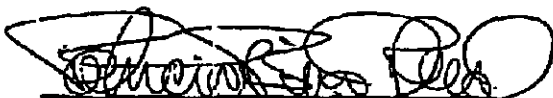
Concurring Arbitrators' Signatures

Robert A. Alston, Esq., Chairperson  
Public Arbitrator

Signature Date

Robert F. Sanville, Panelist  
Public Arbitrator

Signature Date



Patricia Bird Reed, Panelist  
Non Public Arbitrator

4/26/01  
Signature Date

April 26, 2001

Date of Service (For NASD-DR office use only)