

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

In the Matter of the Arbitration Between:

Names of the Claimants

James Bach and Susan Bach Faber  
Mary Ellery Hall

Case Number: 03-00092

Name of the Respondent

Charles Schwab & Co.

Hearing Site: Atlanta, Georgia

Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

For James Bach ("Bach") and Susan Bach Faber ("Faber") and Mary Ellery Hall ("Hall"), hereinafter collectively referred to as "Claimants": Steven J. Gard, Esq. and Allison S.H. Ficken, Esq., Gard Smiley Bishop & Dovin LLP, Atlanta, Georgia.

For Charles Schwab & Co. ("Schwab"), hereinafter referred to as "Respondent": David D. Sterling, Esq., Baker Botts LLP, Houston, Texas.

**CASE INFORMATION**

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

Claimant Hall signed the Uniform Submission Agreement: December 17, 2002.

Claimant Glazer signed the Uniform Submission Agreement: December 19, 2002 (see "Other Issues").

Claimant Bach signed the Uniform Submission Agreement: December 26, 2002.

Claimant Faber signed the Uniform Submission Agreement: May 24, 2004.

Statement of Answer and Third Party Claim filed by Respondent on or about: March 12, 2003.

Respondent signed the Uniform Submission Agreement: March 11, 2003.

**CASE SUMMARY**

Claimants asserted the following causes of action: breach of contract; breach of fiduciary duty; negligence; constructive fraud; aiding and abetting; violation of NASD and NYSE rules; control person liability; violation of common law; and, violation of state and federal securities laws. The causes of action relate to Claimants' investments, through their investment advisor, Hemisphere Trading Company, in shares of technology stocks including Penn Octane, Pharmhouse Corp., RELM Wireless, Savoir Technology and SI Diamond Technology in Claimants' accounts.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various defenses.

**RELIEF REQUESTED**

Claimants Bach and Faber requested compensatory damages in the amount of \$1,150,000.00.

Claimant Hall requested compensatory damages in the amount of \$2,400,000.00. Further,

Claimants requested pre and post award interest on their damages as well as attorneys' fees and all costs and expenses of this arbitration.

Respondent requested that the Panel dismiss the claim against Respondent in its entirety, award Respondent its costs in connection with this proceeding and award Respondent such other relief as provided by law.

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

These claims were originally brought by James Bach and Herbert Glazer, as Co-Executors of the Carol Hinchin Estate and Mary Ellery Hall. On or about February 13, 2004, Claimants James Bach and Herbert Glazer, as Co-Executors of the Carol Hinchin Estate, filed an unopposed Motion to Substitute Parties. The motion asserted that, since the arbitration was filed, the Carol Hinchin Estate had been closed and the Co-Executors discharged. Thus, James Bach and Susan Bach Faber, as residual beneficiaries of the Carol Hinchin Estate, were now the lawful owners of the claim originally brought by the Estate's Co-Executors. On or about February 27, 2004, the Panel issued an order which granted the motion.

Respondent listed Hemisphere Trading Company as a Third Party Respondent in its hearing brief and its Statement of Answer. Respondent agreed, at the evidentiary hearing, that there was never service on the Third Party Respondent and as such, the Panel dismissed the Third Party Claim.

During the evidentiary hearing, after Claimants presented their case-in-chief, Respondent made an ore tenus motion for directed verdict. Claimants objected to the motion. The Panel denied the motion.

The parties have agreed that the Award in this matter may be executed in counterpart copies.

### **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:

Respondent is liable on the claims of negligence and breach of contract and shall pay compensatory damages in the amount of \$294,884.00 to Claimants Bach and Faber and compensatory damages in the amount of \$104,657.00 to Claimant Hall, plus interest at the rate of 6% from the date of service of the Award to the date of payment of the Award.

Respondent is liable and shall pay to Claimants the sum of \$600.00 representing reimbursement of the claim filing fee previously paid by Claimants to NASD Dispute Resolution.

On the claims of constructive fraud and aiding and abetting, the Panel finds for Respondent.

Each party to bear their own attorneys' fees as there is no finding of fraud or breach of fiduciary duty by the Panel. E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 304 S.E. 2<sup>nd</sup> 420 (1983).

Any and all claims for relief not specifically addressed herein 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 = \$ 600.00

#### **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, the member firm Charles Schwab & Co. is a party.

Member surcharge = \$ 2,800.00

Pre-hearing process fee = \$ 750.00

Hearing process fee = \$ 5,000.00

#### **Adjournment Fees**

Adjournment granted during these proceedings for which fees were assessed:

February 24-27, 2004, adjournment requested by Claimants = \$ 1,200.00

#### **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 incurred in this matter.

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

The Panel has assessed forum fees for each session conducted. A 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 the Panel @ \$1,200.00 = \$ 1,200.00

Pre-hearing conference: July 21, 2003 1 session

Eight (8) Hearing sessions @ \$1,200.00 = \$ 9,600.00

Hearing Dates: May 25, 2004 3 sessions

May 26, 2004 3 sessions

May 27, 2004 2 sessions

---

Total Forum Fees = \$10,800.00

The Panel has assessed the total forum fees of \$10,800.00 to Respondent.

**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 are 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 in this matter.

**FEE SUMMARY**

Claimants are jointly and severally liable for:

Initial Filing Fee	= \$ 600.00
<u>Adjournment Fee</u>	= \$ 1,200.00
Total Fees	= \$ 1,800.00
<u>Less payments</u>	= \$ 1,800.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondent is solely liable for:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	= \$10,800.00
Total Fees	= \$19,350.00
<u>Less payments</u>	= \$ 8,550.00
Balance Due NASD Dispute Resolution	= \$10,800.00

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

**ARBITRATION PANEL**

W. William Harness, Esq.	-	Public Arbitrator, Presiding Chair
Fran L. Rothenberg, Esq.	-	Public Arbitrator
David T. Maddux	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/

06/11/04

---

W. William Harness, Esq.  
Public Arbitrator, Presiding Chair

---

Signature Date

/s/

06/10/04

---

Fran L. Rothenberg, Esq.  
Public Arbitrator

---

Signature Date

/s/

06/10/04

---

David T. Maddux  
Non-Public Arbitrator

---

Signature Date

06/14/04

---

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


Concurring Arbitrators' Signatures

\_\_\_\_\_  
W. William Harness, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Fran L. Rothenberg, Esq.  
Public Arbitrator


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

  
\_\_\_\_\_  
David T. Maddux  
Non-Public Arbitrator

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

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

Concurring Arbitrators' Signatures

  
W. William Harness, Esq.  
Public Arbitrator, Presiding Chair

6/11/04  
Signature Date

\_\_\_\_\_  
Fran L. Rothenberg, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
David T. Maddux  
Non-Public Arbitrator

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

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

Arbitration No. 03-00092  
Award Page 5

Concurring Arbitrators' Signatures

W. William Harness, Esq.  
Public Arbitrator, Presiding Chair

Signature Date

  
Fran L. Rothenberg, Esq.  
Public Arbitrator

6/10/04  
Signature Date

David T. Maddux  
Non-Public Arbitrator

Signature Date

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