

**Award  
NASD Dispute Resolution**

In the Matter of the Arbitration Between:	)	
	)	
<u>Name of the Claimant</u>	)	<u>Case Number:</u> 03-04209
Wachovia Securities, LLC	)	
	)	
<u>Name of the Respondent</u>	)	<u>Hearing Site:</u> Albuquerque, New Mexico
John T. Duff	)	
	)	
<u>Name of the Third-Party Respondents</u>	)	
Charles M. Ovis and Guy Patrick Riordan	)	
	)	

**NATURE OF DISPUTE**

Member Firm vs. Associated Persons

**REPRESENTATION OF PARTIES**

Gilbert M. Roman, Esq. of the law firm Rotherberger Johnson & Lyons, LLP, located in Denver, Colorado, represented Claimant, Wachovia Securities, LLC ("Wachovia"), hereinafter referred to as "Claimant." Mr. Roman also represented Third-Party Respondents, Charles M. Ovis ("Ovis") and Guy Patrick Riordan ("Riordan").

Earl R. Norris, Esq. of the law firm Oldaker, Oldaker & Norris, P.A., located in Albuquerque, New Mexico, represented the Respondent, John T. Duff ("Duff"), hereinafter referred to as "Respondent."

**CASE INFORMATION**

Statement of Claim filed on June 9, 2003. Claimant, Wachovia Securities, LLC, signed the Uniform Submission Agreement on June 9, 2003. An Amended Statement of Claim was filed on June 10, 2003.

Answer to Amended Statement of Claim, Counterclaim and Third-Party Complaint filed by Respondent, John T. Duff, on June 25, 2003. Respondent Duff signed the Uniform Submission Agreement on September 12, 2003.

Replies to Duff's Counterclaim and Third-Party Complaint by Claimant Wachovia and Third-party Respondents, Ovis and Riordan, and Riordan's Amended Counterclaim was filed on September 3, 2003. Respondent Ovis signed the Uniform Submission Agreement on October 9, 2003. Respondent Riordan signed the Uniform Submission Agreement on October 13, 2003.

### **CASE SUMMARY**

Claimant asserted deficiencies in the payment of three promissory notes signed by Respondent before he left the employment of Claimant on May 30, 2003. Two of the notes represented advances by Wachovia that were forgivable over the period of Duff's employment and the third note represented an advance by Wachovia for the payment of the purchase price of a book of business of a retiring financial advisor by Duff and Riordan (the "Receiving Financial Advisor Agreement"). Claimant also asserted damages for the payment of a negotiated settlement of an arbitration claim (the "Harris Claim") made by a customer of Duff, which was entered into by Wachovia about the time Duff resigned his position. Claimant made further claims for breach of fiduciary duty by Duff in connection with the solicitation of customers in violation of the terms of a non-compete provision contained in the Receiving Financial Advisor Agreement. Claimant further requested affirmation and continuation of an Order for a preliminary injunction entered by the District Court of Bernalillo County, New Mexico on June 17, 2003, enjoining Duff from soliciting Wachovia customers.

Duff denied the allegations made in the Statement of Claim relating to non-payment of each of the three promissory notes and the obligations for reimbursement of Wachovia for the Harris Claim; denied that the non-competition and non-solicitation agreements are enforceable; denied any breach of fiduciary duty; and raised affirmative defenses of unreasonable non-competition covenants, breach of contract and unclean hands. Duff filed a Counterclaim against Wachovia and Third-Party Claims against Ovis and Riordan alleging constructive and wrongful termination relating to their actions during the period of his employment by Wachovia.

Riordan filed a counterclaim against Duff for loans that he had extended to Duff, but pursued collection in court and withdrew the arbitration claim.

In addition, in their Answer to Respondent Duff's Counterclaim and Third-Party Complaint, Wachovia, Ovis and Riordan asserted the following affirmative defenses:

1. Duff's Counterclaims and Cross-claims fail to state a claim upon which relief can be granted.
2. Duff has failed to mitigate his damages, if any.
3. Wachovia's conduct, as it related to Ovis and Duff, was at all times reasonable and taken in good faith.
4. Ovis' and Riordan's conduct, as it related to Duff, was at all times reasonable and taken in good faith.
5. Duff's claims are barred by the applicable statute of limitations.
6. Duff's claims are barred by the doctrines of waiver, estoppel and/or laches.
7. Duff's claims are barred by the application of the doctrine of unclean hands.
8. Duff's claims are barred on the grounds of unilateral and/or mutual mistake.
9. Duff's claims for fraud fail for lack of specific pleading.
10. Duff's claims for fraud fail because Duff had a duty to seek additional information, which he failed to do.
11. Duff's claims are barred because his damages, if any, were caused by his own special acts or omissions, or the acts or omissions of third parties over whom Wachovia had no control.

12. Duff's claims are barred, in whole or in part, by Duff's contributory or comparative negligence or other fault.
13. Duff's claims are barred on the grounds that Wachovia supervised its employees under an appropriate standard of care, and is not responsible for their conduct outside of their employment relationship with Wachovia.

#### **RELIEF REQUESTED**

Claimant, Wachovia Securities, LLC, requested for preliminary injunction, total compensatory damages in the amount of \$54,573.40 for balances owed on three (3) promissory notes and settlement on the Harris complaint; dismissal of the counterclaims against Wachovia and Third-party Respondents, Charles M. Ovis and Guy Patrick Riordan; for costs, attorney's fees and expenses.

Respondent, John T. Duff, requested denial and dismissal of all claims; requested damages for constructive and wrongful termination against Wachovia, Ovis and Riordan; and requested attorney's fees and expenses.

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

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, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, John T. Duff, is solely liable for and shall pay Claimant, Wachovia Securities, LLC, compensatory damages in the sum of \$6,179.66, plus interest of \$487.91 for the Promissory Note of February 12, 1999, or a total of \$6,667.57.
2. Respondent, John T. Duff, is solely liable for and shall pay Claimant, Wachovia Securities, LLC, compensatory damages in the sum of \$6,568.28 plus interest of \$623.97 for the Promissory Note of April 11, 2000, or a total of \$7,192.25.
3. Respondent, John T. Duff, is solely liable for and shall pay Claimant, Wachovia Securities, LLC, the sum of \$3,000.00 for attorney's fees and expenses related to the collection of the Promissory Notes listed in Nos. 1 and 2, above. In deciding to award attorney's fees, Panel considered the pleadings filed by counsel, as well as arguments presented on behalf of the parties, and determined that authority existed for an award of attorney's fees to Claimant Wachovia.
4. No award is granted with respect to either the Stangle Promissory Note dated January 2, 2001, or the settlement of the Harris Claim.
5. The Order for preliminary injunction entered by the District Court of Bernalillo County, New Mexico on June 17, 2003, was proper and is granted, but will not be made permanent because the non-compete period was enforced and has lapsed. The Panel recommends the release of the \$30,000 bond

- posted by Claimant.
6. Respondent's claims for constructive and wrongful termination are denied.
  7. Except as otherwise specified herein, the parties shall bear their own costs, including attorneys' fees.
  8. Any and all relief not specifically addressed herein is 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	= \$1,000.00
Counterclaim and Third-Party Filing fee (Duff)	= \$ 225.00
Counterclaim filing fee (Riordan)	= \$ 50.00

#### **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. Accordingly, Wachovia Securities, LLC is a party to this case and is assessed the following fees:

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,700.00

Southwest Securities, Inc. currently employs the associated person and is assessed the following fees:

Member surcharge	= \$1,100.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$1,700.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed: None.

#### **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.

1. Member firm, Wachovia Securities, LLC, is assessed:

Injunctive relief surcharge	= \$2,500.00
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**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:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00 = \$ 900.00

Pre-hearing conferences: November 19, 2004 1 session

December 21, 2004 1 session

One (1) Pre-hearing session with Panel @ \$750.00 = \$ 750.00

Pre-hearing conference: June 28, 2004 1 session

Seven (7) Hearing sessions @ \$750.00 = \$5,250.00

Hearing Dates: January 17, 2005 2 sessions

January 18, 2005 2 sessions

January 19, 2005 2 sessions

January 20, 2005 1 session

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Total Forum Fees = \$6,900.00

1. The Panel assessed 50% of the total forum fees in the amount of \$3,450.00 jointly and severally to Claimants, Wachovia Securities, LLC and Third-Party Respondents, Charles M. Ovis and Guy Patrick Riordan.
2. The Panel assessed 50% of the total forum fees in the amount of \$3,450.00 solely to Respondent John T. Duff.

**FFF SUMMARY**

1. Claimant, Wachovia Securities, LLC, is solely liable for:

Initial Filing Fee = \$1,000.00

Member Fees = \$3,550.00

Injunctive Relief Fees = \$2,500.00

Total Fees = \$7,050.00

Less payments = \$6,750.00

Balance Due NASD Dispute Resolution = \$ 300.00

2. Third-Party Respondent, Guy Patrick Riordan, is solely liable for:

Counterclaim Filing fee = \$ 50.00

Less payments = \$ 50.00

Balance Due NASD Dispute Resolution = \$ 0.00

3. Respondent, John T. Duff, is solely liable for:

Counterclaim and Third-Party Filing Fee = \$ 225.00

Forum Fees = \$3,450.00

Less payments = \$ 225.00

Balance Due NASD Dispute Resolution = \$3,450.00

4. Claimant, Wachovia Securities, LLC and Third-Party Respondents, Charles M. Ovis and Guy Patrick Riordan, are jointly and severally liable for:

Forum fees	= \$3,450.00
<u>Less payments</u>	<u>= \$ 350.00</u>
Balance Due NASD Dispute Resolution	= \$3,100.00

5. Member firm, Southwest Securities, Inc., is solely liable for:

Member fees	= \$3,550.00
<u>Less payments</u>	<u>= \$2,625.00</u>
Balance Due NASD Dispute Resolution	= \$ 925.00

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

**ARBITRATION PANEL**

Jerry H. Friedland	-	Non-Public Arbitrator, Presiding Chairperson
James D. Knotter, Esq.	-	Public Arbitrator
Patrick J. Halter	-	Public Arbitrator

**Concurring Arbitrators' Signatures**

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Jerry H. Friedland  
Non-Public Arbitrator, Presiding Chairperson

2-1-05  
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Signature Date

\_\_\_\_\_  
James D. Knotter, Esq.  
Public Arbitrator

2-1-05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Patrick J. Halter  
Public Arbitrator

2-1-05  
\_\_\_\_\_  
Signature Date

2-1-05  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution office use only)

4. Claimant, Wachovia Securities, LLC and Third-Party Respondents, Charles M. Ovis and Guy Patrick Riordan, are jointly and severally liable for:

Forum fees	= \$3,450.00
<u>Less payments</u>	<u>= \$ 350.00</u>
Balance Due NASD Dispute Resolution	= \$3,100.00

5. Member firm, Southwest Securities, Inc., is solely liable for:

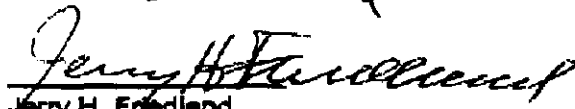
Member fees	= \$3,550.00
<u>Less payments</u>	<u>= \$2,625.00</u>
Balance Due NASD Dispute Resolution	= \$ 925.00

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

**ARBITRATION PANEL**

Jerry H. Friedland	• Non-Public Arbitrator, Presiding Chairperson
James D. Knotter, Esq.	• Public Arbitrator
Patrick J. Halter	• Public Arbitrator

**Concurring Arbitrators' Signatures**

  
Jerry H. Friedland  
Non-Public Arbitrator, Presiding Chairperson

  
Signature Date

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James D. Knotter, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Patrick J. Halter  
Public Arbitrator

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

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

## NASD Dispute Resolution

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4. Claimant, Wachovia Securities, LLC and Third-Party Respondents, Charles M. Oyle and Guy Patrick Riordan, are jointly and severally liable for:

Forum fees	= \$3,450.00
Less payments	= \$ 300.00
Balance Due NASD Dispute Resolution	= \$3,100.00

5. Member firm, Southwest Securities, Inc., is solely liable for:

Member fees	= \$3,500.00
Less payments	= \$2,875.00
Balance Due NASD Dispute Resolution	= \$ 625.00

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


ARBITRATION PANEL

Jerry H. Friedland	- Non-Public Arbitrator, Presiding Chairperson
James D. Knotter, Esq.	- Public Arbitrator
Patrick J. Haller	- Public Arbitrator

Concurring Arbitrators' Signatures

Jerry H. Friedland  
Non-Public Arbitrator, Presiding Chairperson

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

  
James D. Knotter, Esq.  
Public Arbitrator

2/1/05  
Signature Date

Patrick J. Haller  
Public Arbitrator

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

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



NASD Dispute Resolution

Arbitration No. 03-04209

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4. Claimant, Wachovia Securities, LLC and Third-Party Respondents, Charles M. Ovis and Guy Patrick Riordan, are jointly and severally liable for:

Forum fees	= \$3,450.00
Less payments	= \$ 350.00
Balance Due NASD Dispute Resolution	= \$3,100.00

5. Member firm, Southwest Securities, Inc., is solely liable for:

Member fees	= \$3,550.00
Less payments	= \$2,625.00
Balance Due NASD Dispute Resolution	= \$ 925.00

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

**ARBITRATION PANEL**

Jerry H. Friedland	- Non-Public Arbitrator, Presiding Chairperson
James D. Knotter, Esq.	- Public Arbitrator
Patrick J. Halter	- Public Arbitrator

**Concurring Arbitrators' Signatures**

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Jerry H. Friedland  
Non-Public Arbitrator, Presiding Chairperson

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Public Arbitrator

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