

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

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In the Matter of the Arbitration Between:

Carol Howe, individually and as co-trustee and beneficiary of the David E. Howe Trust and for the Estate of David Howe, Claimants v. Wachovia Securities, LLC, Respondent

Case Number: 04-04336

Hearing Site: Helena, Montana

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Nature of the Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

For Claimants:

Linda M. Deola, Esq.  
Reynolds, Motl and  
Sherwood  
Helena, Montana

For Respondent:

Andrew R. Park, Esq.  
Wachovia Securities, LLC  
Richmond, Virginia

**CASE INFORMATION**

Statement of Claim filed: June 17, 2004

Claimants Carol Howe, individually and as co-trustee and beneficiary of the David E. Howe Trust and for the Estate of David Howe's Joint Uniform Submission Agreement signed: June 16, 2004

Statement of Answer filed by Respondent Wachovia Securities, LLC: September 10, 2004

Respondent Wachovia Securities, LLC's Uniform Submission Agreement signed: September 10, 2004

**CASE SUMMARY**

Claimants asserted the following causes of action: negligence, violation of Montana Securities Act, negligent misrepresentation, constructive fraud, fraudulent concealment, common law fraud/misrepresentation, breach of fiduciary duty, and respondeat superior liability. The causes of action relate to Respondent's handling and supervision of Claimants' investment accounts.

Unless specifically admitted in its Answer, Respondent denied the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted the following defenses: waiver, estoppel, ratification, Claimants' claims for damages result from market conditions over which

Respondent had no control, assumption of risk, damages claimed were caused by entities or individuals over whom Respondent had no control, Claimants' tort claims for economic losses are barred as a matter of law, Respondent acted in good faith and exercised reasonable diligence, Claimants' claims are barred in whole or in part by applicable statutes of limitations, failure to mitigate, Respondent's actions are not the proximate cause of the damages alleged by Claimants, and Respondent discharged its responsibilities in a professional and ethical manner.

### **RELIEF REQUESTED**

Claimants requested approximately \$3,000,000.00 in compensatory damages, return of commissions in the amount of \$600,000.00, unspecified punitive damages, pre- and post-judgment interest, return of Claimants' filing fees, and costs, including attorney's fees.

Respondent requested dismissal of Claimants' Statement of Claim in its entirety.

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

#### **Motion to Change Hearing Location**

This matter was originally venued in Denver, Colorado. In March 2005, NASD opened a new hearing location in Helena, Montana. On May 12, 2005, Claimants filed a Motion to Change Hearing Location in order to have this matter heard by a panel of arbitrators in Helena, Montana. On May 26, 2005, Respondent filed its response to Claimants' Motion to Change Hearing Location. On May 26, 2005, the Panel granted Claimants' motion, and this matter was subsequently heard by the same Panel in Helena, Montana.

#### **Respondent's Motion to Dismiss and Claimants' Motion for Determination of Subject Matter Jurisdiction**

- On July 18, 2005, Respondent filed a Motion to Dismiss. On August 2, 2005, Claimants filed a Response to Respondent's Motion to Dismiss. On August 10, 2005, Respondent filed a Reply Brief in Support of Motion to Dismiss.
- On August 10, 2005, Claimants filed a Motion for Determination of Subject Matter Jurisdiction and Request to Postpone Hearing Date. On August 12, 2005, Respondent filed a Response to Claimants' Request to Postpone the Hearing. On August 25, 2005, Respondent filed a Response to Claimants' Motion for Determination of Subject Matter Jurisdiction.

On September 6, 2005, the Panel and the parties participated in a pre-hearing conference during which the Panel heard oral argument regarding these motions. On September 6, 2005, the Panel issued an Order stating that it must defer its consideration of the issues presented in the motions until the arbitration hearing, at which time the Panel would have the opportunity to hear and

review evidence that would likely be relevant to a disposition of the issues raised. Respondent renewed its Motion to Dismiss at the close of Claimant's case and at the close of the hearing; the Panel denied Respondent's motion on both occasions.

*Respondent's Motion to Supplement Record*

On September 26, 2005, Respondent filed a Motion to Supplement Record. On September 27, 2005, Claimants filed a Response to Respondent's Motion to Supplement Record. On October 6, 2005, the Panel deliberated regarding this motion and denied the relief requested by Respondent.

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

- 1) Respondent Wachovia Securities, LLC is liable to and shall pay Claimants Carol Howe, individually and as co-trustee and beneficiary of the David E. Howe Trust and for the Estate of David Howe the sum of \$369,850.00 in compensatory damages.
- 2) This Award shall bear interest at the rate of 10% per annum on any balance that remains unpaid thirty (30) days after receipt hereof, unless a motion to vacate has been filed with a court of competent jurisdiction. If this award is the subject of a motion to vacate that is subsequently denied, the award shall bear interest at the rate of 10% per annum on any balance that remains unpaid from date of the court's order denying said motion to vacate.
- 3) The parties shall bear their respective costs, including attorney's fees.
- 4) Any and all relief not specifically addressed herein, including punitive damages, is denied.

**FEES**

Pursuant to the Code, the following fees are assessed:

**Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$ 600.00

**Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Wachovia Securities, LLC is a party, and the following fees are assessed:

Member Surcharge = \$2,800.00

Pre-Hearing Process Fee = \$ 750.00

Hearing Process Fee = \$5,000.00

**Total Member Fees = \$8,550.00**

**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. The following forum fees are assessed:

Two (2) pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$2,400.00

Pre-hearing conferences: December 15, 2004 1 session  
September 6, 2005 1 session

Six (6) hearing sessions @ \$1,200.00/session = \$7,200.00

Hearings: September 20, 2005 2 sessions  
September 21, 2005 2 sessions  
September 22, 2005 2 sessions

**Total Forum Fees = \$9,600.00**

1. The Panel assessed \$4,800.00 of the forum fees jointly and severally to Claimants Carol Howe, individually and as co-trustee and beneficiary of the David E. Howe Trust and for the Estate of David Howe.
2. The Panel assessed \$4,800.00 of the forum fees to Respondent Wachovia Securities, LLC.

**Fee Summary**

1. Claimants Carol Howe, individually and as co-trustee and beneficiary of the David E. Howe Trust and for the Estate of David Howe are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 600.00
Forum Fees	= \$ 4,800.00
Total Fees	= \$ 5,400.00
Less payments	= \$(1,800.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,600.00</b>

2. Respondent Wachovia Securities, LLC is charged solely with the following fees and costs:

Member Fees	= \$ 8,550.00
Forum Fees	= \$ 4,800.00
Total Fees	= \$13,350.00
Less payments	= \$(8,550.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 4,800.00</b>

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

NASD Dispute Resolution  
Arbitration No. 04-04336  
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ARBITRATION PANEL

<i>Steven Meyrich, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Federico C. Alvarez, Esq.</i>	-	<i>Public Arbitrator</i>
<i>Joseph Keith Kessel, Esq.</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

  
Steven Meyrich, Esq.  
Chair, Public Arbitrator

  
Signature Date

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Federico C. Alvarez, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Joseph Keith Kessel, Esq.  
Non-Public Arbitrator

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Signature Date

  
Date of Service

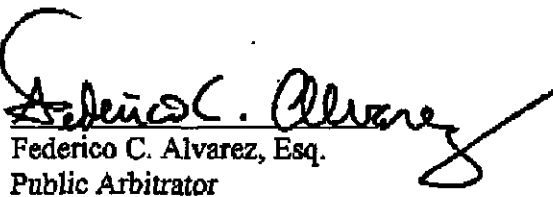
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Chair, Public Arbitrator

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Signature Date

  
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Federico C. Alvarez, Esq.  
Public Arbitrator

10-10-05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Joseph Keith Kessel, Esq.  
Non-Public Arbitrator

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Signature Date

10/10/05  
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Chair, Public Arbitrator

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Signature Date

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Federico C. Alvarez, Esq.  
Public Arbitrator

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Signature Date



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Joseph Keith Kessel, Esq.  
Non-Public Arbitrator

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10/17/05  
Signature Date

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10/10/05  
Date of Service