

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

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In the Matter of the Arbitration Between:

Devora Tilson, Individually and as Co-Guardian of the Property Management of Jack Tilson (Claimants) v. Thomas R. Kershner, Kennerman Associates, Inc., and Wachovia Securities, Inc. [as Successor-in-Interest to First Union Securities, Inc. and First Albany Corp.] (Respondents)

Case Number: 04-08119

Hearing Site: New York City, New York

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Nature of the Dispute: Customers v. Member, Associated Person, and Non-Member

**REPRESENTATION OF PARTIES**

Claimants Devora Tilson ("D. Tilson") Individually, and Devora Tilson as Co-Guardian of the Property Management of Jack Tilson ("J. Tilson"), hereinafter referred to as "Claimants": William A. Rome, Esq., Hoffman & Pollok, LLP, New York, NY.

Respondents Thomas R. Kershner ("Kershner") and Kennerman Associates, Inc., ("Kennerman"): Timothy J. O'Connor, Esq., Albany, NY.

Respondent Wachovia Securities, Inc. [as Successor-in-Interest to First Union Securities, Inc. and First Albany Corp.] ("Wachovia"): David J. Rice, Esq., Wachovia Securities, LLC, Richmond, VA

**CASE INFORMATION**

Statement of Claim filed on or about: November 22, 2004.

Claimants signed the Uniform Submission Agreement: August 18, 2004.

Statement of Answer, Motion to Dismiss and Counterclaim filed by Respondent Wachovia on or about: March 1, 2005.

Respondent Wachovia signed the Uniform Submission Agreement: March 1, 2005.

Joint Statement of Answer and Motion to Dismiss filed by Respondents Kershner and Kennerman on or about: March 1, 2005.

Respondent Kershner signed the Uniform Submission Agreement: February 28, 2005.

Respondent Kennerman did not submit a signed Uniform Submission Agreement.

### **CASE SUMMARY**

Claimant asserted the following causes of action: breach of contract, breach of fiduciary duty, negligence, suitability, aiding and abetting, failure to supervise, and respondeat superior. The causes of action relate to speculative, high-risk telecommunications, and technology stocks.

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

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

In its Counterclaim Respondent Wachovia asserted indemnification.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$2,865,431.39 on the first through third, fifth through seventh, and ninth through tenth claims for relief, and compensatory damages in the amount of \$399,805.23 on the fourth and eighth claims for relief, prejudgment interest, costs, and reasonable attorneys' fees.

Respondents Kershner and Kennerman requested that the Panel dismiss the Statement of Claim in its entirety, together with an award for fees, forum fees, filing fees, surcharges, motion fees, hearing fees, attorneys' fees, costs, disbursements, and any other further relief deemed just and appropriate.

Respondent Wachovia requested that the Statement of Claim be dismissed with prejudice and that all fees and costs be assessed against Claimant, and such other relief as is deemed just and proper.

Respondent Wachovia requested in its Counterclaim indemnification, forum fees, attorney's fees and costs and for such other relief as the panel deems just and proper.

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

Respondent Kennerman did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On or about October 6, 2005, Claimant entered into a settlement agreement with Respondent Wachovia Securities, Inc.

On or about October 26, 2005, the Panel granted Respondents Kershner and Kennerman's Motion to Dismiss without prejudice.

On or about November 1, 2005, Wachovia notified NASD Dispute Resolution that it settled its claims with Claimants and therefore dismissed its Counterclaim with prejudice.

On or about November 7, 2005, Claimants submitted their request for an immediate conference in order to re-argue the Panel's decision to dismiss without prejudice. The Panel denied the Claimants' request to re-argue its order.

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. Claimants' claims are dismissed in their entirety without prejudice.
2. 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	= \$ 600.00
Counterclaim	= \$ 2,000.00

#### **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, Inc., is a party.

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

#### **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. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel @ \$1,200.00	= \$ 1,200.00
Pre-hearing conference: June 22, 2005 1 session	

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Total Forum Fees	= \$ 1,200.00
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1. The Panel has assessed \$240.00 of the forum fees to Claimant D. Tilson.
2. The Panel has assessed \$240.00 of the forum fees to Claimant J. Tilson.
3. The Panel has assessed \$240.00 of the forum fees to Respondent Kershner.
4. The Panel has assessed \$240.00 of the forum fees to Respondent Kennerman.
5. The Panel has assessed \$240.00 of the forum fees to Respondent Wachovia.

**Fee Summary**

1. Claimants are jointly and severally liable for:

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

2. Claimant D. Tilson is solely liable for:

<u>Forum Fees</u>	= \$	240.00
<u>Total Fees</u>	= \$	240.00
<u>Less payments</u>	= \$	240.00
<u>Balance Due NASD Dispute Resolution</u>	= \$	0.00

3. Claimant J. Tilson is solely liable for:

<u>Forum Fees</u>	= \$	240.00
<u>Total Fees</u>	= \$	240.00
<u>Less payments</u>	= \$	960.00
<u>Refund Due Claimant</u>	= \$	720.00

4. Respondent Kershner is solely liable for:

<u>Forum Fees</u>	= \$	240.00
<u>Total Fees</u>	= \$	240.00
<u>Less payments</u>	= \$	0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$	240.00

5. Respondent Kennerman is solely liable for:

<u>Forum Fees</u>	= \$	240.00
<u>Total Fees</u>	= \$	240.00
<u>Less payments</u>	= \$	0.00
<u>Balance Due NASD Dispute Resolution</u>	= \$	240.00

6. Respondent Wachovia, is solely liable for:

<u>Filing Fee</u>	= \$	2,000.00
<u>Member Fees</u>	= \$	8,550.00
<u>Forum Fees</u>	= \$	240.00
<u>Total Fees</u>	= \$	10,790.00
<u>Less payments</u>	= \$	17,250.00
<u>Refund Due Wachovia</u>	= \$	6,460.00


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

**ARBITRATION PANEL**

Oliver Wayne Williams, J.D.	-	Public Arbitrator, Presiding Chairperson
Martin Fogleman, Esq.	-	Public Arbitrator
John Murray Carroll, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

  
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Oliver Wayne Williams, J.D.  
Public Arbitrator, Presiding Chairperson

2/2/06  
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Signature Date

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Martin Fogleman, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
John Murray Carroll, Esq.  
Non-Public Arbitrator

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

February 8, 2006  
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Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Oliver Wayne Williams, J.D.	-	Public Arbitrator, Presiding Chairperson
Martin Fogleman, Esq.	-	Public Arbitrator
John Murray Carroll, Esq.	-	Non-Public Arbitrator

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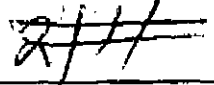
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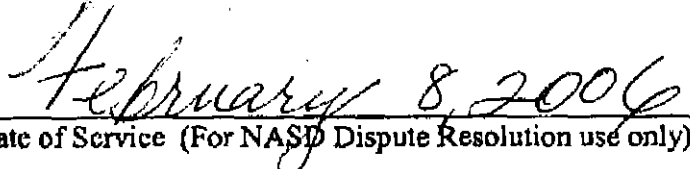
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