

7501117

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

In the Matter of the Arbitration Among

**Name of Claimants**

Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, Ronald G. Green and Matthew H. Patton

Consolidated  
Case Numbers<sup>1</sup>  
90-00460  
90-00461  
91-00116

**Name of Respondents**

Marshall & Co., Inc.; Marshall & Co., Securities, Inc.; Wheat First Securities, Inc., successor in interest to Marshall & Company, Inc. and to Marshall & Co. Securities, Inc.; Kentwood Brett Thackston, and Michael P. Marshall

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**REPRESENTATION**

For Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, Ronald G. Green and Matthew H. Patton (hereinafter referred to collectively as "Claimants"): William E. Sumner, Esq. of the law firm of Sumner & Hewes, Atlanta, Georgia. Claimants were also represented by Nancy Becker Hewes, Esq., Stephen Anderson, Esq. and A. Thomas Stubbs, Esq. of the law firm of Sumner & Hewes, Atlanta, Georgia

For Respondents Marshall & Co., Inc.; Marshall & Co. Securities, Inc.; Wheat First Securities, Inc., successor in interest to Marshall & Company, Inc. and to Marshall & Co. Securities, Inc.; Kentwood Brett Thackston, and Michael P. Marshall (hereinafter collectively referred to as "Respondents"): Peter W. Schneider, Esq. of the law firm of Rogers & Hardin, Atlanta Georgia

**CASE INFORMATION**

Statement of Claim filed by Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter

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<sup>1</sup>Based upon the consent of all parties, Case Numbers 90-00460, 90-00461 and 91-00116 were consolidated.

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Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland in Arbitration Case Number 90-00460 on: February 13, 1990

Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland Submission Agreement signed on: February 5, 1990

Amended Statement of Claim filed by Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland in Arbitration Case Number 90-00460 on March 15, 1991

Respondents Marshall & Co., Inc. ("Marshall") and Kentwood Brett Thackston ("Thackston") filed a Joint Statement of Answer and Counterclaim to case number 90-00460 on: May 4, 1990  
Respondents Marshall and Thackston did not execute a Uniform Submission Agreement. (See Other Issues Considered and Decided)

Respondent Wheat First Securities, Inc. n/k/a Wheat First Butcher Singer, Inc. ("Wheat First") filed Statement of Answer and Counterclaim to case number 90-00460 on: May 4, 1990

Wheat First did not execute a Uniform Submission Agreement. (See Other Issues Considered and Decided).

Answer, Affirmative Defenses and Counterclaim of Marshall, Marshall & Co., Securities, Inc. ("MCS") and Thackston to the Amended Statement of Claim filed in case Number 90-00460 on April 29, 1991

Amendment to Answer filed by Respondents Marshall, MCS, and Michael P. Marshall ("Mr. Marshall") on consolidated case Numbers 90-00460 and 90-00461 on November 22, 1991.

Statement of Claim filed by Claimant Ronald Green ("Green") which was assigned Case No. 90-00461 was filed on: February 13, 1990

An Amended Statement of Claim was filed by Green on March 15, 1991

Claimant Green's Submission Agreement was signed on January 26, 1990.

Respondents Marshall and Thackstons' Joint Answer and Counterclaim filed in Case Number 90-00461 on May 4, 1990.

Respondent Wheat First Answer and Counterclaim filed in Case Number 90-00461 on May 4, 1990

Respondent Wheat First Answer to the Amended Statement of Claim filed in Case Number 90-00461 on April 29, 1991

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Respondent Michael P. Marshall ("Mr. Marshall") Answer and Counterclaim filed in Case Number 90-00461 on April 29, 1991

Claimant Matthew H. Patton ("Patton") Statement of Claim filed in Case Number 91-00116 on January 7, 1991

Patton's Submission Agreement signed on January 3, 1991

Patton's Amended Statement of Claim filed on November 4, 1991

Wheat First's Statement of Answer filed in Case Number 91-00116 on February 27, 1991

Wheat First's Statement of Answer to Patton's Amended Statement of Claim filed in Case Number 91-00116 on December 3, 1991

Marshall and Thackstons' Joint Statement of Answer filed in Case Number 91-00116 on February 27, 1991

Marshall, MCS and Thackstons' Answer and Counterclaim to Patton's Amended Statement of Claim filed in Case Number 91-00116 on December 3, 1991

Marshall, MCS and Thackston to Answer and Counterclaim to Patton's Amended Statement of Claim filed in Consolidated Case Numbers 90-00460, 90-00461 and 91-00116 on December 3, 1991

Claimants' Response to Respondents' Counterclaims in Case Numbers 90-00460, 90-00461 and 91-00116 filed on July 26, 1991

Amended Counterclaim of Respondents filed in Case Numbers 90-00460, 90-00461 and 91-00116 on February 24, 1992

### **HEARING INFORMATION**

Pre-Hearing Conference:     December 17, 1991   - two sessions  
   February 22, 1994   - one session

Hearing Dates/Sessions: January 21, 1992 - two sessions (preliminary hearing  
   before entire panel)

February 13, 1992   - two sessions  
February 14, 1992   - two sessions  
March 23, 1992   - two sessions  
May 4, 1992   - two sessions  
May 5, 1992   - two sessions  
June 12, 1992   - two sessions  
July 23, 1992   - two sessions  
July 24, 1992   - two sessions

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August 13, 1992	- two sessions
August 26, 1992	- two sessions
August 27, 1992	- two sessions
September 30, 1992	- two sessions
October 1, 1992	- two sessions
October 2, 1992	- two sessions
December 16, 1992	- two sessions
December 17, 1992	- two sessions
December 18, 1992	- two sessions
February 25, 1993	- one session
April 12, 1993	- one session
April 13, 1993	- two sessions
April 14, 1993	- two sessions
April 21, 1993	- two sessions
April 22, 1993	- two sessions
April 23, 1993	- one session
August 23, 1993	- two sessions
August 24, 1993	- two sessions
September 8, 1993	- two sessions
September 28, 1993	- two sessions
September 29, 1993	- two sessions
November 11, 1993	- two sessions
November 12, 1993	- one session
December 7, 1993	- two sessions
April 14, 1994	- two sessions

Hearing Locations: NASD District Office, and Atlanta Hilton Hotel - Atlanta, Georgia

### **CASE SUMMARY**

Claimants alleged, among other things, that Respondents breached their obligations that they owed to Claimants. Claimants alleged that Respondents made repeated material misrepresentations to Claimants regarding Central Corporation ("Central")<sup>2</sup> and its predecessor companies and that Respondents repeatedly failed to disclose material adverse information. Claimants alleged that Respondents Marshall, Mr. Marshall and Thackston demonstrated preferential treatment toward

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<sup>2</sup> Central Stock went through several name changes during the relevant period. During the Claimants' initial purchase period it was named 21st Century Robotics and in late 1985 it merged with Sun Teleservices Corporation to form TFC Teleservices Corporation. In March of 1987, the company changed its name to Central Corporation. In November 1988, Central filed in bankruptcy under Chapter 11 and later emerged from Chapter 11 proceedings with a new name Resurgens Communication Group, Inc. ("Resurgens").

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Marshall and Mr. Marshall and other related investors and entities to the detriment of the Claimants. Claimants alleged that Thackston continually touted Central and continually persuaded Claimants to take larger and larger positions in Central. Claimants alleged that Thackston discouraged them from selling Central and that Thackston assured Claimants that if Central had any significant problems he and other representatives of Marshall would know and that Thackston would relay the information to Claimants immediately. Claimants alleged that they relied exclusively on the advice of Respondents as to their stock transactions in Central. Claimants alleged that either Marshall, Mr. Marshall or Thackston knew and concealed Central's serious problems or they knew about these problems and lied to the Claimants. Claimants alleged that Thackston continually lied to them so that they would keep purchasing Central and to prevent them from selling Central. Claimants alleged that they were defrauded by the affirmative misrepresentations of Thackston and Marshall. Claimants alleged that had fraudulent misrepresentations not been made, they could have protected themselves by selling their Central stock. Claimants alleged that Thackston personally guaranteed that Central stock would go up. Claimants alleged that Respondents breached their fiduciary duty they owed Claimants. Claimant Paul Duke alleged that Respondents churned his account and made unauthorized trades in his account. Claimants alleged that Thackston, Marshall and its successor in interest Wheat First made improper margin calls in respect to Duke, Jr.'s account. Patton alleged that Thackston, based on material misrepresentations, induced Patton to purchase shares of Resurgens. Patton alleged that Respondents made unauthorized trades in his account and that Marshall and its agents, induced him into investing in investments which were unsuitable given Patton's investment goals. Claimants alleged market manipulation, violation of NASD rules and deception by Thackston's selling Central through house accounts which took place outside of the parameters of the bid and ask. Claimants asserted that Mr. Marshall and others conspired to force Central through a pre-arranged bankruptcy reorganization. Claimants alleged securities fraud, common law fraud, breach of fiduciary duty, negligence, violation of Federal Racketeer Influenced and Corrupt Organization Act, violation of Section 16-14-3 of the Georgia Racketeer Influenced and Corrupt Organization Act, and unjust enrichment.

Respondents denied the allegations asserted by Claimants in all respects. Respondents maintained, among other things, that they had a reasonable basis for all statements and opinions that they provided Claimants. Respondents maintained that virtually all of Claimants' trades in Central were based on the advice that they received from the manager of their securities portfolio, Claimant Ruth Strickland. Respondents maintained that it was Ms. Strickland and Claimants, not Respondents, who made the decision to invest in Central. Respondents maintained that Ms. Strickland had known about Central since 1984 and that she conducted an independent research of Central, which verified Marshall's and Thackston's opinion about the stock. Respondents maintained that it was Claimants not Respondents who exercised control over Claimants accounts. Respondents maintained that although Thackston provided Claimants with investment advice they exercised their independent decision as to whether to purchase or sell Central. Respondents maintained that the Claimants', whose claims have been consolidated for hearing in this matter, are wealthy, sophisticated investors with broad business and market experience. Claimants were well aware of all the risks associated with Central and decided when to buy and when to sell Central stock. The Claimants have

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attempted to shift their responsibility to Respondents by using the benefit of hindsight. Respondents maintained that all material information was properly disclosed to Claimants and that Claimants purchased some Central in a May, 1987 private placement in which the Private Placement Memorandum disclosed the particularized risks of investing in Central. Respondents denied that they have committed any violations of federal securities laws, the laws of the state of Georgia or the rules of the NASD, Inc. Respondents set forth the following affirmative defenses in the pleadings filed in this consolidated matter: Claimants' claims are barred by the doctrine of estoppel and ratification; Claimants failed to exercise the degree of diligence required of investors; Respondents acted properly and in good faith; Claimants suffered no damages as a result of Respondents actions; Claimants' negligence claim is barred by the defense of contributory negligence; Respondents, as a matter of law, are not liable to Claimants for any alleged violation of NASD rules; and, Claimants' claims are barred by the applicable statutes of limitation.

Respondents asserted a counterclaim against Claimants for attorneys' fees and expenses that have been incurred by reason of the need to defend Claimants' claims.

Respondent Wheat First maintained that Claimants assert no valid claim against it and that all claims about trading arise out of purchases and sales of Central at Respondent Marshall & Co., Inc. Wheat First maintained that Claimants assertion that Wheat First is liable as a "successor in interest" to Marshall is without merit. Wheat First maintained that under the terms of the Asset Purchase Agreement, Wheat First has no liability for the claims raised in this matter. Respondent Wheat First counterclaimed for attorneys' fees and expenses incurred by reason of the need to defend this claim.

In Respondents Amended Counterclaim, Respondents more specifically delineated the basis for their counterclaim and alleged among other things that Claimants claims were without justification and were asserted in bad faith to harass Respondents. Respondents further asserted that Claimants through a series of actions tried to pressure Respondents to accede to Claimants unreasonable settlement offer.

Claimants' denied each and every allegation of wrongdoing and liability set forth by the Respondents in their counterclaims.

### **RELIEF REQUESTED**

Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, in their pleadings, requested reimbursement for their losses in an amount not less than \$2,153,700.00, with interest thereon at a rate of 12 %; attorneys' fees incurred in connection with this dispute; the costs and expenses incurred and punitive damages in an amount determined by the arbitrators.

Claimant Green requested an amount not less than \$1,500,000.00, plus interest thereon at 12%;

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attorneys' fees incurred in connection with this dispute; costs and related expenses and punitive damages in an amount determined by the arbitrators.

Claimant Patton requested an amount of not less than \$900,000.00, plus interest thereon at 12%; attorneys' fees incurred in connection with this dispute; costs and related expenses related to this arbitration; and punitive damages as determined by the arbitrators.

The Claimants also requested damages under RICO.

Respondents requested that Claimants' claims be dismissed in their entirety and that they be awarded attorneys' fees and expenses.

Respondents Wheat First, MCS and Mr. Marshall requested that the arbitrators dismiss them from these proceedings prior to the hearings.

Respondents Thackston, MCS, Marshall and Mr. Marshall in their Memorandum of Law in support of their application for an award of attorneys' fees and expenses requested legal fees in the amount of \$543,747.50 and out of pocket expenses in the amount of \$90,269.77 for a total of \$634,017.27.

Claimants requested that Respondents request for fees and expenses should be rejected in its entirety.

#### **OTHER ISSUES CONSIDERED & DECIDED**

Respondents did not file with the NASD properly executed Submission Agreements but were required to submit to arbitration pursuant to the NASD bylaws as well as Section 12 of the NASD Code of Arbitration Procedure (the "Code"), and having answered the claims, filed counterclaims and being represented by counsel, are bound by the determination of the arbitration panel on all issues submitted.

Respondent Wheat First filed an action in Federal Court requesting declaratory judgment that it had no obligation to arbitrate the above captioned cases against the Claimants under a successor liability theory. The District Court granted summary judgment in favor of Wheat First. The Claimants' appealed this decision and the Eleventh Circuit Court of Appeals unanimously affirmed the District Court's decision. Respondent Wheat First requested that the Panel dismiss Wheat First from these proceedings and Claimants requested that the Panel's dismissal be limited to those claims asserted against Wheat First in its capacity as successor in interest to Marshall Securities. The Panel decided in September 1993 to dismiss all claims asserted against Wheat First, under the theory of successor in interest but determined that Wheat First would remain a valid party to this proceeding by virtue of the claims asserted directly against it.

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The Panel in an Interim Order unanimously determined that Respondents Marshall, Thackston, MCS and Mr. Marshall's Motion to Dismiss be granted. The Panel in its Interim Order did not address whether all claims against Wheat First were dismissed and has determined that the claims asserted by Claimants directly against Wheat First are dismissed in their entirety.

The Panel in its Interim Order closed the record on the merits and requested submissions by the parties related to attorneys' fees. The Panel's determination on attorneys' fees is reflected below.

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of all issues submitted for determination as follows:

1. That all claims submitted by the Claimants in case numbers 90-00460, 90-00461 and 91-00116; including claims of punitive and RICO damages, are dismissed in their entirety.
2. That Claimants on case numbers 90-00460, 90-00461 and 91-00116 are liable to Respondents for an award of attorneys' fees and expenses and shall pay to Respondents attorneys' fees in the amount of \$543,747.50 and out of pocket expenses in the amount of \$90,269.77 for a total of \$634,017.27. The Panel finds its authority to award attorneys' fees and expenses is derived from three sources. First the parties agreed to submit the issue of attorneys fees and expenses to the Panel so that an enforceable "bi-lateral agreement" exists. See Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.) 753 F. Supp. 86 (S.D.N.Y. 1990). Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American Rule" See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y. 421 U.S. 240 (1975); Dean Witter Reynolds, Inc. v. Bork, 1991 U.S. Dist LEXIS 11907 (E.D. Pa 1991). See also O.C.G.A. Section 9-15-14
3. Any relief not specifically provided for herein is denied in its entirety.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

64 hearing sessions X \$1000 = \$64,000 minus hearing session deposits deposited by the Claimants



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at the time of filing their claim as follows:

Claimants in Case Number 90-00460 deposited a hearing session fee of \$500. Claimant Green deposited a hearing session deposit of \$750 in Case Number 90-00461 and Claimant Patton deposited a hearing session deposit of \$1000 = leaving a balance \$61,750

Claimants in case numbers 90-00460, 90-00461 and 91-00116 paid Interim Forum Fees of \$24,000 leaving a balance of \$37,750

Respondents also deposited Interim Forum Fees in the amount of \$12,000 so that the amount that remains due to the NASD is \$25,750.

The Panel has determined that Claimants shall pay the outstanding forum fees in the amount of \$25,750 to the NASD and orders Claimants to reimburse directly to Respondents their Interim Forum Fee assessment in the amount of \$12,000.

**Concurring Arbitrators' Signatures**

Name

Public/Industry

  
A. Keith Logue - Chairman

Public Arbitrator

  
James E. Giblin

Public Arbitrator

  
Ronald W. Lankford

Industry Arbitrator

Date Award Served by the NASD: December 23, 1994

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