

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Robert D. Burkholder

91-02486

Name of Respondents

J.W. Gant and Associates, Inc.  
Douglas Weir  
Kevin McClain

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REPRESENTATION

For Claimant: Anthony J. Rom. Esq., Philadelphia, PA.

Respondents: J.W. Gant and Associates, Inc. Douglas Weir and Kevin McClain failed to appear at the hearing.

CASE INFORMATION

Statement of Claim filed: August 9, 1991.

Claimant's Submission Agreement signed on: July 19, 1991.

Statement of Answer filed by Respondent, J.W. Gant & Associates, Inc. on: October 4, 1991.

Respondent, J.W. Gant & Associates, Inc.'s Submission Agreement signed on: September 26, 1991.

Statement of Answer filed by Respondent Douglas Weir on: September 20, 1991.

Respondent Douglas Weir's Submission Agreement signed on: September 19, 1991.

Amended Statement of Claim filed: September 27, 1991.

Statement of Answer filed by Respondent Kevin L. McClain on: October 10, 1991.

The NASD does not have record of a Submission Agreement having been filed by Respondent Kevin L. McClain.

### HEARING INFORMATION

Hearing date: April 13, 1991. 1 session.

Hearing Location: Chicago, Illinois.

### CASE SUMMARY

Claimant Robert D. Burkholder ("Claimant") alleged fraud, misrepresentations, unsuitability, manipulation of the price of stock, and failure to supervise by Respondents J.W. Gant & Associates ("Gant"), Kevin McClain ("McClain"), and Douglas Weir ("Weir") in transactions advised, and completed for Claimant's account at Gant in the following securities: magnetch Corp. ("Mag") stock; Mag warrants' Action Staffing, Inc. stock; Jack Jacrl Futures ("Futures"); Boca Raton Capital; International Technology Corp.; Sentex Sensing Technology; and Total Resch Corp. Claimant alleged that Respondents committed fraud by:

1. Making unsuitable recommendations of the above mentioned securities.
2. By not providing prospectuses to the Claimant for the above mentioned stocks.
3. By making misstatements and omissions in connection with the sale and purchase of the above mentioned stocks.
4. Manipulating the price of the above mentioned stocks through the Respondents broker dealer as the only market maker for the stocks.
5. Misrepresenting the location of the broker dealer.

Claimant further alleged that Gant failed to supervise Respondents McClain and Weir.

In its Statement of Answer, Gant denied each and every allegation contained in the Statement of Claim. In addition, Gant asserted the following affirmative defenses:

1. The Statement of Claim fails to state a claim upon which relief may be granted.
2. Claimant's actions and inactions bar him from recovery under the Statement of Claim by reason of the doctrine of waiver.
3. Claimant's actions and inactions bar him from recovery under the Statement of Claim by reason of the doctrine of estoppel and acquiescence.
4. Claimant's action and inactions constitute a failure to mitigate his damages and, therefore, Claimant is barred from recovery under the Statement of Claim in whole or in part.
5. Claimant's Statement of Claim is frivolous and lacks substantial justification against Gant.

6. The negligence of Claimant and assumption of risk by Claimant bars any recovery by Claimant.

7. Claimant has suffered no damage as a result of alleged wrongful inactions or actions on the part of Gant.

8. Claimant is an informed investor and was at all times aware of the risks of loss inherent in the securities purchased by him.

9. Claimant's claims are barred by reason of his own negligence and failure to exercise such diligence with respect to his investments as would be expected of reasonable persons under the same circumstances.

10. Such affirmative defenses which, although unknown, may become applicable upon the presentation of the evidence at the arbitration hearing. Therefore, leave is requested to amend the Statement of Answer upon the presentation of facts which support further affirmative defenses.

11. Claimant's claims are barred by the applicable statute of limitations.

12. Claimant's claims are barred by the fact that Gant did not have the required specific intent to defraud Claimant.

13. Claimant's Statement of Claim fails to state facts with sufficient particularity to meet the requirements of a claim of common law or statutory fraud.

14. Claimant's losses, if any, were caused or contributed to by the acts of others over whom Gant had no control, and for whom Gant was not responsible, or by events and circumstances beyond the control of Gant.

15. Claimant's Statement of Claim fails to state facts with sufficient particularity to meet the requirements of a claim of a failure to supervise.

For his Statement of Answer, Respondent Weir denied all of the Material allegations contained in the Statement of Claim. Weir also alleged that Claimant received the only prospectus he was required to receive when Claimant purchased new issue stock in Celebrity Reserck, Inc., and that Gant delivered the prospectus as evidenced on the purchase confirmation. Weir further alleged that Claimant represented himself as being an experienced investor and was aware of the risks, as well as the opportunities, of the speculative nature of the securities in which he was investing.

For his Amendment to the Statement of Claim, Claimant stated that in March, 1990, McClain had solicited him to purchase stock in May. Claimant then alleged that McClain left Gant shortly thereafter. Weir then contacted Claimant convincing Claimant to leave his account with Gant. Claimant also alleged that Weir represented himself as McClain's superior with even more knowledge and experience than McClain. Claimant alleged that in May of 1991, when Weir left Gant, did he find out that the phone number he had been calling was connected to Florida. Lastly, Claimant alleged making a complaint about Weir and McClain to Tom hands. Nothing was done about the complaint.

In his Statement of Answer, McClain admitted contacting Claimant concerning Mag stock and warrants, and that they were something to buy and hold for a long period of time. McClain alleged that Claimant's position only moved up and down slightly for the time McLain was at Gant, and that McLain did not recommend the sale of the securities. McLain further alleged that Claimant's account was at no loss when he left the employment of Gant.

#### RELIEF REQUESTED

Claimant requested an award of compensatory damages of \$4,590.50 plus interest from the date of the loss incurred. The Claimant further requested punitive damages to deter the stock manipulation of J.W. Gant in the penny stock market and any other relief the panel may deem just and fair.

Respondent Douglas Weir requested that the Complaint of Claimant be dismissed and that any costs incurred be paid by Claimant.

Respondent Gant requested that all claims against Gant should be dismissed with costs and attorneys' fees paid to Gant.

In his amended Claim Claimant requested an award of \$6,869.41 plus arbitration fees and attorney costs (totally \$11,000.00).

#### OTHER ISSUES CONSIDERED & DECIDED

At the beginning of the hearing on April 13, 1992, the Chairman took recognition of the fact that Respondents Gant, Weir, and McClain failed to appear at the hearing. The Chairman also took recognition of the fact Gant had informed the NASD staff, by telephone, that Gant would not appear. The Chairman also took note of the fact that the Respondents had either filed a Submission and/or answer in this case. After hearing argument from Claimant in favor of allowing the hearing to proceed, and deliberation, the Chairman ruled pursuant to Section 29 of the Code of Arbitration Procedure to allow the hearing to proceed without the Respondents present.

Due to the unusual circumstances caused by the Chicago flood, the offices of the NASD were closed on April 13, 1992, and the hearing had to be held at the offices of the undersigned arbitrator. The Chicago Arbitration office of the NASD was later informed by the New York Arbitration Department that Respondent Weir had contacted them. Weir had claimed in his telephone call to the New York office, to be in Chicago that morning, but could not locate the site for the hearing and therefore he had missed the arbitration. Weir later sent a letter to this effect to the Chicago Arbitration office.

Respondent Kevin L. McLain did not file with the NASD a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure and having answered the claim, failed to appear and testify at the hearing. However, Respondent Kevin L. McLain is bound by the determination of the arbitration panel on all issues submitted.

Respondent Gant filed a Motion to Prohibit Introduction of Evidence and in Lieu of Attendance at hearing. After hearing Claimant's arguments in opposition to the motion, and deliberation, the Chairman ruled to take the motion to prohibit introduction of Evidence under advisement. The Chairman disallowed the Statement in Lieu of Appearance.

Claimant next made a Motion of Default Judgment. After hearing argument in favor of the motion, and deliberation, the Chairman denied the motion and ordered the Claimant to proceed with the case.

On April 28, 1992, prior to the Award being rendered in this case, Respondent Gant filed a motion for rehearing of this case. After review of the motion and response, and deliberation the undersigned arbitrator has denied the motion.

Prior to the Award being rendered in this case, Claimant informed the NASD, by letter dated April 16, 1992, of a settlement with Respondent Weir, releasing Weir from arbitration.

The party in attendance at the hearing has agreed that the Award in this matter may be executed by counterpart copies or that a handwritten, signed Award may be entered. In either case, the party present at the hearing has agreed to receive a conformed copy of the award while the original remains on file with the NASD.

#### AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent J. W. Gant & Associates, Inc.'s Motion to Reopen the hearing is hereby denied with prejudice.
2. Respondent J. W. Gant & Associates, Inc.'s Motion to Prohibit Introduction of Evidence by Claimant at the Hearing is hereby denied with prejudice.
3. Claimant, Robert D. Burkholder's claims against Respondent Douglas Weir are hereby denied and dismissed with prejudice.
4. Respondents J. W. Gant & Associates, Inc. and Kevin McClain are jointly and severally liable for, and shall pay to the claimant, Robert D. Burkholder the sum of \$1,275.00.
5. Respondent J. W. Gant & Associates, Inc. is liable for, and shall pay to the claimant, Robert D. Burkholder the sum of \$2,765.00.

#### OTHER COSTS

6. Respondents J. W. Gant and Associates, Inc. and Kevin McClain are

liable for, and shall pay to claimant the sum of \$3,750.00 for attorneys' fees. The authority for the Award of attorneys' fees can be found in the case of Neville v. Davinroy, 355 NE 2d 86, 41 Ill. App.3d which had been cited in the application of claimant's attorney for legal fees and costs.

**FORUM FEES**

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

1 hearing session x \$100.00 = \$100.00

Pursuant to Section 43c, the NASD shall retain the nonrefundable filing fee in the amount of \$50.00, and shall refund the hearing session deposit in the amount of \$75.00 previously paid to the NASD by the claimant.

Forum Fees in the amount of \$100.00 are assessed against Respondent J.W. Gant & Associates, Inc.

Fees are payable to the National Association of Securities Dealers, Inc.

Dated:

June 18, 1992

/s/Amos J. Coffman, Jr.  
Amos J. Coffman, Jr.  
Chairman