

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Theodore C. Porter

91-03834

Name of Respondents

Jeffrey Heet;
First Gateway Securities, Inc.;
Howe, Barnes & Johnson, Inc., now known
as Howe Barnes Investments, Inc.;
R. Marshall Barnes

REPRESENTATION

For Claimant: Theodore C. Porter appeared pro se.

For Respondent: First Gateway Securities, Inc. was represented by Peter O'Neal of First Gateway Securities, Inc., St. Louis, Missouri.

Jeffrey Heet appeared pro se.

Howe Barnes & Johnson, Inc., now known as Howe Barnes Investments, Inc. and R. Marshall Barnes, deceased, were represented by J. William Holland, Esq. of Holland & Holland (Associated), located in Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on: December 5, 1992.

Claimant's Submission Agreement signed on: November 22, 1991.

Respondent Jeffrey Heet's Statement of Answer filed on: February 25, 1992.

Respondent Jeffrey Heet's Submission Agreement signed on: February 24, 1992.

Joint Statement of Answer of Respondents Howe, Barnes & Johnson, Inc., now known as Howe Barnes Investments, Inc., and R. Marshall Barnes, deceased, filed on: March 11, 1992.

Respondents Howe Barnes & Johnson, Inc. and R. Marshall Barnes did not file an executed Submission Agreement, but appeared by counsel at the hearing and as a member and associated person of the NASD, are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

Respondent First Gateway Securities, Inc. did not file a Statement of Answer or an executed Submission Agreement, but appeared and testified at the

hearing, and as a member of the NASD, is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

Statement of Answer of Respondent Jim Becherer & Co. filed on: March 6, 1992.
Respondent Jim Becherer & Co.'s Submission Agreement signed on: March 10, 1992, by James F. Becherer, President of Jim Becherer & Co.
Notice of Bankruptcy filed by Respondent Jim Becherer & Co. on: April 6, 1992.

Statement of Answer of Respondent Stifel, Nicolaus & Company, Incorporated filed on: February 7, 1992.

Respondent Stifel, Nicolaus & Company, Incorporated did not file an executed Submission Agreement, but as a member of the NASD is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

Dismissal with Prejudice of Claims against Stifel, Nicolaus & Company, Incorporated filed by Claimant Theodore C. Porter on: May 29, 1992.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Date/Sessions: November 19, 1992 for two (2) sessions.
Hearing Location: St. Louis, Missouri.

CASE SUMMARY

Claimant Theodore C. Porter ("Porter") alleged that Respondent Jeffrey Heet ("Heet"), while employed by or acting as an agent for Respondents First Gateway Securities, Inc. ("First Gateway"), Howe Barnes & Johnson, Inc., now known as Howe Barnes Investments, Inc. ("Howe Barnes"), R. Marshall Barnes ("Barnes"), Jim Becherer & Co., ("Becherer & Co.") and Stifel, Nicolaus & Co. ("Stifel"), did engage in acts and conduct which damaged Claimant's investment portfolio. Porter specifically alleged that:

1. In 1985, with the advice of Heet, Porter invested the net proceeds from the sale of his home in securities in a discretionary account to provide for his retirement;
2. Porter was an unsophisticated investor who instructed Heet that he wished to invest conservatively; that his investment goals were to preserve his capital; and that he was only interested in dividend or interest income rather than immediate gains from speculative investments;
3. From 1985 through 1987, Heet invested in conservative corporate bonds which were usually held for six months to a year and yielded interest income for Porter. In January of 1988, Heet's investment strategy dramatically changed and he began to purchase highly speculative investments, including VMS Mortgage LP II, VMS Strategic Land, Envirodyne Industries, Advanced Marketing Services and Alta Gold;

4. In addition to the purchase of speculative stocks, ten of the twenty-four purchases made by Heet from July 1988 through March of 1991 were held by Heet less than sixty-three (63) days, four were held for one hundred twenty (120) days or less and one investment was held for less than six months; and

5. From July 1988 to March 1991, Heet's commissions exceeded Porter's modest gains.

Based upon the above allegations, Porter alleged that Heet misrepresented the investments made in his portfolio and purchased investments which were unsuitable for Porter given his investment objectives. Furthermore, Porter asserted claims for violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder; violation of Section 17(a) of the Securities Act of 1933; violation of Section 15(c)(1) of the Securities Exchange Act of 1934 and Rule 15(c)(1)-(2) promulgated thereunder; constructive fraud; breach of fiduciary duty; and breach of Rule 405 of the New York Stock Exchange requiring the broker to use due diligence in learning the facts relating to the customer.

Respondent Heet denied the material allegations of the Statement of Claim, alleging that:

1. Heet did not solicit Porter to do business, but was approached by Porter at a family party;
2. Porter's objectives were aggressive growth and income, and he never advised Heet that his primary goal was preservation of capital and conservative investing;
3. Porter's initial investments were not in conservative investments as stated in the claim, but in risky investments in which Porter took an active participation in all aspects of the investments, including the review of prospectus, execution of subscription agreements and the receipt and delivery of securities;
4. Porter agreed to buy certain equities that were being touted as "leveraged buy out candidates" for obvious speculation and was aware of the risk and authorized the purchase;
5. Heet cannot be held responsible for the problems with VMS because VMS was a highly rated investment at the time of purchase and Heet had nothing to do with the acts which caused the failure of the investments; and
6. Porter authorized each transaction, received confirmations and Monthly statements and never complained to Heet's supervisor or a regulatory agency about unauthorized trading.

Respondent First Gateway did not file a Statement of Answer. At hearing, First Gateway verbally denied the allegations of the Statement of Claim.

Respondents Howe Barnes and Barnes denied the material allegations of the

Statement of Claim, asserting as an Affirmative Defense the terms of the Clearing Agreement entered into by First Gateway and Howe Barnes on September 21, 1988 which provided that First Gateway was responsible for the conduct of the customer account and the supervision thereof, including the suitability on the customer's transactions. In addition, it was alleged that the inclusion of Barnes as a Respondent was the result of a clerical error which placed Barnes representative number of 0001 on a confirmation for the purchase of 400 VMS Mortgage Limited Partnership Series II instead of Heet's representative number of 5001.

Respondent Becherer & Co. denied the allegations of the Statement of Claim, alleging that:

1. Porter engaged in five transactions with Becherer & Co. between July of 1988 and September of 1988, and did not register a complaint with officers of the firm as to the handling of the account by Heet;
2. The account was not handled in a discretionary manner as the firm did not allow registered representatives to handle discretionary accounts and the firm did not accept responsibility for such orders; and
3. Porter made profits on the securities purchased through Becherer & Co.

Respondent Stifel denied any liability to Porter, alleging that:

1. In November of 1988, Stifel purchased some, but not all, of the assets of Rowland, Simon & Company, L.P. and assumed specified liabilities in a carefully structured Asset Purchase Agreement. Heet was terminated from Rowland, Simon in May of 1988;
2. The security upon which Porter based liability was not purchased and never held at Stifel, having been delivered to Porter in August of 1988; and
3. Liability was not assumed by Stifel as a result of the transfer of assets.

RELIEF REQUESTED

Claimant Porter requested that the panel enter an award against each of the Respondents in the amount of \$33,082.13 in actual damages plus interest; \$99,246.39 in punitive damages; and for reasonable attorneys' fees and costs.

Respondent Heet requested that the Statement of Claim be dismissed and denied in its entirety.

Respondent First Gateway, at hearing, requested that the Statement of Claim be dismissed.

Respondents Howe Barnes and Barnes requested that the panel dismiss the statement of claim as to them and award costs and attorneys' fees in favor of

these respondents against Porter or Respondents Heet and First Gateway.

Respondent Becherer & Co. requested that the firm be dismissed from the arbitration case.

Respondent Stifel requested that it be dismissed from the arbitration case.

OTHER ISSUES CONSIDERED & DECIDED

Respondent First Gateway did not file an executed submission agreement, but appeared and testified at the hearing, and as a member of the NASD, the panel determines that Respondent First Gateway Securities, Inc. is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

Respondents Howe Barnes and Barnes did not file an executed submission agreement, but filed a Statement of Answer and appeared at the hearing by counsel, and are a member and associated person of the NASD respectively. Based upon these findings, the panel of arbitrators determines that Respondents Howe Barnes Investments, Inc. and R. Marshall Barnes, deceased, are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

On April 3, 1992, Respondent Jim Becherer & Co. filed with the NASD a Notice of Bankruptcy Proceeding and a copy of the order entered in the United States District Court for the Eastern District of Missouri by the Honorable Jean C. Hamilton on March 16, 1992. Pursuant to the automatic stay provisions of section 362(a) of the Bankruptcy Code, 11 U.S.C.A. 362(a) (Supp. 1991), this arbitration proceeding was stayed as to Respondent Jim Becherer & Co.

On May 29, 1992, Claimant Porter filed with the NASD a Dismissal with Prejudice dismissing any and all claims made by him against Respondent Stifel. Pursuant to the dismissal, the panel made no further rulings regarding Respondent Stifel.

At hearing, Respondents Howe Barnes and Barnes called Claimant Porter as their witness. Based upon Porter's testimony, Howe Barnes and Barnes moved for dismissal of the claims against them. Upon review, the panel granted the motion to dismiss.

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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

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

1. The Statement of Claim filed by Claimant Theodore C. Porter against Respondents Jeffrey Heet and First Gateway Securities, Inc. is hereby dismissed and denied in its entirety;

2. The Motion to Dismiss presented by Respondents Howe Barnes Investments, Inc. and R. Marshall Barnes is hereby granted and Respondents Howe Barnes Investments Inc. and R. Marshall Barnes, deceased, are hereby dismissed with prejudice;

3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Hearing Sessions x \$750.00 = \$1,500.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Claimant Theodore C. Porter. In addition, Claimant Theodore C. Porter is liable for and shall pay to the NASD additional forum fees in the sum of \$750.00.

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

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Keith D. Patten, Esq.
Keith D. Patten, Esq.
Public Arbitrator
Chairperson

November 30, 1992

Robert G. Haddenhorst, Sr.
Robert G. Haddenhorst, Sr.
Public Arbitrator

November 30, 1992

Mark A. Yarwood
Mark A. Yarwood
Industry Arbitrator

December 1, 1992

Date of Service on Parties: 12-4-92