

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Gordon Robert Foster, Jr.

92-01676

Name of Respondent(s)

J.W. Gant and Associates, Inc.
Carlton W. Fleming, Jr.

01730J

REPRESENTATION

For Claimant Gordon R. Foster, Jr.: Charles M. Dalziel, Esq. of the law firm of Savell & Williams.

The Respondent J.W. Gant & Associates, Inc. did not attend the hearing. The Respondent Carlton W. Fleming, Jr. entered into a settlement agreement with the Claimant prior to the first hearing session.

CASE INFORMATION

Statement of Claim filed: May 19, 1992.

Motion to Preclude Pursuant to Section 25(b)(2)(i) filed: July 30, 1992.

Claimant's Submission Agreement signed on: May 15, 1992.

Answer of J.W. Gant & Associates, Inc. ("Gant") and Carlton W. Fleming, Jr. ("Fleming") filed: July 16, 1992.

Amended Answer to Statement of Claim filed: August 13, 1992.

The Respondents J.W. Gant & Associates, Inc. and Carlton W. Fleming, Jr. did not execute Submission Agreements as required pursuant to Section 25 of the Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Date/Session: April 21, 1993 / One Session.

Hearing Location: Atlanta, Georgia.

CASE SUMMARY

Claimant alleged J.W. Gant & Associates, Inc. and Carlton Fleming approached Gordon Robert Foster, Jr. ("Foster") via a cold call in May of 1989, promising higher returns on Foster's investments than he was currently receiving in 401(K) savings, mutual funds and certificates of deposit, without incurring any appreciable higher risk and Foster, an unsophisticated investor with a relatively small liquid net worth, agreed to begin investing with Fleming and Gant. Claimant further alleged Fleming and Gant knew that Foster's objective was growth with moderate risk, but they nonetheless engaged in speculative trading in Foster's account in penny stocks with excessive markups and commissions until the fall of 1991. Claimant further alleged Foster's account was churned, and the purchases made for him were unsuitable, and this churning and unsuitability is actionable under Georgia and federal law. Claimant further alleged under Georgia law, a broker/dealer and its account executive are fiduciaries over a client's account and act as fiduciaries over their customer's account and they have a duty to exercise the utmost good faith with respect to the customer and a review of the facts shows the Respondents *did not meet their duty of the utmost good faith with respect to Foster's account* as they also violated Article III, Sections 1, 2 and 4 of the NASD Rules of Fair Practice and Rule 405 of the New York Stock Exchange in violating suitability rules, charging unfair prices, and failing to supervise Foster's account and the markups charged Foster violated the guidelines these rules establish and the Respondents were negligent in the handling of Claimant's account. Claimant further alleged the Respondents' actions violated the recent Georgia Penny Stock Amendments and among the requirements for sale of penny stocks in Georgia is the provision to the customer of a risk disclosure document and a written contract containing information regarding the purchaser's right to rescind and violation of these standards (which clearly occurred here) allows the purchaser to rescind the purchases and recover the investment amount, interest, treble damages, and attorneys' fees. O.C.G.A. Section 10-5-14(h). Claimant further alleged punitive damages and attorneys' fees are also recoverable under O.C.G.A. Sections 51-12-5.1 and 13-6-11, respectively.

Respondents maintained Claimant advised Respondents that he had investment experience and had as an investment objective growth with risk which was verified by Claimant in writing and Respondents deny that the risk involved in any recommended security was misrepresented and that Claimant was fully advised of the risk. Respondents further maintained Claimant approved and authorized any and all transactions in his account; Claimant was by virtue of his education and expertise capable of evaluating the recommendations made to him and Respondents denied that Claimant lost de facto control over his account. Respondent J.W. Gant & Associates, Inc. denied it would be liable to Claimant under the doctrine of respondeat superior for any action

of Respondent Carlton W. Fleming, Jr. and Respondents further denied that the losses Claimant suffered were due to lack of suitability, excessive charges or any other wrongful conduct. Respondents further maintained fees charged were fully disclosed and never objected to by the Claimant and further maintained when Claimant first stated his dissatisfaction with the losses suffered, Claimant was advised that only more conservative investments would be recommended.

Respondents further denied the volume of trading in Claimant's account was excessive; denied any violation of federal or state law or self-regulatory organization or their own internal procedures and denied any wrongdoing with respect to the determination of Claimant's investment objectives; denied selling securities which were not authorized registered or exempt and denied any obligation to provide the risk disclosure document.

OTHER ISSUES

Claimant asserted a Motion to Preclude the Respondent from presenting any facts or disclosures at the hearing pursuant to Section 25(b)(2)(i) because the Respondents in their general denial denied facts known to be true and totally failed to cooperate and showed a clear disrespect for arbitration. The arbitration panel denied the Claimant's Motion as the Respondents were not present at the hearing.

RELIEF REQUESTED

Claimant requested actual damages including pre-award interest of \$19,981.64 treble or punitive damages in the sum of \$59,944.92, attorneys' fees and costs in the sum of \$23,010.70, plus expert witness fees in the sum of \$1,000.00.

Respondents requested dismissal of the Statement of Claim.

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. In accordance with Section 25 of the Code of Arbitration Procedure, the Respondent J.W. Gant & Associates, Inc. was served with the Statement of Claim and given an opportunity to respond which the Respondent J.W. Gant & Associates, Inc. did;
2. In accordance with Section 21 and Section 26 of the Code of Arbitration Procedure, the Respondent J.W. Gant & Associates, Inc. was given due notice of the hearing procedure by regular and certified mail and failed to appear at the hearing;

3. In accordance with Section 29 of the Code of Arbitration Procedure, the arbitration panel determined in light of the foregoing information to proceed with the Respondent J.W. Gant & Associates, Inc. as a party.
4. The Respondent J.W. Gant & Associates, Inc. be and hereby is liable and shall pay to the Claimant the sum of \$17,704.89 plus simple interest at the rate of 7% per annum from the date of decision until the date of payment of the award.
5. The Claimant's request for pre-judgement interest is denied.
6. The Respondent J.W. Gant & Associates, Inc. be and hereby is liable and shall pay to the Claimant the sum of \$12,500.00 to represent attorneys' fees and costs including the expert witness fee pursuant to O.C.G.A. Sections 10-5-14(h) and 51-12-5.1.
7. The Respondent J.W. Gant & Associates, Inc. be and hereby is liable and shall pay to the Claimant the sum of \$40,000.00 to represent punitive damages pursuant to O.C.G.A. Section 51-12-5.1.
8. Prior to the commencement of the first hearing session the arbitration panel was informed that the Claimant had entered into a settlement agreement with the Respondent Carlton W. Fleming, Jr. which is hereby incorporated and attached and made part of this award.
9. The Respondent Carlton W. Fleming, Jr. be and hereby is liable and shall pay to the NASD the sum of \$500.00 to represent the outstanding adjournment fee.
10. The Respondent J.W. Gant & Associates, Inc. be and hereby is liable and shall pay to the Claimant the sum of \$650.00 to reimburse him for the claim filing fee and hearing session deposit paid.

FORUM FEES

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

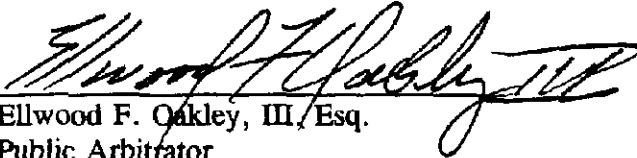
1 session x \$500.00 = \$500.00 less Claimant's hearing session deposit
(\$500.00) = \$0.00 due.

The NASD shall retain the \$150.00 claim filing fee previously paid by the Claimant.

ARBITRATORS' SIGNATURE



Richard Allan Kaye, Esq.
Public Arbitrator



Ellwood F. Oakley, III, Esq.
Public Arbitrator



Edward P. Vollersten, III
Industry Arbitrator

Decision Dated: June 29, 1993