

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Name of Claimant

Bill D. Werth

No. 92-03815

Name of Respondents

Rhodes Securities, Inc.
James Rhodes
Gus Bauer
Jeff Brault
James D. Wilson
Southwest Securities, Inc.

REPRESENTATION OF PARTIES

For Claimants: Glenn D. Young, Jr., Esq., of Young, Bogle, McCausland, Wells & Clark, P.A., Wichita, Kansas.

For Respondents Rhodes Securities, Inc., James Rhodes, Gus Bauer, and Jeff Brault: David M. Rapp, Esq., of Hinkle, Eberhart & Elkouri, L.L.C., Wichita, Kansas.

For Respondent James D. Wilson: Stephen E. Robison, Esq., of Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas.

CASE INFORMATION

Statement of Claim filed: November 9, 1992.

Claimant's Submission Agreement signed: October 28, 1992.

Statement of Answer and Counterclaim filed by Respondents, Rhodes Securities, Inc., James Rhodes, Gus Bauer, and Jeff Breault on: January 15, 1993.

Respondent James G. Rhodes' Submission Agreement signed on: January 12, 1993.

The NASD does not have a record of Respondents Gus Bauer, Jeff Breault, and James D. Wilson having filed Submission Agreements.

Claimant's Answer to Respondents' Counterclaim filed: February 8, 1993.

Supplemental Statement of Answer and Counterclaim of Respondents Rhodes Securities, Inc., James Rhodes, Gus Bauer, and Jeff Breault filed on: February 4, 1993.

Second Supplemental Statement of Answer and Counterclaim of Respondents Rhodes Securities, Inc., James Rhodes, Gus Bauer, and Jeff Breault filed on: April 2, 1993.

Claimant's Response to Second Statement of Answer and Counterclaim of Respondents Rhodes Securities, Inc., James Rhodes, Gus Bauer, and Jeff Breault filed on: April 16, 1993.

Voluntary Dismissal of Claimant's Statement of Claim against Southwest Securities, Inc. and the Counterclaim of Southwest Securities against the Claimant.

Motion of Claimant to Bar Respondent James D. Wilson from presenting any matter, arguments or defenses at the hearing filed: April 26, 1993.

Response of Respondent James D. Wilson to Claimant's Motion to Bar Respondent from presenting any matter, arguments, or defenses at the hearing filed: April 29, 1993.

Respondent James D. Wilson's Motion for Leave to File Answer Out of Time filed: April 29, 1993.

Response to Motion to File Answer Out of Time filed: April 29, 1993.

Statement of Answer and Counterclaim of James D. Wilson filed on: April 29, 1993.

HEARING INFORMATION

Hearing dates: May 6, 1993. Two (2) sessions.
May 7, 1993. Four (4) sessions.

Hearing Location: Kansas City, Missouri.

CASE SUMMARY

Claimant, Bill D. Werth ("Claimant") alleged that all transactions which had transpired from August, 1991 through the middle of May, 1992 had been solicited by Respondent James D. Wilson ("Wilson"). Claimant asserted that he was not a sophisticated investor in options trading and had relied on Respondent's recommendations. Claimant further contended that it had been the lack of knowledge of Wilson in the area of options and the failure of Respondent

Rhodes Securities, Inc., who had placed the 10 percent of annual income restriction on the account, to supervise and monitor the portfolio in Claimant's account. In particular, Claimant's allegation of lack of supervision also extended to Gus Bauer and Jeff Breault (along with Respondent Rhodes Securities, Inc. and Respondent James Rhodes collectively referred to as "Respondents").

In their Answer, Respondents denied each and every allegation contained in the Statement of Claim. Respondents also asserted the following affirmative defenses: Estoppel; laches; waiver; ratification; unclean hands; recklessness of the investor and further stated that Respondents' actions were largely ministerial in nature and did not substantially assist the Claimant in any way in any action or omission that could be determined violative of securities laws or regulations. In addition, Respondents asserted a Counterclaim against the Claimant for their costs and expenses, including reasonable attorneys' fees, for their defense against Claimant's claims.

In his Answer to Respondents' Counterclaim, Claimant denied each and every material allegation, and specifically denied that his claim contained unsubstantiated or frivolous accusations against Respondents.

For his Answer, Wilson denied each and every allegation contained in the Statement of Claim which was not specifically admitted in his Answer. Wilson also asserted the following affirmative defenses:

1. Claimant's Statement of Claim is barred for the reason that it fails to state a cause of action for which relief can be granted.
2. The Statement of Claim is barred for the reason that Claimant failed to mitigate his damages. Any trading activity in Claimant's account after May 13, 1992, was not conducted by Respondent Wilson, and any activity after that date is not the responsibility of Wilson.
3. The Statement of Claim is barred for the reason that the alleged damages, if any, were substantially caused by the negligence of Claimant, and the negligence of Claimant is equal to or greater than that alleged against Respondent Wilson and other Respondents.
4. The claim is barred for the reason that Respondent Wilson at all times acted in good faith and did not directly or indirectly induce the act or acts constituting the alleged cause of action.

In addition, Wilson asserted a Counterclaim against the claimant for Wilson's reasonable costs and expenses in defending this claim,

including reasonable attorneys' fees.

RELIEF REQUESTED

Claimant requested recovery of all of the funds advanced from the commencement of trading in the account from August 7, 1991 to the date when the account had been closed on August 28, 1992 with reasonable interest on funds advanced. Claimant requested out-of-pocket losses of \$248,212.00. Claimant further requested the recovery of his reasonable attorneys' fees, and recovery of his costs of arbitration including the claim filing fee in the amount of \$200.00 and the hearing session deposit fees in the amount of \$750.00. Lastly, Claimant requested that Respondents take nothing by their Counterclaim and that he be given the relief sought in his claim.

Respondents Rhodes Securities, Inc., James G. Rhodes, Gus Bauer, and Jeff Breault requested that the Claimant's Statement of Claim be dismissed with prejudice, that their Counterclaim for their costs, fees and expenses be awarded to them, and that they be awarded such further relief to which they may show themselves entitled.

Respondent Wilson requested that the Statement of Claim be denied. Wilson further asserted a Counterclaim for his reasonable costs and expenses in defending against this claim, including reasonable attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondents Gus Bauer, James D. Wilson, and Jeff Breault did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to Section 12 of the Code and having answered the claim, appeared and testified at the hearing and are therefore bound by the determination of the panel on all issues submitted.

In Respondents' Answer and Counterclaim filed on January 15, 1993, Respondents had also requested that the hearing site be changed to Dallas or Fort Worth, Texas. After eliciting responses from the parties, the motion and responses were forwarded to the panel. After review of the documents submitted, the panel denied the motion.

On April 26, 1993, Claimant filed a Motion to Bar Respondent Wilson from presenting any matter, arguments or defenses at the hearing. Wilson filed his response on April 29, 1993 along with his Motion to file Answer out of time, as well as his Answer and Counterclaim. After review of the documents submitted, the panel denied the

Motion to Bar, and allowed Wilson to file his Answer out of time. The panel denied Wilson's request to file his Counterclaim out of time.

The parties have 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 parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.

AWARD

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

1. Respondents, Rhodes Securities, Inc. and James D. Wilson are jointly and severally liable for, and shall pay to Claimant, Bill D. Werth, the sum of \$87,890.00 as satisfaction for all of his claims.

2. Claimant's claims against Respondents James Rhodes, Gus Bauer, Jeff Brault and Southwest Securities are hereby denied and dismissed with prejudice.

3. Claimant's claims for punitive damages and attorneys' fees are hereby denied and dismissed with prejudice.

4. The Counterclaims of Respondents Rhodes Securities, Inc., James Rhodes, Gus Bauer, James D. Wilson, and Jeff Breault are hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall pay its own costs and attorneys' fees associated with this arbitration.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

6 hearing sessions x \$600.00 = \$3,600.00

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$200.00, and shall retain the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimant.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable Counterclaim filing fee in the amount of \$250.00, and shall retain the Counterclaim hearing session deposit in the amount of \$600.00 previously paid to the NASD by Rhodes Securities, Inc.

Additional forum fees in the amount of \$562.50 are assessed against Respondent Gus Bauer.

Additional forum fees in the amount of \$562.50 are assessed against James Rhodes.

Additional forum fees in the amount of \$562.50 are assessed against Jeff Breault.

Additional forum fees in the amount of \$562.50 are assessed against James D. Wilson.

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

CONCURRING ARBITRATORS

Dated:

Name:

June 26, 1993

/s/Murray S. Levin
Murray S. Levin
Presiding Chair
Public Arbitrator

June 26, 1993

/s/William F. Hoeschele
William F. Hoeschele
Public Arbitrator

June 30, 1993

/s/M. Douglas Mays
M. Douglas Mays
Industry Arbitrator

Date of Service by the NASD:

July 6 1993