

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

J.B. Hanauer & Co.

93-01853

Name of Respondents

A. Webster Dougherty & Co. Inc.  
Constantin G. Alio  
Peter J. Galiano  
James Dotzman

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REPRESENTATION

For Claimant J.B. Hanauer & Co., Inc. ("Hanauer"): Jeff Wild, Esq. of Lowenstein Sandler Kohl Fisher Boylan of Roseland, New Jersey.

For Respondents A. Webster Dougherty & Co., Inc. ("Dougherty"), Constantin G. Alio ("Alio") and James Dotzman ("Dotzman"): Ronald H. Surkin, Esq. of Richard Disanti Hamilton & Gallagher of Media, Pennsylvania.

For Respondent Peter J. Galiano ("Galiano"): Glenn S. Gitomer, Esq. of McCausland, Keen & Buckman of Radnor, Pennsylvania.

CASE INFORMATION

Statement of Claim filed: May 3, 1993.

Claimant's Submission Agreement signed on: May 3, 1993.

Statement of Answer and Counterclaim filed by Respondents, Dougherty, Alio, and Dotzman on: July 16, 1993.

Statement of Amended Answer filed by Respondents Dougherty, Alio and Dotzman on: March 3, 1994.

Respondent Dougherty's Submission Agreement signed on: July 16, 1993.

Respondent Alio's Submission Agreement signed on: July 16, 1993.

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Respondent Dotzman's Submission Agreement signed on: July 16, 1993.

Statement of Answer filed by Respondent Galiano on: July 19, 1993.

Respondent Galiano's Submission Agreement signed on: July 14, 1993.

Claimant's Reply to Counterclaim filed: August 6, 1993.

### **HEARING INFORMATION**

Pre-Hearing Conference: March 4, 1994 / Two Sessions

Hearing Dates/Sessions:    March 22, 1994 / Two Sessions  
                                      March 23, 1994 / Two Sessions  
                                      May 20, 1994 / Two Sessions  
                                      June 23, 1994 / Two Sessions  
                                      June 24, 1994 / Two Sessions  
                                      September 1, 1994 / Two Sessions

Hearing Location:    National Association of Securities Dealers Offices located  
at 33 Whitehall Street in New York City, New York.

### **CASE SUMMARY**

Claimant alleged that on April 1, 1993, at approximately 10:15 A.M., Berns, an employee in Hanauer's trading department, contacted Respondent Galiano with respect to the prospective purchase by Dougherty from Hanauer of \$16 million par value Federal Home Loan Mortgage Bonds, Cusip No. 312904-9A-5 ("Bonds"). Claimant further alleged that Galiano, on behalf of Dougherty, had been involved in two prior trades with Hanauer during 1993, both of which settled without incident. Claimant further alleged that at approximately 11:11 A.M. Galiano advised Berns by telephone that he had someone who was interested in the Bonds.

Claimant alleged that at approximately 1:16 P.M. Galiano and Berns agreed on a purchase price of 100 16/32 for the Bonds. Claimant further alleged that Berns then purchased the Bonds from Lehwald, Orosey and Pepe, Inc. of Boca Raton Florida, at a price of 99 27/32 immediately thereafter. Claimant further alleged that at approximately 1:22 P.M. Berns advised Galiano by telephone that he had purchased the Bonds.

Claimant alleged that at approximately 1:32 P.M. Galiano advised Berns that there may have been a wrong bid on the Bonds and that there could be problems

with the transaction. Claimant further alleged that at approximately 2:29 P.M. Galiano told Berns by telephone that he was having problems with the transaction but that Galiano confirmed that he had purchased the Bonds. Claimant further alleged that in a telephone conversation that commenced at approximately 3:06 P.M. Galiano again confirmed that he had purchased the Bonds from Berns at a price of 100 16/32.

Claimant next alleged that in a telephone conversation commencing at approximately 4:00 P.M., Galliano told Berns that his superiors were questioning the validity of the trade since it had not been confirmed with Dougherty's trader. Claimant then alleged that in a telephone conversation commencing at approximately 4:40 P.M. a representative of Lehwald informed Berns that the sale of the Bonds from Lehwald to Hanauer could not be broken. Claimant further alleged that at 5:00 P.M. Greg Plifka, Executive Vice President of Hanauer, was advised by Dotzman, Chief Operating Officer of Dougherty, by telephone that Galiano was a salesman who had no authority to complete the purchase of the Bonds and that Dougherty would neither confirm the transaction nor complete the purchase on the settlement date.

Claimant alleged that, after contacting a number of prospective purchasers on the afternoon of April 1, 1993 and the morning of April 2, 1993, Hanauer resold the Bonds on April 2, 1993 to the Pershing Division of DLJ Securities Corp. of New York at a price of 98 9/16. Claimant further alleged that the reduced price of the Bonds was a result of Dougherty's attempts to resell the Bonds once its purchaser had backed out. Claimant further alleged that based upon the difference between the purchase price of the Bonds from Lehwald and the sale price to Dougherty, Hanauer's spread would have been \$105,000, but as a result of the sale to DLJ at the reduced price Hanauer actually suffered a loss of \$205,000.

Respondents Dougherty, Alio and Dotzman maintained in their joint answer and counterclaim that Berns and Galiano had several conversations between 11:00 A.M. and 1:00 P.M. and that during those conversations Berns incorrectly advised Galiano that the Bonds had a life cap of 8.893 while the life cap of the Bonds Claimant allegedly sold to Dougherty was 8.896. Respondents maintained this error was never corrected.

Respondents maintained that Galiano did not have the authority to bind Dougherty to purchase the bonds without the approval of a trader. Respondents further maintained that the bid made by Galiano was erroneous and was corrected immediately thereafter in accordance with industry practice. In addition, Respondents maintained that the bonds which Berns described and claimed to have sold were not the bonds Claimant claimed to have sold as the description provided by Berns in his conversations did not match the alleged confirmations

attached to Claimant's statement of claim.

Respondents maintained that Galiano specifically advised Berns that there was a mistaken bid and so there was no deal. Respondents further maintained that the bid discussed by Berns and Galiano was clearly outside the market price range for the bonds such that Bern's knew, or should have known, upon hearing the bid that there was a mistake and under industry standards should have advised the buyer that there may have been a mistake.

Respondents denied that it made efforts to resell the Bonds which Claimant alleged had adversely affected the market for the Bonds. Rather, Respondents maintained that the value of the bonds was reduced by either Claimant's or Lehwald's attempts to resell the same bonds.

Respondents maintained as an affirmative defense that Claimant actively misrepresented its source of and price for the bonds to Respondents, and that upon learning from Lehwald that it had misdescribed the bonds to Respondent, Claimant failed to advise Respondent of its error and to offer Respondents the option to disclaim the sale as required by industry custom and the Rules of Fair Practice. Respondents maintained as an affirmative defense that Galiano was acting outside his scope of authority as he could not bind the company without authorization from a trader, which he did not have. Respondents further maintained that Claimant knew or should have known that Galiano did not have the authority to bind Dougherty to purchase the bonds and that Claimant was timely advised that Galiano did not have said authority. Respondents asserted as an affirmative defense that any damages suffered by Claimant were a result of Claimant's failure to mitigate damages and to "sell-out" in the best available market.

Respondents further maintained that the sale of the Bonds by Claimant to the Pershing Division of DLJ Securities Corp. may not have been an arms length transaction and that Claimant and Pershing agreed either orally or in writing that Claimant could repurchase the Bonds at an agreed time and price, a practice referred to in the industry as "parking" the Bonds.

Respondents maintained that the Bonds described in confirmations attached to Claimant's statement of claim were different than the bonds Claimant alleged were sold to Dougherty over the telephone on April 1, 1993. Specifically, Respondents maintained that the bonds described by Berns over the telephone were described as having a life cap of 8.893 while the bonds listed in the confirmations had a life cap of 8.896. In addition, Respondents maintained that Respondents never authorized the substitution of nonconforming bonds and therefore Claimant never attempted, or had the ability, to deliver the bonds that

Claimant alleged were purchased by Dougherty.

Respondents Alio and Dotzman asserted as an affirmative defense that Claimant raised no allegation of individual liability against Alio or Dotzman for any losses Claimant may have sustained.

Respondent Galiano maintained that Claimant actively misrepresented its source of and price for the bonds to Galiano and Dougherty. Respondent Galiano further maintained that the false information was directly relevant to Galiano's evaluation of the bond price. Respondent Galiano further maintained that had he been accurately advised of the source of the bonds, Galiano would not have dealt with Berns but rather would have dealt directly with Lehwald, as Lehwald was already a customer of Galiano and Dougherty.

Respondent Galiano maintained that Claimant misled Lehwald as to the price at which Claimant was selling the bonds and that Claimant was under pressure to consummate the sale of the Bonds quickly in order to avoid discovery by Lehwald and Dougherty that Claimant misrepresented its position with regard to the bonds.

Respondent Galiano further maintained that he had no authority to bind Dougherty to purchase the bonds and that Claimant knew or should have known that Galiano did not have the authority to bind Dougherty to purchase the bonds. Respondent Galiano also maintained that Claimant was timely advised of Galiano's lack of authority by Dougherty's employee Carol Torelli and Respondent Dotzman.

Respondent Galiano maintained that any damages suffered by Hanauer in the sale of the bonds were the direct result of Hanauer's failure to adequately mitigate damages. Respondent Galiano further maintained that on April 1, 1992, after Hanauer had been advised that Dougherty had not purchased the bonds, that Galiano told Berns that he had a buyer at "par 8" (100 8/32). Respondent Galiano also maintained that Dougherty was willing to purchase the bonds at 100 12/32 but that Claimant's representatives refused to acknowledge that proposal.

Respondent Galiano maintained that Dougherty clearly and promptly communicated to Claimant the fact that it would not purchase the bonds either prior to Claimant's purchase of the bonds from Lehwald or within a few minutes after Claimant's purchase of the bonds from Lehwald. Respondent Galiano further maintained that, under industry standards, a transaction entered in error can be "undone" if notice of the mistake is promptly conveyed. In addition, Respondent Galiano maintained that any damages Claimant suffered in the transaction were the result of Claimant's decision to purchase the bonds after being informed that Dougherty would not purchase the bonds at 100 16/32.

Respondent Galiano maintained that during the entire course of the events alleged in Claimant's statement of claim. Galiano was acting as an employee of Dougherty within the scope of his employment, and, therefore, Galiano had not personal liability to Claimant for any of the events alleged.

Claimant, in its reply to Respondents Dougherty, Alia and Dotzman's counterclaim, denied that Berns failed to correct any erroneous information he had previously supplied and Claimant denied that Galiano's bid of 100 16/32 was erroneous. Claimant maintained that Berns informed Galiano that Hanauer was purchasing the Bonds from a mortgage banker and Claimant denied that Berns' statement was a misrepresentation of where Hanauer was purchasing the Bonds. Claimant denied that Galiano informed Berns that there was no deal as a result of a mistaken bid and Claimant denied that the price of 100 16/32 for the Bonds was outside of the reasonable range of prices for the Bonds. Claimant further maintained that Berns did not misrepresent to Galiano that he was purchasing the Bonds at 100 13/32. Claimant maintained that Berns sought alternative purchasers of the Bonds solely for the purpose of assisting Galiano and not because Berns realized there had been no trade. Claimant denied that any employees or officers of Dougherty stated to any of Claimant's employees at any time prior to Claimant's purchase of the Bonds from Lehwald that no deal had been consummated between Claimant and Dougherty. Claimant further maintained that the confirmations attached to Claimant's statement of claim were not creations to confirm a transaction which did not occur. Claimant denied that the sale of the Bonds to Dougherty could have been "undone" at any time because it had purchased the Bonds from Lehwald immediately after Galiano purchased the Bonds from Berns. Claimant also denied that such "undoing" of a trade is in any way a standard industry practice. In addition, Claimant denied that the subsequent sale of the Bonds to the Pershing Division of DLJ Securities Corp. of New York involved "parking."

#### **RELIEF REQUESTED**

Claimant requested in its statement of claim:

1. An award against Respondents for the sum of \$310,000, together with interest on said sum from April 8, 1993.
2. An affirmative declaration that the failure to consummate the purchase of the Bonds constitutes a violation by the Respondents of Sections 1 and 6 of Article III of the NASD Rules of Fair Practice and a recommendation for appropriate sanctions to the applicable District Business Conduct Committee.

3. An award against Respondents for attorneys' fees, costs and other damages, including punitive damages.

Claimant requested in its reply to Respondents Dougherty, Alio and Dotzman's counterclaim:

1. An affirmative declaration that Claimant's activities in the sale of the Bonds were not violative of any NASD rules; and
2. An award against Respondents for attorneys' fees, costs, and such other and further relief as the arbitrators deem appropriate.

Respondents Dougherty, Alio and Dotzman requested:

1. Recovery of no sums by Claimant from Respondents.
2. An affirmative declaration that Respondents committed no violation of NASD Rules.
3. An award against Claimant for attorneys' fees, costs and such other and further relief as the arbitrators shall deem appropriate.

Respondents Alio and Dotzman requested:

1. Dismissal of from these proceedings of Alio and Dotzman.

Respondents Dougherty, Alio and Dotzman requested in their Counter-Claim:

1. An affirmative declaration that Claimant's activities in the sale of the Bonds constitutes a violation by Claimant of Sections 1 and 18 of Article III of the NASD Rules of Fair Practice, and a recommendation for appropriate sanctions to the applicable District Business Conduct Committee.
2. An award against Claimant for attorneys' fees, costs and other damages, including punitive damages, as the arbitrators shall deem appropriate.

Respondent Galiano requested:

1. An affirmative declaration that Claimant's activities in the sale of the bonds constituted a violation by Claimant of Sections 1 and 18 of Article III of the NASD Rules of Fair Practice, and a recommendation for

appropriate sanctions to the applicable Business District Conduct Committee.

2. An award against Claimant for attorneys' fees, costs and other damages, including punitive damages, as the arbitrators shall deem appropriate.

### **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. Respondent Dougherty is liable to Claimant in the amount of \$310,000 in compensatory damages.
2. Respondent Dougherty is liable to Claimant for interest at the New Jersey legal rate from April 8, 1993 to the date of payment of the award.
3. All other parties shall bear their respective costs including attorneys' fees.
4. Claimant's claims as against Respondents Alio, Dotzman and Galiano are denied.
5. Respondents Dougherty, Alio and Dotzman's claim for recovery of no sums by Claimant from Respondents is denied.
6. All parties' claims for affirmative declarations are denied.
7. The counterclaims of Respondents Dougherty, Alio and Dotzman are denied.
8. Respondents Alio and Dotzman's request for dismissal is denied.
9. All parties' requests for punitive damages are denied.



**FORUM FEES**

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

1 Prehearing session X \$300 = \$300.

6 hearing sessions X \$750 = \$4,500.

**Forum fees Assessed Against:**

1. Claimant is assessed \$2,400 which represents one-half of the forum fees due, less \$750 hearing session deposit paid by Claimant, leaving \$1,650 due. Claimant is liable and shall pay to the NASD the sum of \$1,650.
2. Respondents are assessed \$2,400 which represents one-half of the forum fees due, less \$600 hearing session deposit paid for Respondents Dougherty, Alio and Dotzman's counterclaim, leaving \$1,800 due. Respondents Dougherty, Alio, Dotzman and Galiano are liable jointly and severally and shall pay to the NASD the sum of \$1,800.

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

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Concurring Arbitrators' Signatures

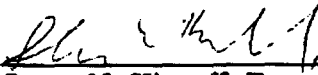
Name

Industry Chairman

Theodore Kimelman

Name

Industry Panelist

 As Arbitrator  
Stuart N. Kingoff, Esq.

Name

Industry Panelist

Alexander Stewart Barnes

Date of Decision: \_\_\_\_\_

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Theodore Kimelman** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

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STATE OF: *NEW YORK*

SS:

COUNTY OF: *NASSAU*

On this *10<sup>th</sup>* day of *October* , 1994, before me personally appeared **Stuart N. Kingoff, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

  
\_\_\_\_\_

JAY MARC ISRAEL  
Notary Public, State of New York  
No. 5006389  
Qualified in Nassau County  
Commission Expires January 19, 1995

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Alexander Stewart Barnes** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

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Concurring Arbitrators' Signatures

Name

Industry Chairman



Theodore Kimelman

\_\_\_\_\_

Name

Industry Panelist

\_\_\_\_\_  
Stuart N. Kingoff, Esq.

\_\_\_\_\_

Name

Industry Panelist

\_\_\_\_\_  
Alexander Stewart Barnes

\_\_\_\_\_

Date of Decision: \_\_\_\_\_

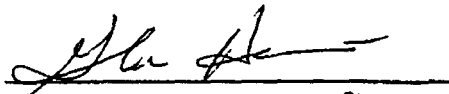
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NASD Award #93-01853

STATE OF:

SS:

COUNTY OF:

On this 7 day of OCTOBER, 1994, before me personally appeared **Theodore Kimelman** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.



GLORI HEWITT  
NOTARY PUBLIC, State of New York  
No. 01 34665  
Qualified in Nassau County  
Commission Expires April 30, 1996

STATE OF:

SS:

COUNTY OF:

On this     day of                   , 1994, before me personally appeared **Stuart N. Kingoff, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

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STATE OF:

SS:

COUNTY OF:

On this     day of                   , 1994, before me personally appeared **Alexander Stewart Barnes** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

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Concurring Arbitrators' Signatures

Name

Industry Chairman

Theodore Kimelman

Name

Industry Panelist

Stuart N. Kingoff, Esq.

Name

Industry Panelist

Alexander Stewart Barnes  
Alexander Stewart Barnes

Date of Decision: \_\_\_\_\_

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Theodore Kimelman** know and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

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STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Stuart N. Kingoff, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

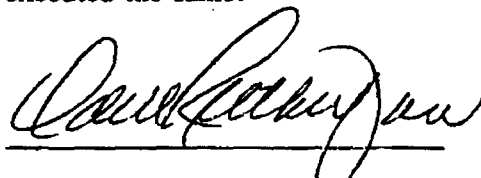
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STATE OF: *New York*

SS:

COUNTY OF: *New York*

On this *11* day of *October* 1994, before me personally appeared **Alexander Stewart Barnes** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.



ODELL RUTHERFORD  
Notary Public, State of New York  
No. 24-4627771  
Qualified in Kings County  
Commission Expires June 30, *1996*