

NASD REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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Name of Claimant

J.W. Charles Securities, Inc.

Name of Respondents

93-02057

Jon C. Botula  
Rita C. Botula

Name of Third Party Respondent

William B. Bruder

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**REPRESENTATION**

For claimant J.W. Charles Securities, Inc. ("J.W. Charles") appeared Lonnie Browne, Esq. of the law firm of Boose Casey Ciklin Lubitz Martens McBane & O'Connell, located in West Palm Beach, Florida.

For respondents Jon C. Botula and Rita C. Botula (collectively referred to as "the Botulas") appeared Thomas J. Schuchert, Esq. of the law firm of Thomas Schuchert & Associates, located in Pittsburgh, Pennsylvania.

For third party respondent William B. Bruder ("Bruder") appeared Robert L. Saylor, Esq. of the law firm of Saylor & Gwynn, located in West Palm Beach, Florida.

**CASE INFORMATION**

Statement of Claim was filed by J.W. Charles on May 18, 1993. J.W Charles.'s Submission Agreement was signed on June 21, 1993.

Answer and Counterclaim was filed by the Botulas on September 30, 1993. The Botulas' Submission Agreement was signed on September 29, 1993.

Answer and Affirmative Defenses to the Counterclaim was filed by J.W. Charles on October 28, 1993.

Third Party Claim against Bruder was filed by J.W. Charles on October 28, 1993.

Answer to the Third Party Claim and Counterclaim was filed by Bruder on November 30, 1993. Bruder's Submission Agreement was on February 28, 1994.

Reply, Answer and Affirmative Defenses to the Third Party Answer and Counterclaim was filed by J.W. Charles on December 21, 1993.

#### **HEARING INFORMATION**

Pre-hearing Conferences:	July 12, 1995	-	Full panel
	August 21, 1995	-	One Arbitrator
	July 3, 1996	-	Full panel
	November 13, 1996	-	One Arbitrator
Hearing Sessions/Dates:	February 26, 1996	-	Two Sessions
	February 27, 1996	-	Two Sessions
	February 28, 1996	-	Two Sessions
	November 21, 1996	-	Two Sessions
	November 22, 1996	-	Two Sessions

The hearings were held at the William Penn Hotel located in Pittsburgh, Pennsylvania.

#### **CASE SUMMARY**

J.W. Charles alleged that, on April 22, 1991, the Botulas opened an account with it and, over the course of a year and a half, the Botulas made various stock purchases on cash and margin with their account executive, Bruder. J.W. Charles further alleged that, during the period of August 1992 through January 1993, the Botulas began to purchase on a solicited and unsolicited basis Hunter Environmental services ("HESI"). J.W. Charles asserted that subsequently, upon negative reports about HESI, the price of the stock plunged and, as a result, a margin call was issued to the Botulas.

J.W. Charles alleged that payment was demanded from the Botulas but that the Botulas refused to pay the debit balance that existed in their account and that, as a result, J.W. Charles liquidated the Botulas account. J.W. Charles further alleged that, after the liquidation, the Botulas still has a debit balance of \$42,143.46.

The Botulas alleged that Bruder engaged in brokerage activities on their behalf for approximately fifteen years at various brokerage firms. The Botulas further alleged that, during the entire relationship they had with Bruder, they believe that he never made any inquiry as to their goals, financial plans and/or investment objectives. The Botulas asserted that, over the years, they came to rely more and more upon the recommendations of Bruder and to trust that he was acting in their best interest and on their behalf and that representations were being made to them in their best interests.

The Botulas alleged that, in or about August 1992, Bruder contacted them to discuss the purchase of HESI and that he represented that HESI was the "all time winner" and he strongly recommended the aggressive purchase of the stock. The Botulas further alleged that Bruder maintained that the company had advanced technology for disposing of hazardous waste and salt domes in the state of Texas and the company had obtained preliminary approval and that the actual permitting would be "rubber stamped". The Botulas maintained that Bruder repeatedly maintained that he guaranteed the investment and personally guaranteed that it could not miss. The Botulas further maintained that all of the stock purchases made at J.W. Charles on their behalf were solicited by Bruder.

The Botulas contended that, contrary to the representation of Bruder, in or about January 6, 1993, the Texas Water Commission unanimously denied the applications of HESI and, as a result, they sustained losses in their account in excess of \$250,000.00. The Botulas maintained that they believed that, prior to the decision of the water commission being issued, principals in HESI had been selling off their shares in a context whereby J.W. Charles knew or should have known that such was occurring. The Botulas also maintained that J.W. Charles knew or should have known of various facts that made HESI purchases much more speculative than it was represented.

In its Answer to the Counterclaim filed by the Botulas, J.W. Charles denied that it or its agents ever guaranteed the performance or prospects of HESI and maintained that the information provided to the Botulas was publicly available information. J.W. Charles further maintained that each and every trading decision was made by the Botulas after a full and detailed discussion regarding the particular transaction. J.W. Charles contended that the decision to invest in HESI was made by the Botulas and that it provided the Botulas with full and detailed disclosure regarding HESI based upon the public information available to it.

In its Third Party Claim against Bruder, J.W. Charles alleged that, if the allegations made by the Botulas in their counterclaim that Bruder made certain misrepresentations of material fact and certain guarantees with respect to HESI are true, they were made without the knowledge or permission of J.W. Charles and in violation of Bruder's fiduciary duties to J.W. Charles, the internal rules of J.W. Charles and the rules of the New York Stock Exchange and the National Association of Securities Dealers. J.W. Charles maintained that, if the panel renders an award against J.W. Charles arising out of its sale of the HESI to the Botulas, then it is entitled to indemnification or contribution by Bruder for his purported improper activities with respect to the Botulas.

Bruder denied all allegations contained in the third party claim. Bruder maintained that this conduct with respect to the Botulas was at all times consistent with his duties, the internal guidelines and policies of J.W. Charles and the investment objectives and instructions of the Botulas.

Bruder alleged that, on or about March 4, 1991, he entered into an written agreement with J.W. Charles by which J.W. Charles employed him as a branch manager. Bruder further alleged that J.W. Charles agreed to pay him \$3,000.00 a month and various other incentives, including commissions on his individual production as well as a certain percentage of profits. Bruder also

maintained that J.W. Charles agreed to pay him a recruiting bonus to be applied to the production of licensed security dealers depending upon the individual's demonstrated capacity to produce sales.

Bruder alleged that J.W. Charles breached the terms of the employment agreement by failing to pay him the percentage of branch profits as well as commissions generated by new brokers recruited by him. Bruder further alleged that J.W. Charles wrongfully converted his personal investment account and improperly withheld his paycheck.

In its Reply, Answer and Affirmative Defenses to the Third Party Answer and Counterclaim filed by Bruder, J.W. Charles maintained that, consistent with firm operating procedures and the customary and usual practices in the brokerage industry, it placed a freeze on Bruder's brokerage account due to the debit balance existing in the Botulas' account and the settlement of an unrelated claim. J.W. Charles further maintained that, in connection with errors, losses, demands and/or claims for damages arising out of a client's brokerage account, it is entitled to a setoff against the broker of record from any source.

With respect to Bruder's claim for breach of contract, J.W. Charles maintained that the branch was never profitable during Bruder's tenure and, therefore, Bruder was not entitled to a bonus. J.W. Charles further maintained that no recruiting bonus was due to Bruder because he failed to identify a single individual he recruited. In addition, J.W. Charles contended that Bruder received all employment benefits to which he was entitled.

### **RELIEF REQUESTED**

J.W. Charles requested an award against the Botulas in the amount of \$42,143.46 in compensatory damages, \$50,000.00 in punitive damages, attorneys fees and all other costs incurred in this matter. In its Third Party Claim, J.W. Charles requested indemnification or contribution by Bruder for his purported improper activities with respect to the Botulas. J.W. Charles further requested that the counterclaims of the Botulas and Bruder be dismissed in their entirety.

The Botulas requested that the panel dismiss the claim of J.W. Charles and to alternatively enter an award in their favor in an amount in excess of \$250,000.00, the specific amount of which will be established at the time of the hearing and which amount will include, but is not limited to the following: (a) rescission; (b) compensatory damages; (c) consequential damages; (d) margin interest; (e) punitive damages; (f) interest on losses; (g) damages pursuant to the Pennsylvania Consumer Protection Act, including but not limited to treble damages' legal fees and expenses; (h) as appropriate, the award of legal fees; and (i) costs and expenses.

Bruder requested that J.W. Charles' prayer for indemnification or contribution be dismissed and, in his counterclaim against J.W. Charles, requested \$100,000.00, representing the value of his trading account plus damages for trades not executed; \$93,750.00, representing a bonus for recruiting other brokers; \$1,200.00, representing unpaid salary; \$10,000.00, representing production payment for personal production and \$52,291.88, representing a branch office production bonus.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Bruder made a motion to dismiss any direct claims against him as may be intended to be asserted by the Botulas following the resolution of all claims between the Botulas and J.W. Charles. The panel considered all of the submission concerning this motion and, on November 20, 1996, issued the following ruling:

As to the stated intention of Botulas to pursue direct claims against Bruder after settlement of all claims between Botulas and J.W. Charles Securities, Inc., the Panel finds that the objection on behalf of Bruder to permitting such a claim to be asserted or to proceed at the resumption of proceedings on November 21, 1996 to be well taken. No direct claim against Bruder has been asserted by Botulas, and one cannot be fairly implied from the manner of pleading third party or contribution claims to date, which have only indirectly involved Botulas, in such a way as to avoid manifest unfairness in requiring Bruder to defend against a direct claim by Botulas with notice of the Botula/J.W. Charles settlement coming only on November 13, 1996. Because no direct claim has actually been asserted against Bruder by Botulas, a motion to "dismiss" is not well taken. If such a claim is intended to be pursued in the context of this case, Botulas may pursue amendments of their Statement of Claim in accordance with controlling rules, and thus provide adequate notice to and opportunity for Bruder to prepare his own defense at a later hearing. Accordingly, the Bruder "motion" is deemed to be an objection to proceeding at this time on any direct claim by Botulas against Bruder, which objection is allowed. At such time as there is an amendment of the Statement of Claim to add Bruder as a Respondent on the direct claim by the Botulas, and a fair opportunity afforded Bruder to prepare his defense against such a claim, the panel will hear and determine it.

At the hearing on November 21, 1996, the Botulas requested reconsideration of the panel's November 20, 1996 determination to preclude assertion of any direct claim by the Botulas against Bruder. The panel heard arguments from counsel for the Botulas and responses from counsel for Bruder and reaffirmed its prior determination. At the conclusion of the hearing, the panel took notice of other separate, proceedings commenced by the Botulas against Bruder. No Amended Statement of Claim to assert direct claims against Bruder was tendered by the Botulas in this matter, and the record was closed upon receipt of all required post-hearing submissions.

### **AWARD**

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

1. As to the claim of J.W. Charles against the Botulas and the Counterclaims of the Botulas against J.W. Charles, all claims by and between these parties were settled, and withdrawn from the panel's consideration, prior to the resumption of the hearing on November 21, 1996.

2. As to any desired direct claim by the Botulas against third party respondent Bruder intended by the Botulas to survive the settlement referenced above, the Botulas were invited to submit an Amended Statement of Claim to be considered by the panel in the context of this case. The Botulas did not do so. During the course of the proceedings on November 21, 1996 the panel took notice of an apparent election of the Botulas to proceed with any direct claim against Bruder via separate proceedings. It is therefore the panel's determination that no direct claim by the Botulas individually was put before it for determination in the disposition of this arbitration.
3. On the Third Party Claim of J.W. Charles against Bruder for contribution and/or indemnification, the panel has determined that J.W. Charles shall recover from Bruder the sum of \$21,071.73. All claims of J.W. Charles for attorneys fees are denied.
4. On the claim of Bruder against J.W. Charles for conversion, Civil Theft, or for otherwise exercising wrongful dominion over his personal J.W. Charles account, J.W. Charles is ordered forthwith to release any restriction, and to restore to Bruder fully and unfettered ownership and control of the account and the assets currently comprising it. Bruder's claims for consequential or other losses, damages, treble damages or punitive damages by reason of J.W. Charles' actions in regard to his account are denied.
5. On his claims relating to compensation, Bruder shall recover from J.W. Charles the total sum of \$8,369.47. All other claims or amounts claimed by Bruder as owing for compensation, including recruiting bonuses, are denied.

#### FORUM FEES

Pursuant to Rule 10332(c) (formerly Section 43(c)) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 filing fee previously deposited by J.W. Charles, the \$200.00 filing fee previously deposited by the Botulas and the \$500.00 filing fee previously deposited by Bruder. In addition, the arbitrators have assessed the following forum fees:

2 pre-hearing conferences (chairman only) x \$300.00	= \$ 600.00
2 pre-hearing conferences (full panel) x \$750.00	= \$1,500.00
10 hearing sessions x \$750.00	= <u>\$7,500.00</u>
Total forum fees	= \$9,600.00

Forum fees are assessed against:

1. J.W. Charles be and hereby is liable for the sum of \$2,400.00, representing twenty-five percent of the total amount of forum fees assessed. J.W. Charles


previously deposited \$600.00 and, therefore, J.W. Charles is liable and shall pay \$1,800.00 to NASD Regulation.

2. Jon and Rita Botula be and hereby are liable for the sum of \$4,800.00, representing fifty percent of the total amount of forum fees assessed. Jon and Rita Botula previously deposited \$750.00 and, therefore, they are liable and shall pay \$4,050.00 to NASD Regulation.

3. Bruder be and hereby is liable for the sum of \$2,400.00, representing twenty-five percent of the total amount of forum fees assessed. Bruder previously deposited \$750.00 and, therefore, Bruder is liable and shall pay \$1,650.00 to NASD Regulation.

Fees are payable to the NASD Regulation, Inc.

Arbitrators' Signatures

  
Robert Rapp, Esq.  
Chairperson-Public Arbitrator

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Robert N. Sugrue  
Public Arbitrator

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Jay W. Lewis  
Industry Arbitrator

Date of Decision: February 7, 1997

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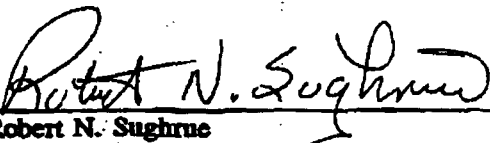
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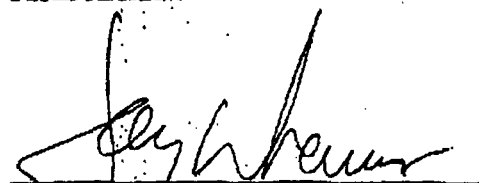
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