

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Robert M. Bauer,
Claimant,

V.

**Rhodes Securities, Inc.,
James Rhodes,
Richard Pendleton,
Thomas Hoover, and
Jeffery Breault,
Respondents.**

and No. 95-01262

Rhodes Securities, Inc.,
Counterclaimant,

V.

Robert M. Bauer,
Counterrespondent

REPRESENTATION OF PARTIES

Robert M. Bauer ("**Claimant**") was represented by Christopher L. Cella, Esq., Dallas, Texas, and Barnett D. Hammond, Esq., of Cooper, Glasgow, Kupchynsky & Kittelson, L.L.P., Dallas, Texas.

Rhodes Securities, Inc. ("**RSI**"), James Rhodes ("**Rhodes**"), and Richard Pendleton ("**Pendleton**") were represented by Sarah B. Estes, Esq. and Peter J. Anderson, Esq., of Sutherland, Asbill & Brennan, Atlanta, Georgia.

Thomas Hoover ("**Hoover**") and Jeffery Breault ("**Breault**") were represented by David B. Hawley, Esq. of Cummings & Hawley, Wichita, Kansas.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about March 13, 1995. Claimant's Submission Agreement was signed on February 27, 1995.

Respondents RSI, Rhodes, and Pendleton's Statement of Answer was filed on or about May 17, 1995. Respondents RSI, Rhodes, and Pendleton's Submission Agreements were signed on April 26, 1995.

Respondent RSI's Counterclaim against Claimant was filed on or about May 17, 1995. Claimant's Response to Counterclaim of Rhodes Securities, Inc. was filed on or about June 22, 1995.

Respondents Hoover and Breault's Statement of Answer was filed on or about June 16, 1995. Respondent Hoover's Submission agreement was signed on June 15, 1995. Respondent Breault's Submission Agreement was signed on July 14, 1995.

HEARING INFORMATION

A telephonic pre-hearing conference was held on November 10, and December 1, 1995 for one (1) session each day.

The hearing was held on December 18, and 19, 1995 for three (3) sessions each day, and December 20, 1995 for two (2) sessions in Kansas City, Missouri for a total of eight (8) sessions.

CASE SUMMARY

Claimant alleged that Respondents RSI, Rhodes, Hoover, and Breault breached their fiduciary duty and duty of trust arising from business arrangements entered into with Claimant. In addition, Respondent Pendleton, while an employee and officer of RSI, attempted to extort a release agreement from Claimant and asserted defamatory remarks regarding Claimant. Claimant specifically alleged that:

1. In November, 1992, Rhodes converted \$30,000 from Claimant's funds to pay legal expenses stemming from an arbitration suit. Once judgement was granted in the arbitration suit, RSI, Rhodes, Hoover and Breault conspired to extort the judgement amount from Claimant and dissolve Claimant's interest in the Wichita office.
2. On or about October, 1993, Pendleton then an employee and officer of RSI, threatened that if Claimant did not sign a release he would file a U-5 containing false information. Subsequently, Pendleton filed a U-5 containing information which prevented claimant from working for several months.

Based upon the above allegations, Claimant asserted claims against respondents for breach of trust, breach of fiduciary duty, extortion, and defamation.

RSI, Rhodes, and Pendleton, denied all material allegations set forth in the Statement of Claim. In addition, RSI, Rhodes, and Pendleton asserted the following affirmative defenses: Some or all of the claims asserted by Claimant are barred by the Statute of Frauds; the statements alleged to be defamatory are true statements; the Statement of Claim fails to state a claim upon which relief may be granted; and to the extent that Claimant has suffered any injury (which Respondents denied), those injuries are the result of Claimant's own actions, and not those of Respondents.

Hoover and Breault denied all material allegations set forth in the Statement of Claim. In addition, Hoover and Breault asserted the following affirmative defenses: This court lacks jurisdiction to consider this matter, or in the alternative should decline to hear this matter pursuant to section 12(b) of the Code of Arbitration Procedure; Claimant fails to state a cause of action upon which relief can be granted against Hoover and Breault; that at all times Hoover and Breault acted in good faith and did not directly or indirectly perform or refrain from performing any act or acts which may be deemed to constitute any violation or wrongful conduct on the part of these respondents; Claimant has alleged no facts or claims which entitles him to an award of attorneys' fees or punitive damages; that Breault has not been properly served; that Christopher Cella, Claimant's attorney, has a conflict of interest in that he is a material witness and potential creditor of BEI and should be removed as attorney for Claimant; Claimant's alleged loss was proximately caused or contributed to by his own negligence; and the Statement of Claim is barred by the doctrine of laches.

For its Counterclaim, RSI asserted that Claimant failed to supervise its Wichita office properly, and that as a result of Claimant's failure, the following claims have been made: Bill Werth filed a claim against James Wilson, a broker of RSI and RSI resulting in an award of \$87,890, under terms of Claimant's agreement with RSI, Claimant is obligated to indemnify RSI for the loss; Kevin Pfeiffer has filed a claim arising out of the conduct of Lynn Marasco, who was a registered representative under Claimant's supervision, the claim has not been resolved, RSI is incurring legal fees in its defense, and under Claimant's agreement with RSI, Claimant is obligated to bear the legal fees and other expenses of defending this matter, as well as to bear the cost of any award made against the firm; and administrative sanctions have been entered by the Kansas Securities Commission for Claimant's failure to detect the improper use of margin in the accounts of two customers of the Wichita branch office, Tom and Kathy Biehler, the broker involved was George Munkres, who was also cited for unregistered business in Kansas. RSI alleged that Claimant breached the express terms of his agreement with RSI by his failure to supervise, and by failing to indemnify and bear the financial responsibility for the arbitration awards, legal fees and other costs to RSI as a result of Claimant's conduct.

For his response to RSI's Counterclaim, Claimant stated that: He had, several years previous to the supervisory problems with the accounts of Bill Werth and Kevin Pfeiffer, divested himself of all

supervisory responsibility; Claimant's transition from supervisory to a non-supervisory capacity occurred in approximately October of 1992; and that RSI is attempting to hold Claimant liable for violations of its, and of its alter ego's, Rhodes, own making.

RELIEF REQUESTED

Claimant requested an award in the amount of \$200,000 for compensatory damages, \$1,000,000 for emotional distress damages, \$1,000,000 for punitive damages, for all costs incurred in this proceeding inclusive of attorneys' fees, and for such further and other relief as is appropriate. In his Response to RSI's Counterclaim, Claimant also requested that: He be awarded damages as set forth in his Statement of Claim; all relief requested by RSI be denied; and that he be awarded his costs incurred in this matter, inclusive of attorneys' fees.

RSI, Rhodes, and Pendleton requested that the Statement of Claim be dismissed in its entirety with prejudice, and they further requested that each be awarded their costs, expenses and attorneys' fees at the conclusion of the hearing of this matter.

Hoover and Breault requested that the claims asserted against them be dismissed in its entirety with prejudice and they further requested that each be awarded their costs, expenses and attorneys fees at the conclusion of the hearing or dismissal of this matter.

In its Counterclaim, RSI requested that it be awarded damages in an amount to be determined at the hearing, but not less than \$200,000.

OTHER ISSUES CONSIDERED & DECIDED

RSI, Rhodes, and Pendleton filed with the NASD: A request to change the venue of this arbitration to Dallas, Texas; a Motion to Disqualify Claimant's counsel; a Motion to Dismiss; and a Motion to Compel. Hoover and Breault filed with the NASD: A request to change the venue of this arbitration to Wichita, Kansas; a Motion to Dismiss; and a Motion for Attorneys' fees. Claimant initially filed a request to have the venue of this arbitration changed to Dallas, Texas, but later withdrew the request. Claimant also filed a request to take the depositions of Hoover and Breault. Pre-hearing conferences were held with the arbitrators on November 10, 1995, and December 1, 1996. Amongst the discovery and deposition matters heard and decided by the arbitrators, the panel also made the following rulings: RSI, Rhodes, and Pendleton's Motion to Disqualify and Motion to Dismiss were denied; Hoover and Breault's Motion to Dismiss and Motion for Attorneys' fees were denied; and that the hearing in this matter would remain in Kansas City, Missouri.

The parties have agreed that a handwritten, signed award may be entered. The parties have agreed to receive conformed copies of the award.

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:

Respondents Rhodes Securities, Inc., James Rhodes, and Richard Pendleton are ordered to Amend Claimant Robert M. Bauer's Form U-5 to read "Permitted to resign" and to remove the language:

- (A) "Business in unregistered States", and
- (B) "Nondisclosure of outside interests".

Respondents Rhodes Securities, Inc., James Rhodes, and Richard Pendleton, are ordered to pay Claimant Robert M. Bauer \$7,800, which can be offset by remitting this amount to Respondents Thomas Hoover and Jeffrey Breault on behalf of Claimant Robert M. Bauer. Additionally, this amount will be personally paid 1/3 by Rhodes Securities, Inc., 1/3 by James Rhodes, and 1/3 by Richard Pendleton.

Claimant Robert M. Bauer is ordered to pay \$10,350 to Thomas Hoover and Jeffrey Breault which will be offset in part by the amount above from Respondents Rhodes Securities, Inc., James Rhodes, and Richard Pendleton.

Each claim/request for an award/damages not specifically set forth herein are, and each of them, denied with prejudice.

Each party will bear its own costs and expenses associated with this arbitration, including attorneys' fees, except as set forth more specifically below.

Forum fees will be paid 50% by Claimant Robert M. Bauer, and 50% by Respondents Rhodes Securities, Inc., James Rhodes, and Richard Pendleton.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each prehearing conference. There were eight regular sessions x \$750 and two (2) pre-hearing conference sessions x \$300 = \$6,600 in forum fees. Pursuant to §43(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD by the Claimant.

Pursuant to §45 of the Code, the Rhodes Securities, Inc. is liable for, and shall pay to the NASD a member surcharge in the amount of \$500.

Pursuant to §44 of the Code, Rhodes Securities, Inc. is liable for, and shall pay to the NASD the sum of \$500 for its Counterclaim filing fee.

Additional forum fees in the amount of \$2,300 are assessed against Robert M. Bauer.

Additional forum fees in the amount of \$3,300 are assessed against Respondents Rhodes Securities, Inc., James Rhodes, and Richard Pendleton.

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

Dated:

Dane H. Madsen

s/s

February 22, 1996

Dane H. Madsen

Industry Arbitrator, Presiding Chair

James S. Allen, Jr.

s/s

February 22, 1996

James S. Allen, Jr.

Industry Arbitrator

Clarence Albert Getchell, III

s/s

February 23, 1996

Clarence Albert Getchell, III

Industry Arbitrator