

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Government Securities Corp.,

Claimant,

and

No. 96-02092

Rhodes Securities, Inc., James G. Rhodes,
and William C. Swanner,

Respondents,

REPRESENTATION OF PARTIES

Claimant Government Securities Corp. was represented by J. Dale Wainwright, Esquire of Haynes and Boone LLP, located in Houston, Texas.

Respondents Rhodes Securities, Inc., James G. Rhodes, and William C. Swanner were represented by Sarah B. Estes, Esquire of Sutherland Asbill & Brennan, located in Atlanta, Georgia.

CASE INFORMATION

Claimant Government Securities Corp.'s Statement of Claim was filed on or about May 15, 1996. Claimant Government Securities Corp.'s Reply to Respondents' Counterclaim was filed on or about August 13, 1996. Claimant Government Securities Corp.'s Submission Agreement was signed on May 10, 1996 by Frank J. Klaus, Executive Vice President of Government Securities Corp.

Respondent Rhodes Securities, Inc., James G. Rhodes, and William C. Swanner's Statement of Answer and Counterclaim was filed on or about July 22, 1996. Respondent Rhodes Securities, Inc.'s Submission Agreement was signed on July 22, 1996 by Jim G. Rhodes, President of Rhodes Securities, Inc. Respondent James G. Rhodes' Submission Agreement was signed on July 22, 1996. Respondent William C. Swanner's Submission Agreement was signed on July 23, 1996.

HEARING INFORMATION

Pre-hearing conferences were held on: January 27, 1997 for one (1) session; and February 14, 1997 for one (1) session.

The hearing was held on: April 8, 1997 for two (2) sessions; April 9, 1997 for two (2) sessions; and April 10, 1997 for two (2) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Government Securities Corp. ("Claimant" or "GSC") brought this action to recover damages allegedly caused by the representation by William C. Swanner ("Mr. Swanner"), of Rhodes Securities, Inc., that the sale of Centrust Savings Bank Defeased Zero Coupon Eurobond, Cusip 1564019A47 (the "Bonds") was completed for immediate transfer.

According to Claimant, on December 6, 1995, Rhodes Securities, Inc. sold \$2,000,000 face of the Bonds to GSC at a price of \$24. Claimant asserted that later during the day on December 6, when its broker Mr. Ballas called to finalize the documentation for the transaction, Rhodes Securities, Inc. and Mr. Swanner reneged on the trade, thereby breaching their agreement. Claimant further asserted that because Mr. Swanner was told that Claimant had a customer waiting to purchase the Bonds from it, Rhodes Securities, Inc. and Mr. Swanner were aware that Mr. Swanner's affirmation on behalf of Rhodes Securities, Inc. that the Bonds were definitely available for sale and that Rhodes Securities was making a "firm offer" to GSC was being relied on by GSC in the transaction. Claimant also asserted that Rhodes Securities, Inc. and Mr. Swanner were encouraged to complete the transaction as agreed or find substitute securities that would be suitable for purchase by GSC, but they failed to do either. Claimant stated that it suffered a loss of \$37,500 by having to purchase substitute bonds, for which it was never reimbursed.

Claimant also alleged that at the time that Mr. Swanner sold the Bonds to GSC, he was not registered with the State of Texas. Claimant asserted that Mr. Swanner and Rhodes Securities, Inc. offered and sold securities from their office in Memphis, Tennessee to customers in Texas in violation of the mandatory securities registration laws of the State of Texas.

Claimant asserted the following causes of action against respondents Rhodes Securities, Inc., its chief executive officer, James G. Rhodes, and Mr. Swanner ("Respondents"): (1) breach of contract; (2) fraud; (3) gross negligence; (4) negligence and negligent misrepresentation; (5) violation of § 10(b) of the Securities Exchange Act of 1934; (6) violation of the Texas Securities Act; (7) fraud in a stock transaction; (8) promissory estoppel; (9) failure to supervise; and (10) agency, respondeat superior and control person liability.

Respondents denied the allegations set forth in the Statement of Claim. Respondents contended that no contract was ever formed between GSC and Rhodes Securities, Inc. and that Mr. Ballas was never left with the impression that the bonds had been bought. According to Respondents, Claimant sold the Bonds short to another customer, and now is trying to make the Respondents pay for its (GSC's)

mistake. Respondent stipulated that there was only conversation about a potential trade, but it was never consummated.

Respondents asserted the following affirmative defenses: (1) the purported trade never occurred, so there could have been no violation of any laws, rules or regulations; (2) dealer to dealer trades are exempt transactions not subject to the provisions of the Texas Securities Act; (3) the Statement of Claim fails to state a claim on which relief can be granted; (4) Claimant failed to mitigate its damages, if any; (5) some or all of the claims asserted by Claimant are barred by Claimant's own negligence; (6) Claimant's damages, if any, were proximately caused by its own conduct or by the conduct of others, and not by Respondents; (7) the real party in interest may be Coastal Securities, in which case Claimant would not have standing to bring this claim; and (8) Claimant may have failed to join a necessary and indispensable party, namely Coastal Securities.

Respondents also brought a Counter-Claim against Claimant to recover their attorney fees, costs, and expenses incurred in this matter. Respondents alleged that the claims asserted against them are groundless and have been brought in bad faith because Claimant knew that there was never any trade between GSC and Respondents. Respondents asserted that Claimant violated the Texas Civil Practice and Remedies Code § 9.012.

RELIEF REQUESTED

Claimant Government Securities Corp. requested an award for: actual damages in an amount in excess of \$37,500; pre-judgment and post-judgment interest at the maximum rate allowable by law; exemplary damages; and all of its costs, expenses, disbursements and reasonable attorneys' fees incurred in this arbitration proceeding, pursuant to § 38.001 *et seq.* of the Texas Civil Practice and Remedies Code, Art. 581-33D(7) of the Texas Securities Act, § 27.01(e) of the Texas Business and Commerce Code, and as part of an appropriate award of exemplary damages. Claimant Government Securities corp. also requested that the Counterclaim be dismissed and that it be awarded its attorneys' fees, and legal expenses and costs.

Respondents Rhodes Securities, Inc., James G. Rhodes, and William C. Swanner requested that the claims asserted against them be dismissed with prejudice and that they be awarded their expenses, costs, and attorney fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in 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 NASD Regulation, Inc. Office of Dispute Resolution.

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. That the Statement of Claim is denied with prejudice;
2. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There were two pre-hearing conference sessions x \$300 = \$600, and there were six (6) hearing sessions x \$600 = \$3,600. Total forum fees are thus \$600 + \$3,600 = \$4,200. Pursuant to §10332(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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$600 and shall **retain** as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Government Securities Corp.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Government Securities Corp.

Pursuant to §10332(a) of the Code, NASD Regulation, Inc. Respondents Rhodes Securities, Inc., James G. Rhodes, and William C. Swanner are jointly and severally liable for and shall pay the NASD Regulation, Inc., Office of Dispute Resolution the non-refundable Counter-Claim filing fee in the amount of \$500.

Claimant Government Securities Corp. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$1,200 (= 1/3 \$3,600 total forum fees - \$600 hearing session deposit).

Pursuant to §10333 of the Code, respondent Rhodes Securities, Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$200.

Respondents Rhodes Securities, Inc., James G. Rhodes, and William C. Swanner are jointly and severally liable for and shall pay the NASD Regulation, Inc., Office of Dispute Resolution forum fees in the amount of \$2,300 (= 1/2\$3,600 total forum fees plus outstanding Counter-Claim filing fee of \$500).

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Joe S. Shepherd

Joe S. Shepherd

Panelist

Public Arbitrator

April 18, 1997

Date

/s/ Stephen Denning

Stephen Denning

Panelist

Industry Arbitrator

April 17, 1997

Date

Dissenting Arbitrator's Signature

/s/ David G. Beerbower

David G. Beerbower, Esquire

Chairperson

Public Arbitrator

April 17, 1997

Date

For NASD use only

Date award served on the parties: April 28, 1997