

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

James N. and Barbara B. Galbraith

96-03929  
96-04015

96-04016  
96-04017

Name of Respondent

Nationwide Securities Corporation  
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CASE SUMMARY

In cases filed with the National Association of Securities Dealers Regulation, Inc. on September 4 and 9, 1996, claimants James and Barbara Galbraith ("claimants") who appeared Pro Se, alleged that respondent Nationwide Securities Corporation ("Nationwide") corrupted their investment account. Claimants further alleged that they authorized their broker at Nationwide Peter Restivo ("Restivo") to purchase 1500 shares in a new offering of Gaylord Companies ("Gaylord") at \$3.00 and 1500 Gaylord warrants at \$0.10. Claimants also alleged that when they received the confirmation slips, they learned that there was an additional purchase of Gaylord common at \$4.00 a share. Claimants asserted that the buy slips indicated that the trades they authorized were purchased on October 31, 1995 and the unauthorized purchase had a trade date of November 2, 1995. Claimants further asserted that when they questioned Restivo about the unauthorized trade, he was unable to give a logical explanation or resolution. Claimants also asserted that in January 1996, they finally sold their 3000 shares of Gaylord at \$3.45. Claimants contended that Restivo told them that they sold Gaylord at \$3.75 a share, but it was not until they received the confirmation slip that they learned the sale price was less than expected. Claimants further asserted that when they questioned Restivo why the sale was not for what they had been told, he responded by telling them that was just the way it was.

Claimants also contended that on March 14, 1996, Restivo called to get their approval to sell 7450 Gaylord warrants at \$1.625 each. Claimants alleged that Restivo told them that Gaylord warrants were going to go way down, because Nationwide had allowed a private placement which took the price control out of his hands. Claimants further alleged that they told Restivo that he had misrepresented his ability to control warrant prices, but agreed to sell at \$1.625 to protect their small profit. Claimants also alleged that since they were not given the quoted sales price, Mr. Galbraith called Restivo on March 15, 1996 to confirm the sale price at \$1.625. Claimants asserted that Restivo confirmed that all Gaylord warrants had been sold at \$1.625. Claimants further asserted that when the sell confirmation slip arrived on March 21, 1996, the sale price was listed as \$1.00 rather than at \$1.625 and the transaction date was listed as March 15, 1996 rather than March 14, 1996. Claimants also asserted Mrs. Galbraith called Restivo immediately and Restivo stated that the computers at Nationwide had been down on March 14 causing many Nationwide transactions from that day to be in error. Claimants contended that Restivo then told them that he would correct the mistake. Claimants further contended that after several days and many attempts to correct the mistake, they found out on March 28, 1996, the Restivo no longer worked at Nationwide and that the mistake had never been corrected. Claimants also contended that they were so upset about the price

discrepancies of the warrants, that they did not notice on March 21, 1996 that only 5450 warrants had been sold rather than all 7450 warrants. Claimants alleged that since Restivo clearly indicated that the price of the warrants were going to go down, it would make no sense for them to retain 2000 warrants.

Claimants further alleged that on the advice of Restivo, they purchased 30,000 shares of Communication World International ("Comm World") warrants on November 22, 1995. Claimants also alleged that it was Restivo's contention to them that this was a safe investment with little downside danger and considerable upside potential. Claimants asserted that they told Restivo and Restivo understood that they knew very little about the small market and because they were retired, they could not afford to make any high risk investments. Claimants further asserted that Restivo told them that Comm World was low risk and had made no reference to any liquidity problems. Claimants also asserted that when they received their confirmation purchase slip, they noticed that the warrants expiration was listed as December 11, 1995. Claimants contended that they called Restivo to see what this meant since he had indicated that he expected to sell their warrants in early January. Claimants further contended that they were told that the expiration had been changed to June 30, 1997, but were given no explanation for what this meant. Claimants also contended that when they received their December and January statements, Comm World was down considerable. Claimants alleged that they asked Restivo if they should sell, and he told them not to sell because the price of the warrants would be coming up. Claimants also alleged that Restivo told them that Nationwide's New York office controlled the majority of Comm World and they had been purposely lowering the price to get non-Nationwide clients to panic and sell their warrants back to Nationwide. Claimants asserted that Restivo stated that the office then planned to reissue the warrants at a higher price and they would soon realize a profit. Claimants further asserted that by early April 1996, Comm World warrants were no longer being traded at all on the small cap market and the entire New York office was closed and all staff fired for improper trading. Claimants also asserted that they later learned that Comm World warrants were extremely high in risk and that the issue was very thin.

Claimants contended that by late October 1995, Restivo had left Greenway Capital Corporation and joined Nationwide. Claimants further contended that he asked Restivo if they should sell their shares of Auxer Industries ("Auxer") before moving from Greenway and withdraw the cash. Claimants also contended that Restivo did not want Greenway to get the sales commission and that if he moved the account in tact he would charge him no sales commission at Nationwide for selling Auxer. Claimants alleged that Restivo assured them that he would sell Auxer as soon as it transferred and that the transfer would take no more than 5 days from when he had the account transfer paperwork. Claimants further alleged that they sent the account transfer paperwork to Restivo by Federal Express on October 28, 1995. Claimants also alleged that they told Restivo not to buy Gaylord shares and warrants until the Auxer proceeds were available. Claimants asserted that the account transfer did take longer than five days and Restivo did go ahead and place the Gaylord shares and warrants purchase. Claimants further asserted that on November 16, Restivo had told them the account transfer was complete and assured them that he would sell Auxer at \$8.00 a share. Claimants also asserted that on November 24, they received the confirmation slip, which listed the sale of Auxer at \$6.00 rather than \$8.00. Claimants contended that they immediately called Restivo and demanded an explanation and was told that it was the best he could do.

Claimants further contended that they also transferred over from Greenway to Nationwide 500 shares of Smartel Communications ("STCCF"). Claimants also contended that they approved the purchase of STCCF because Restivo told them that Motorola was taking over Smartel. Claimants alleged that in March 1996, they told Restivo that they thought they should sell STCCF while it was at \$4.75. Claimants further alleged that Restivo told them that it was only known to brokers at the time, but that Motorola had bought Smartel and that their investment would be going up soon. Claimants also alleged that since Restivo left Nationwide, it is now obvious to them that Smartel had not been taken over by Motorola and because of this blatant erroneous information they held the stock longer than they wanted.

Claimants asserted that on March 14, 1996, Restivo recommended that they purchase 1610 warrants of Thermo-Mizer ("THM") at \$3.00 on March 14, and sell the warrants for \$5.00 in two weeks. Claimants further asserted that they questioned Restivo on the detail on the buy and proposed sell prices because of other times his priced quotes did not end up being what their trades were made at. Claimants also asserted that Restivo told them there was virtually no risk which was why he proposed the warrants. Claimants contended that based on Restivo's assurance on quotes and risk factor, they agreed to purchase the warrants. Claimants further contended that since previous price quotes did not match the confirmation slip, they called Restivo on March 15, 1996 to verify that the trade had been made as he proposed it. Claimants also contended that Restivo told them that indeed they bought 1610 THM warrants at \$3.00 a warrant. Claimants alleged that when they received the buy confirmation slip it indicated that they purchased the warrants at \$3.375 a share, dated March 15, 1996. Claimants further alleged that they immediately called Restivo, who told them the computers were down and that many trades made on that day had errors and were being corrected. Claimants also alleged that the trade price was never corrected.

Claimants asserted that in an attempt to resolve all these disputes, they received abusive treatment from the staff and management of Nationwide. Claimants further asserted that this abusiveness is demonstrated by known false information being given to them, by the foul language being used in the conversations with them, and by promises of actions being made where there was no intent of that action being taken.

Respondent Nationwide through its representative and counsel Jonathan A. Pace, Esq. of the law firm Pace & Rickey L.L.P. located in Dallas, Texas denied that they were any unauthorized transactions and submits that the claimants ratified the purchase of Gaylord shares in October 1995. Respondent denied that the Gaylord warrants were sold at \$1 5/8. Respondent further denied that it entered into any transactions which were illegal as alleged by claimants. Respondent also denied that it had any knowledge of any such allegations of control by Restivo or agreements of the claimant to cooperate in pricing and selling controlled shares. Respondent maintained that claimants apparently still own 2000 Gaylord warrants and as a matter a law failed to mitigate their damages.

Respondent further maintained that claimants purchased THM warrants because there was no risk. Respondent also maintained that the claimants state that the trades were to be made to make up for some losses Restivo had caused them on other investments that he said were low in risk. Respondent contended that claimants had no right to rely on assurance that an investment was low risk. Respondent further contended that claimants assert that several trades were made where the quote did not match the confirmation slip. Respondent also contended that claimants are really not properly relying on the representation made by Restivo, but are attempting to participate with him in an illegal scheme. Respondent maintained that claimants agreed to participate in the sell of Gaylord warrants to purchase THM in two weeks to rebuy the Gaylord warrants at a much lower price. Respondent denied participation in any such scheme.

Respondent further maintained that claimants purchased Auxer months before Restivo joined Nationwide. Respondent also maintained that within one month of joining Nationwide, Claimants accuse him of failing to sell the shares as ordered. Respondent contended that claimants are requesting damages from the sale of Auxer on November 24, 1995, claiming that it should have been sold at 8 instead of 6. Respondent further contended that by their very pleading, claimants admit that they ordered Restivo to sell Auxer prior to November 16 at \$8.00 per share, yet the account was not transferred until November 16. Respondent also contended that no complaint was made to any management personal at Nationwide until at least March 1996. Respondent maintained that under these circumstance, claimants have ratified and approved the transaction with Restivo in November 1995.

Respondent further maintained that the 500 shares of Smartel were purchased and the misrepresentations were made prior to the move to Nationwide. Respondent also maintained that by their pleadings claimants admit that they discovered the misrepresentation concerning the imminent takeover as the shares declined. Respondent contended that claimants nevertheless determined to hold the shares and apparently still hold them. Respondent further contended that claimants ratified this purchase and cannot rely on the alleged misrepresentation made prior to transferring the account to Nationwide.

Respondent denied that any misrepresentation was made to claimants concerning the warrants of Comm World. Respondent also contended that claimants admit that they became aware of the misrepresentation within weeks of it being allegedly made. Respondent maintained that claimants state that they were convinced by Restivo that the price was being artificially manipulated for their benefit by holding it down and inducing other clients to panic and sell their shares. Respondent further maintained that claimants agreed to participate in this alleged manipulation and hold their shares. Respondent denied any participation in any such scheme and that claimants have no right to rely on such representation.

Respondent also maintained that once the discoveries of unauthorized trading is alleged by claimants and misrepresentation occurred in November and December 1985, claimants cannot prove reliance on further misrepresentation by Restivo as a matter of law. Respondent denied any responsibility for punitive damages.

#### **RELIEF REQUESTED**

Claimants James and Barbara Galbraith requested on case number 96-04017: (1) \$5433.75 to correct the Thermo-Mizer trade; (2) \$2000 in punitive damages.

Claimants James and Barbara Galbraith requested on case number 96-04016: (1) \$4,000 for the Auxer sale; (2) \$1,375 for failure to sell Smartel; (3) \$2,000 in punitive damages.

Claimants James and Barbara Galbraith requested on case number 96-03929: (1) \$10,000 for the Comm World purchase.

Claimants James and Barbara Galbraith requested on case number 96-04015: (1) \$7,931.25 for the incorrect purchase and/or sale of Gaylord shares and warrants; (2) \$2,000 for punitive damages.

Respondent Nationwide Securities Corporation requested that the claims of claimants be dismissed in their entirety.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The arbitrator had reviewed and considered respondent Nationwide's motion to consolidate case numbers 96-04015, 96-04016, 96-04017, and 96-03929, the arbitrator granted respondent's motion. The damages for these cases were not aggregated, therefore, the cases were processed in accordance with Rule 10302 of the Code of Arbitration Procedure.

The arbitrator considered respondent Nationwide's Motion to Bar in Case number 96-03929 and 96-04016, the arbitrator denied the motion.

**AWARD**

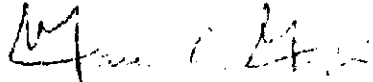
Pursuant to Rule 10302 of the Code of Arbitration Procedure, a single Public Arbitrator, Marc A. Myrin, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by claimants James and Barbara Galbraith on September 3, 1996 and by respondent Nationwide Securities Corporation on September 24, 1996 as required by Rules 10301 and 10302 of the Code of Arbitration Procedure.

And, the arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants of the sum of \$10,000.00 for case number 96-03929.
2. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$6,681.25 for case number 96-04015.
3. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$2,000 representing punitive damages awarded for case number 96-04015.
4. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$4,000 for case number 96-04016.
5. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$2,000 representing punitive damages awarded for case number 96-04016.
6. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$5,433.75 for case number 96-04017.
7. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$2,000 representing punitive damages awarded for case number 96-04017.
8. The \$600.00 filing fees previously deposited by claimants for all four of their cases shall be retained by NASD Regulation, Inc. Respondent Nationwide Securities Corporation be and hereby is liable and shall pay claimants the sum of \$600.00 as reimbursement of the filing fees.

**AFFIRMATION**

I, **Marc A. Myrin, Esq.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.

A handwritten signature in dark ink, appearing to read "Marc A. Myrin", is written over a horizontal line.

Marc A. Myrin, Esq.

Date of Decision: April 23, 1997