

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Michael and Nancy Morrell, Claimants v. Stuart K. Simon and Wedbush Morgan Securities Inc.,  
Respondents

Case Number: 04-06067

Hearing Site: Seattle, Washington

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Nature of the Dispute: Customer v. Member and Associated Person

**REPRESENTATION OF PARTIES**

For Claimants:

John Messina, Esq.  
John Christensen, Esq.  
Messina Bulzomi  
Tacoma, Washington

For Respondent Wedbush Morgan Securities Inc.:

Gary L. Holmes, Esq.  
Wedbush Morgan Securities  
Inc.  
Los Angeles, California

For Respondent Stuart K. Simon:

Mark Roth, Esq.  
Golbeck Roth  
Seattle, Washington

**CASE INFORMATION**

Statement of Claim filed: August 25, 2004

Claimants' Joint Uniform Submission Agreement signed: August 24, 2004

Statement of Answer filed by Respondent Wedbush Morgan Securities, Inc.: November 1, 2004

**CASE SUMMARY**

Claimants asserted the following causes of action: unsuitability, negligence, breach of fiduciary duty, negligent and material misrepresentations and omissions, violation of the Revised Code of Washington Title 21.20.010 et seq. and 19.86.020, breach of contract, and failure to supervise. Claimants' allegations involved Respondents' alleged failure to act in accordance with Claimants' stated investment objectives and the unauthorized sale of, and failure to repurchase, Claimants' IBM shares.

Unless specifically admitted in its Answer, Respondent Wedbush Morgan Securities Inc. denied

the allegations of wrongdoing set forth in Claimants' Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

Claimants requested full reimbursement of monies lost as a result of the claims set forth above, unspecified punitive damages, pre-judgment interest, rescission, and costs, including attorney's fees.

Respondent Wedbush Morgan Securities Inc. requested dismissal of Claimants' Statement of Claim in its entirety, expungement of this matter from its CRD records, and costs, including attorney's fees.

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

#### **Uniform Submission Agreements**

Respondent Wedbush Morgan Securities, Inc. did not file with NASD Dispute Resolution a properly executed submission agreement, but it is required to submit to arbitration pursuant to NASD's Code of Arbitration Procedure (the "Code"), and, having answered the claim and appeared and testified at the hearing, it is bound by the determination of the Panel on all issues submitted.

Respondent Stuart K. Simon did not file with NASD Dispute Resolution a properly executed submission agreement, but he is required to submit to arbitration pursuant to the Code, and he is bound by the determination of the Panel on all issues submitted.

#### **Dispositive Motions**

On October 22, 2004, Respondent Stuart K. Simon filed a Motion to Dismiss and a Motion for a More Definitive Statement. On November 9, 2004, Claimants filed a Response to Respondents' Motion for Summary Judgment, Declaration of Michael Morrell, Declaration of John R. Christensen, and Proposed Order. On November 10, 2004, Respondent Wedbush Morgan Securities Inc. joined in Respondent Stuart K. Simon's Motion to Dismiss and Motion for a More Definitive Statement. On January 21, 2005, Respondent Stuart K. Simon submitted a Reply to Claimants' Opposition to Respondents' Motion to Dismiss.

On February 11, 2005, Respondent Wedbush Morgan Securities Inc. filed a Motion to Dismiss. On February 24, 2005, Claimants filed a Response to Respondent Wedbush Morgan Securities Inc.'s Motion for Summary Judgment. On March 4, 2005, Respondent Wedbush Morgan Securities Inc. filed a Reply in Support of its Motion to Dismiss. On March 9, 2005, the Panel heard oral argument from the parties regarding the pending motions during an in-person hearing and received supplemental documents from Claimants and Respondent Wedbush Morgan

Securities Inc. in connection with the motions to dismiss.

On March 9, 2005, the Panel issued an Order noting that the briefing and argument regarding statute of limitation issues had focused on Washington law, but the customer agreement that had been entered into by the parties contained a choice of law clause that stated that California law would govern the terms of the parties' agreement. The Panel requested that it be advised of whether the parties would stipulate to Washington law being used to decide the statutes of limitations issues in this matter or whether they would submit a proposed briefing schedule that would allow them to address which state's law should be used to decide these issues. On March 18, 2005, the parties submitted and the Panel accepted such a briefing schedule.

On March 31, 2005, Respondent Stuart K. Simon submitted a brief arguing that Claimants' claims were time-barred under both Washington and California law. On April 1, 2005, Respondent Wedbush Morgan Securities, Inc. submitted its Motion to Dismiss applying California law. On April 15, 2005, Claimants filed a Trial Brief re: Application of California Law and Declaration of John R. Christensen. On April 22, 2005, Respondent Stuart K. Simon submitted a letter in support of his request for dismissal from this action. On April 25, 2005, Respondent Wedbush Morgan Securities Inc. filed a Reply in Support of its Motion to Dismiss applying California law.

On April 29, 2005, the Panel issued an Order dismissing all claims against Respondent Stuart K. Simon with prejudice and dismissing all claims against Respondent Wedbush Morgan Securities, Inc. with prejudice with the exception of:

- 1) The allegation that Wedbush Morgan Securities Inc. (through its agent, Stuart K. Simon) wrongfully sold the Morrells' shares of IBM stock and that Wedbush Morgan Securities Inc., and/or its agent, Stuart K. Simon, breached the alleged promise(s) to make restitution to the Morrells for their losses on the IBM shares;
- 2) The allegation that Wedbush Morgan Securities Inc. and/or its agent, Stuart K. Simon, breached fiduciary duties that were owed to the Morrells; and
- 3) The allegation that Wedbush Morgan Securities Inc. and/or its agent, Stuart K. Simon, breached one or more written contracts.

Respondent Wedbush Morgan Securities Inc.'s Motions to Dismiss the above-referenced claims were denied with leave to renew them at the arbitration hearing once the Panel had had the benefit of receiving evidence. Claimants were ordered to file and serve a statement disclosing which securities were purchased in Claimants' accounts that Claimants contend were purchased in violation of any written contracts or, the purchase of which they believe constituted a breach of a fiduciary duty owed to Claimants by Respondents.

If Claimants contended that the sale of their IBM shares or the failure to make restitution for the

sale of those shares constituted a breach of a written contract, then they were to specify what contract or contracts were breached, the term(s) that were breached, and the damages that were allegedly caused by the breach.

On January 27, 2006, the Chair issued an Order in connection with certain discovery matters; the Order reminded Claimants that they were to submit a written statement of claims, which had not yet been submitted.

#### Motions in Limine

On February 10, 2006, Respondent Wedbush Morgan Securities Inc. filed a Motion in Limine to preclude all claims except the alleged unauthorized sale of IBM stock in 1995. On February 13, 2006, the Panel denied the motion without prejudice. It ordered Claimants to provide the statement called for in the Panel's April 29, 2005 Order to Respondent Wedbush Morgan Securities Inc. and to the Panel immediately.

On February 15, 2006, Respondent Wedbush Morgan Securities, Inc. filed a Renewed Motion in Limine, or, in the alternative Motion for Continuance. On February 15, 2006, the Panel issued an Order denying the motion and stating that the only issues that would be arbitrated would be those delineated in the April 29, 2005 Order regarding the Motions to Dismiss. The Panel stated that Respondent Wedbush Morgan Securities Inc.'s right to renew its Motion to Dismiss and its Motions in Limine were fully reserved. The Panel requested that the parties provide it with a memorandum of points and authorities regarding the applicability of California law to the breach of fiduciary duty claims. On February 16, 2006, Claimant filed an Opposition to Respondent Wedbush Morgan Securities, Inc.'s renewed Motion in Limine or in the alternative Motion for Continuance.

#### Motion for Election of Remedies

On February 17, 2006, Respondent Wedbush Morgan Securities, Inc. filed a Motion for Election of Remedies. The Panel issued an Order that same day stating that it would address the issues raised in the motion on the first day of the arbitration hearing. Claimants were requested to provide any legal authorities that they wanted the Panel to consider regarding these issues on or before February 24, 2006. On February 21, 2006, Claimants submitted a Response to Respondent Wedbush Morgan Securities, Inc.'s Motion for the Election of Remedies.

#### Claimants' Additional Submissions

On February 15, 2006, Claimants submitted benchmark returns in support of Claimant's unsuitability and asset allocation claims. On February 21, 2006, Claimants submitted a statement of damages regarding unauthorized sale of IBM stock and a statement regarding Respondent Wedbush Morgan Securities Inc.'s affirmative defense of failure to mitigate with respect to the IBM shares.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

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

#### **Findings and Conclusions**

##### **1) Claims Against Stuart K. Simon:**

All claims against Stuart K. Simon were previously dismissed with prejudice as a result of the Panel's prior Order on Motions to Dismiss, dated April 29, 2005. That Order is attached hereto as Exhibit "A" and is hereby incorporated into this final Award.

##### **2) Wedbush Morgan Securities Inc.'s Subsequent Motions to Dismiss:**

Counsel for Wedbush Morgan Securities Inc. filed motions to dismiss Claimants' claims prior to and during the arbitration hearing. All such motions to dismiss were or are hereby denied. The Panel concluded that the issues presented by the motions could not be fairly decided without the benefit of the testimony and exhibits that were presented at the arbitration hearing.

Based on the evidence presented and the prior rulings of the Panel, the Panel determines that the following issues were properly presented for resolution at the arbitration hearing:

- Did Wedbush Morgan Securities Inc. breach one or more contracts when its broker, Stuart K. Simon, acting in a capacity as an agent for Wedbush Morgan Securities, Inc., sold shares of IBM stock in the Morrell accounts, contrary to the direct instructions of the Morrells?
- Did Wedbush Morgan Securities Inc., acting through its agent, Stuart K. Simon, commit a breach of fiduciary duty in selling the IBM shares, contrary to the direct instructions of the Morrells?
- Did Wedbush Morgan Securities Inc., acting through its agent, Stuart K. Simon, commit breaches of fiduciary duty with regard to the assets that were purchased and/or maintained in the Morrell accounts (the unsuitability claim)?

Having now had the benefit of the evidence presented and the arguments of counsel, the Panel rules as follows:

The unsuitability claim (breach of fiduciary duty) is denied. The Panel finds that Claimants did not meet their burden of proof to demonstrate that Respondent Wedbush Morgan Securities Inc. committed a breach of fiduciary duty with regard to the assets that were purchased or maintained in the Morrells' accounts or that the investments were otherwise unsuitable.

The claim regarding the sale of the IBM stock has been resolved under the breach of fiduciary duty theory. Accordingly, it is not necessary to reach the statute of limitations issue regarding the alternate theory that the sale of the IBM stock, or the failure to replace the stock, constituted a breach of an oral contract. The Panel has concluded that the failure to replace the IBM stock was a continuing course of conduct that persisted well into the four year period that ended when the four year statute of limitations was tolled on September 19, 2001 by the filing of the original pleading in this matter, which was the Pierce County Washington Superior Court law suit.

The Panel concludes based on the evidence presented that Mr. Simon, acting in his capacity as an agent for Wedbush Morgan Securities Inc., undertook a duty not to sell the IBM shares and that he also undertook the duty to replace the IBM shares after they had been improperly sold by him.

The Panel further concludes that when the shares had not been repurchased by Simon, as he had committed to do, then by early 1999 the Morrells had a duty to mitigate their own losses.

Accordingly, the Morrells are entitled to an award of damages for some of their losses due to the failure of Stuart K. Simon, acting as agent for Wedbush Morgan Securities Inc., to replace the IBM shares in a timely manner.

This Award is also made with due regard for the offset to which Wedbush Morgan Securities Inc. is entitled for the commission discounts that had been granted to the Morrells as partial redress for their losses due to the improper sale of the IBM shares and with due regard for the Morrells' duty to mitigate their losses after early 1999.

The Panel has determined that by early 1999, despite Mr. Simon's assurances, when it became clear to the Morrells that the shares had not been repurchased, the Morrells should have either repurchased the shares or directed Wedbush Morgan Securities Inc. to do so. Accordingly:

- 1) Respondent Wedbush Morgan Securities Inc. is liable to and shall pay Claimants Michael and Nancy Morrell the sum of \$70,600.00 in compensatory damages resulting from the improper sale of the IBM shares and the failure to replace said shares in a timely matter.
- 2) Respondent Wedbush Morgan Securities Inc. is liable to and shall pay Claimants Michael and Nancy Morrell interest in the amount of \$12.07 per day on \$70,600.00 from February 1, 1999 until the date of service of this Award, for a total interest payment of \$31,217.14.
- 3) With due regard for all of the claims and defenses that have been presented by the parties and resolved in this Award, the Panel has determined that each party will be responsible for its

own attorneys fees and costs.

4) Any and all relief not specifically addressed herein, including punitive damages, is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$ 250.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Wedbush Morgan Securities, Inc. is a party, and the following fees are assessed:

Member Surcharge	= \$ 1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$ 2,200.00</u>
<b>Total Member Fees</b>	<b>= \$ 4,450.00</b>

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. The following forum fees are assessed:

One (1) pre-hearing conference session with a single arbitrator @ \$450.00/session	= \$ 450.00
Pre-hearing conference: February 10, 2006 1 session	

Two (2) pre-hearing conference sessions with the Panel @ \$1,000.00/session	= \$2,000.00
Pre-hearing conferences: January 27, 2005 1 session	
March 9, 2005 1 session	

Five (5) hearing sessions @ \$1,000.00/session	= \$5,000.00
Hearings: February 27, 2006 2 sessions	
February 28, 2006 2 sessions	
March 1, 2006 1 session	

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<b>Total Forum Fees</b>	<b>= \$7,450.00</b>
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1. The Panel assessed \$3,725.00 of the forum fees jointly and severally to Claimants Michael and Nancy Morrell.

2. The Panel assessed \$3,725.00 of the forum fees to Respondent Wedbush Morgan Securities Inc.

**Fee Summary**

1. Claimants Michael and Nancy Morrell are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 250.00
<u>Forum Fees</u>	<u>= \$ 3,725.00</u>
Total Fees	= \$ 3,975.00
<u>Less payments</u>	<u>= \$(1,250.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,725.00</b>

2. Respondent Wedbush Morgan Securities, Inc. is charged solely with the following fees and costs:

Member Fees	= \$ 4,450.00
<u>Forum Fees</u>	<u>= \$ 3,725.00</u>
Total Fees	= \$ 8,175.00
<u>Less payments</u>	<u>= \$(4,450.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,725.00</b>

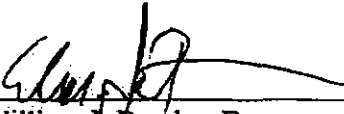
All balances are payable to NASD Dispute Resolution and are due upon the receipt of the Award pursuant to Rule 10330(g) of the Code.



**ARBITRATION PANEL**

<i>William J. Bender, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Lawrence E. Little, Esq.</i>	-	<i>Public Arbitrator</i>
<i>Kevin I. Patrick</i>	-	<i>Non-Public Arbitrator</i>

**Concurring Arbitrators' Signatures**

  
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William J. Bender, Esq.  
Chair, Public Arbitrator

3-3-06  
Signature Date

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Lawrence E. Little, Esq.  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Kevin I. Patrick  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

3/3/06  
Date of Service

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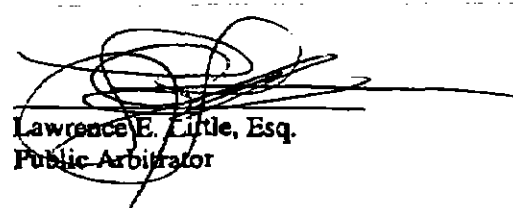
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