

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

---

In the Matter of the Arbitration Between:

Midwood Securities, Inc. (Claimant) v. Donald G. Kress (Respondent)

Case Number: 04-07896

Hearing Site: New York, New York

---

Nature of the Dispute: Member vs. Associated Person.

**REPRESENTATION OF PARTIES**

Claimant Midwood Securities, Inc. hereinafter referred to as "Claimant": Donald A. Corbett, Esq., Carter Ledyard & Milburn, LLP, New York, NY.

Respondent Donald G. Kress hereinafter referred to as "Respondent": Jonathan Rogin, Esq., Berger & Webb, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: November 12, 2004.

Claimant signed the Uniform Submission Agreement: November 11, 2004.

Statement of Answer and Counterclaim filed by Respondent on or about: January 13, 2005.

Respondent did not sign the Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: declaratory relief – terms of the contract; declaratory relief – Kress' actions constituted cause; and breach of the implied covenant of good faith and fair dealing.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim. Respondent filed a counterclaim requesting a declaration that Claimant is obligated to pay Respondent his base salary throughout the five-year term of the Agreement.

**RELIEF REQUESTED**

Claimant requested a declaration that Respondent was entitled to base salary only during the first two years; a declaration that Respondent's actions constituted "Cause" to terminate the Agreement; attorneys' fees and costs; and unspecified compensatory damages.

Respondent requested that the Panel dismiss the arbitration for lack of jurisdiction based on the parties' Agreement to proceed with this arbitration as a private-party arbitration outside the auspices of the NASD, or in the alternative, if this arbitration proceeds to a hearing, a declaration that Claimant is obligated to pay Respondent his base salary throughout the five-year term of the Agreement and, pursuant thereto, ordering Claimant to pay Respondent an amount to be determined at the hearing in this matter; a declaration that Claimant had no cause to terminate Respondent's employment; a declaration that Respondent's actions did not constitute a breach of the covenant of good faith and fair dealing; that the Panel deny Claimant's request for attorneys' fees and costs; and that the Panel award Respondent's attorneys' fees and costs.

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

Respondent did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On or about March 25, 2005, Respondent made a motion to dismiss. On or about April 13, 2005, Claimant filed a response to the motion to dismiss. After due consideration, the Panel dismissed the claim in its entirety without prejudice because NASD does not have jurisdiction over this dispute.

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.

### **AWARD**

After considering the pleadings, and Respondent's motion to dismiss and Claimant's response, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are dismissed in their entirety.
2. The Respondent's counterclaim is denied in its entirety.
3. Any and all relief not specifically addressed herein is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$500.00
Counterclaim filing fee	= \$250.00

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Midwood Securities, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

**Forum Fees and Assessments**

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

One (1) Pre-hearing session with Panel @ \$1,000.00	= \$1,000.00
Pre-hearing conference: March 24, 2005 1 session	
Total Forum Fees	= \$1,000.00

1. The Panel has assessed \$500.00 of the forum fees against Claimant.
2. The Panel has assessed \$500.00 of the forum fees against Respondent.

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 500.00
Member Fees	= \$4,450.00
Forum Fees	= \$ 500.00
Total Fees	= \$5,450.00
Less payments	= \$3,825.00
Balance Due NASD Dispute Resolution	= \$1,625.00

2. Respondent is solely liable for:

Filing Fee	= \$ 250.00
Forum Fees	= \$ 500.00
Total Fees	= \$ 750.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$ 750.00

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


NASD Dispute Resolution  
Arbitration No. 04-07896  
Award Page 4 of 4

**ARBITRATION PANEL**

Douglas F. Stone, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Scott L. Fagin	-	Non-Public Arbitrator
Edith M. Gunn	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
\_\_\_\_\_  
Douglas F. Stone, Esq.  
Non-Public Arbitrator, Presiding Chairperson

4/21/05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Scott L. Fagin  
Non-Public Arbitrator

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

\_\_\_\_\_  
Edith M. Gunn  
Non-Public Arbitrator

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

May 3, 2005

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

NASD Dispute Resolution  
 Arbitration No. 04-07896  
Award Page 4 of 4

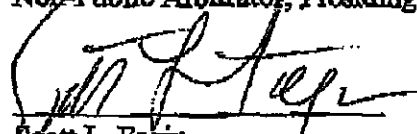
**ARBITRATION PANEL**

Douglas F. Stone, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Scott L. Fagin	-	Non-Public Arbitrator
Edith M. Gumm	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

\_\_\_\_\_  
 Douglas F. Stone, Esq.  
 Non-Public Arbitrator, Presiding Chairperson

  
 Scott L. Fagin  
 Non-Public Arbitrator

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

  
 Signature Date

\_\_\_\_\_  
 Edith M. Gumm  
 Non-Public Arbitrator

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

May 3, 2005

\_\_\_\_\_  
 Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

Douglas F. Stone, Esq.	-	Non-Public Arbitrator, Presiding Chairperson
Scott L. Fagin	-	Non-Public Arbitrator
Edith M. Gunn	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

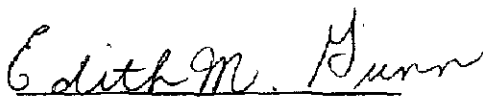
I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

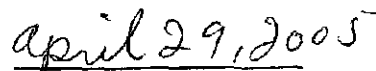
\_\_\_\_\_  
Douglas F. Stone, Esq.  
Non-Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Scott L. Fagin  
Non-Public Arbitrator

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

  
\_\_\_\_\_  
Edith M. Gunn  
Non-Public Arbitrator

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

May 3, 2005

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)