

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Frank G. Mistretta

92-02884

Name of Respondents

Advest, Inc.  
Daniel J. Wixted  
Washington Investment Corporation

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**REPRESENTATION**

For Claimant Frank G. Mistretta ("Claimant"): Walter D'Ull, Esq., sole practitioner.

For Respondent Advest, Inc. ("Advest"): William C. Freitag, Esq., in-house counsel at Advest.

For Respondent Daniel J. Wixted ("Wixted"): appeared pro se.

For Respondent Washington Investment Corporation ("Washington Investment"): James R. Johnson.

**CASE INFORMATION**

Statement of Claim filed on: August 26, 1992.

Claimant's Submission Agreement signed on: August 23, 1992.

Amendment to Statement of Claim filed on: December 8, 1992.

Statement of Answer filed by Respondent Wixted on: November 22, 1992.

Respondent Wixted's Submission Agreement signed on: November 11, 1992.

Statement of Answer filed by Respondent Advest on: November 6, 1992.

Respondent Advest's Submission Agreement signed on: November 6, 1992.

Amended Statement of Answer filed by Respondent Advest on: December 17, 1992.

Statement of Answer filed by Respondent Washington Investment on: November 23, 1992.

Respondent Washington Investment's Submission Agreement signed on: November 20, 1992.

Amended Statement of Answer filed by Washington Investment on: January 12, 1993.

### **HEARING INFORMATION**

Hearing Dates/Sessions:     June 8, 1993, 2 sessions  
                                     June 9, 1993, 2 sessions

Hearing Location: Merchant Club, located in New York City, New York.

### **CASE SUMMARY**

Claimant alleged that Respondent Wixted, employee of Respondent Advest and Respondent Washington Investment, manipulated Claimant's account so that an over 37% annualized return would be required to break even. Claimant further alleged that Respondent Wixted induced Claimant to make investment decisions through misrepresentations of expertise and baseless oral promises of quick returns and possession of "inside information". Claimant contended that Respondent Wixted defrauded Claimant and enriched himself by executing securities transactions in Claimant's accounts without authorization and induced Claimant to take excessive, margined positions in the market which were unsuitable to Claimant's investment needs. Claimant alleged that Respondent Wixted induced Claimant to purchase calls which were unsuitable to his investment needs and induced Claimant to "churn" his account by engaging in excessive trading. Claimant further alleged Respondent Advest and Washington Investment failed to supervise and are liable under the doctrine of Respondent Superior. Claimant further alleged Respondent Wixted acted on a discretionary basis without any discretionary power, committed forgery, whereby due to the loss of his funds Claimant suffered emotional duress.

Respondent Wixted maintained that he inherited Claimant's account after a broker at his office at Respondent Advest left the firm and Claimant's account only had one trade entry, a purchase of low priced speculative stock. Respondent Wixted further maintained that the account showed that Claimant informed his previous broker that his investment objectives were speculation and appreciation with risk. Respondent Wixted further maintained that he did not do any unauthorized trading in Claimant's account and Claimant received confirms and statements which he opened and read and never once complained to Respondents. Respondent Wixted further maintained that he never misrepresented anything to Claimant and the account was non-discretionary.

Respondent Advest maintained that Claimant's own decisions and involvement in his Advest account resulted in losses, and Claimant knew what his positions were and knew what the potential risks and rewards of his trading were. Respondent Advest further maintained Claimant was a sophisticated investor and Respondent Advest denies any and all claims submitted in the claim.

Respondent Washington Investment maintained that Claimant requested an account to be opened on February 21, 1992, whereby, he submitted a signed Margin Agreement. Respondent Washington Investment further maintained that Claimant was an "informed investor" and his investment objective was "appreciation with risk". Respondent Washington Investment maintained that it had an contractual agreement with Claimant that permitted Claimant to contest any trade within 3 days after receiving trade confirmations and Respondent Washington Investment did not receive any complaints within the proper time limits and the trades were considered authorized. Respondent Washington Investment further maintained that Claimant was intensely involved with everyone of the transactions and there was no churning, unauthorized transactions or unsuitable investments in Claimant's account.

#### **RELIEF REQUESTED**

Claimant requested \$150,892 in damages, interest, attorneys' fees and costs.

Respondents requested that Claimant's claim be dismissed in its entirety.

#### **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 originals remain on file with the NASD.

#### **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. All claims against Respondents Advest, Wixted and Washington Investments be and hereby are dismissed in their entirety.
2. Although the claim is dismissed against Washington Investment, the Panel has found them to have been lax in their options supervisory procedures. Accordingly, the Panel requests that Washington Investment: (i) amend their options supervisory procedures to explicitly prohibit the practice of allowing a broker or other employee to place a customer's initials on a customer's

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Option Account Agreement; (ii) provide the Panel with a copy of said amended procedures; and (iii) amend their Form BD to reflect these amended procedures. Said amended Form BD shall be made a part of the final record in this arbitration proceeding.

3. Each party shall bear its own costs including Attorneys' fees.

### **FORUM FEES**

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

4 sessions x 500 = \$2000  
less \$500 hearing session deposit = \$1500 net due

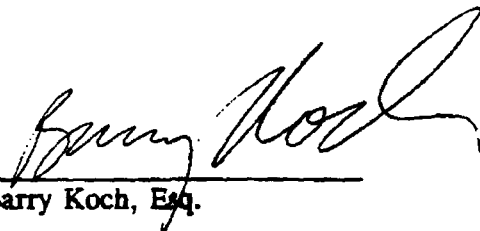
Respondent Wixted be and hereby is liable and shall pay the NASD the sum of \$1500 to represent forum fees.

The NASD shall retain the \$150 filing fee and \$500 hearing session previously paid by Claimants.

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

Concurring Arbitrators' Signatures  
Name

Public/Industry

  
Barry Koch, Esq.

Public Arbitrator

Lotte Fields

Public Arbitrator

Andrew Reegen

Industry Arbitrator

Date of Decision: August 18, 1993

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Award #92-02884

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\_\_\_\_\_  
Public Arbitrator

\_\_\_\_\_  
*Lotte Fields*  
Lotte Fields

\_\_\_\_\_  
Public Arbitrator

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Public Arbitrator

  
\_\_\_\_\_  
Andrew Reegen

\_\_\_\_\_  
Industry Arbitrator

Date of Decision: August 18, 1993

STATE OF: New York  
COUNTY OF: New York

S.S.:

On this      day of      , 1993, before me personally appeared **Lotte Fields** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

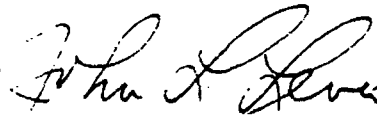
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**EDMONDS O. SLIPS**  
Notary Public, State of New York  
No. 4445827  
Qualified in Dutchess County  
Commission Expires January 27, 19\_\_\_\_

STATE OF: New York  
COUNTY OF: New York

S.S.:

On this 12<sup>th</sup> day of August, 1993, before me personally appeared Barry Koch, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.




JOHN L. LEVIN  
Notary Public, State of New York  
No. 41-4609178  
Qualified in Queens County  
Commission Expires APR 30, 1995



STATE OF: New York  
COUNTY OF: New York

S.S.:

On this 28 day of July, 1993, before me personally appeared Andrew Reegen known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

  
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MARK G. GLUT  
Notary Public, State of New York  
No. 4088193  
Qualified in Queens County  
Commission Expires April 20, 1994