

May 27, 1994 / 1 Session
May 31, 1994 / 2 Sessions

Hearing Location: April 18, 1994 Hearing held at the Water Club located in New York City, New York.

All other hearings held at National Association of Securities Dealers, Inc. offices located in New York City, New York.

CASE SUMMARY

Claimant alleged that Respondent breached its contract with Claimant by refusing to deliver to Claimant warrants due and owing to Claimant in return for services rendered by Claimant while Claimant was employed by Respondent.

Claimant further alleged that while Claimant was employed by Respondent one of Claimant's duties was to solicit corporations to use the investment banking services of Respondent. Claimant next alleged that by agreement dated January 24, 1989 Claimant successfully solicited Medical Technology Systems, Inc. ("Medical") to retain Respondent for investment banking consulting services under a corporate finance consulting agreement which provided for payment of a monthly fee and the issuance of warrants to Respondent ("Medical Consulting Agreement"). Claimant alleged that the warrants were to provide for the purchase of 150,000 shares of "Medical" at \$.50 per share for a period of three years. Claimant alleged that it was customary practice for Respondent to divide equally the monthly payments and warrants issued under such consulting agreements between Respondent and the employee that solicited the consulting agreement. Claimant further alleged that under the Medical Consulting Agreement, Respondent paid Claimant half of the monthly fee of \$1,000 and assigned Claimant 50% of the warrants which provided Claimant with the right to purchase 75,000 shares of Medical. Claimant further alleged that this assignment was memorialized in two Memoranda dated May 7, 1991, one from Howard Blum, Chairman of Respondent, and one from Norman Lawi, General Counsel of Respondent.

Claimant then alleged that in November 1991 Claimant resigned from Respondent and joined Josephthal Lyon & Ross, Inc. ("Josephthal"). Claimant further alleged that following Claimant's resignation, Respondent renegotiated the Medical Consulting Agreement as it pertained to the warrants. Claimant further alleged that after the renegotiation, Medical canceled the original warrants and in February 1992 issued new warrants, pursuant to the original Medical Consulting Agreement, granting Respondent the right to purchase 37,500 shares of Medical at a price of \$1.00 per share.

Claimant next alleged that after joining Josephthal he requested that Respondent deliver to Claimant the Medical warrants which were due to Claimant. Claimant alleged he was owed 18,750 warrants, 50% of the 37,500 February 1992 warrants. Claimant then alleged that Respondent, in a letter dated March 26, 1992, informed Claimant that Claimant was the assignee to purchase 9,375 warrants rather than 18,750 warrants. Claimant further alleged that after requesting, by letter dated February 4, 1994, that Respondent deliver to Claimant 50% or 18,750 of the Medical warrants Respondent replied that Claimant would have to accept 9,375 warrants or none at all.

Claimant further alleged, in an Addendum to the Statement of Claim, Respondent violated Article 6 of the N.Y. Labor Law and that Respondent breached its fiduciary duty.

Respondent maintained that there was no willful refusal to pay Claimant for services rendered. Respondent also maintained that it did not renegotiate the agreement with Medical and that Respondent did not renege on a written agreement. Respondent further maintained that it was not a customary practice for Respondent to divide equally any payments and warrants paid to Respondent under consulting agreements between Respondent and the Corporate Finance Employee who brought the business to Respondent.

Respondent further maintained that Claimant did not inform Respondent of Claimant's desire to have the February 24, 1992 warrants delivered to Claimant when Claimant joined Josephthal since the warrants did not exist in early November 1991 when Claimant left Respondent.

Respondent asserted as a first general defense that the Statement of Claim failed to state a cause of action for which relief may be granted and that the Claimant had no rights to the warrants. Respondent asserted that the original warrants dated March 1, 1989 was unilaterally dishonored, breached and canceled by Medical and that on or about February 24, 1992 a new agreement was negotiated by a third party employee of respondent and Respondent's outside counsel.

Respondent asserted as a second general defense that Claimant had no direct or indirect interest in the February 24, 1992 warrants since they were not related to the original Medical warrants. Respondent asserted that the March 1, 1989 warrants were unilaterally canceled in December 1990 and that at least 14 months passed before there were new warrants. Respondent further asserted that Claimant voluntarily resigned during the intervening 14 month period and that the new warrants issued February 24, 1992 were issued after Claimant resigned.

Respondent alleged as a first defense to damages that Claimant should not be

allowed to claim damages with respect to the warrants Respondent had offered to Claimant in return for services rendered. Respondent alleged as a second defense to damages that Claimant's damage calculation was based upon a market price for the underlying common stock which bore no relation to a claim for damages for failure to deliver warrants.

Respondent alleged as an affirmative defenses: (1) the Statute of Frauds under New York State General Obligation Law and, (2) no causal relationship between Claimant and issuance of new warrants to Respondent and, (3) Claimant's failure to mitigate damages and, (4) no sufficient reliance by Claimant upon Respondent's actions or inactions to Claimant's detriment and, (5) contributory negligence and, (6) Claimant waived all rights by not accepting Respondent's offer.

RELIEF REQUESTED

Claimant requested: Delivery to Claimant of 18,750 Medical warrants or the cash equivalent of \$187,500, plus interest and costs.

Respondent requested: Claimant's Statement of Claim be dismissed with costs and expenses.

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:

The arbitrators hereby award Claimant the amount of \$79,514.64 which includes interest through May 31, 1994.

The arbitrators have considered Claimant's amended Statement of Claim requesting damages under Article 6 of N.Y. Labor Law and have summarily dismissed said claim.

The arbitrators have determined that each side shall bear their own respective fees and costs.

The arbitrators have determined that no attorneys fees are awarded.

Respondent is directed to satisfy this award within ten (10) days of receipt of this award.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

1 prehearing session X \$300 = \$300.

9 sessions X \$750 = \$6,750 minus hearing session deposit of \$750 = net \$6000 due.

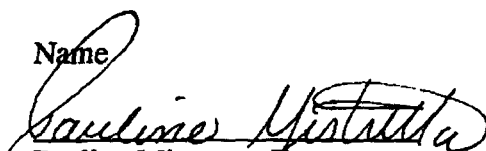
Forum fees Assessed Against:

1. Claimant is assessed \$3,525 which represents one-half of the balance of the total forum fees assessed of \$7,050, less \$750 hearing session deposit previously deposited with the NASD leaving a balance due of \$2,775. Claimant is hereby liable and shall pay to the NASD the sum of \$2,775.
2. Respondent is assessed \$3,525 which represents one-half of the balance of the total forum fees assessed of \$7,050. Respondents are hereby liable and shall pay to the NASD the sum of \$3,525.

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

Concurring Arbitrators' Signatures

Name


Pauline Mistretta, Esq.

Industry Chairperson

Industry Panelist

Alvin Meentemeier

Industry Panelist

James J. Noone

Date of Decision: September 2, 1994

Award #93-2130

STATE OF: *New York*

COUNTY OF: *New York*

SS:

On this *22* day of *August*, 1994, before me personally appeared **Pauline Mistretta, Esq.** know 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.

CATHERINE SAMMARTINO
Notary Public, State of New York
No. 4965566
Qualified in Suffolk County
Commission Expires April 23, *1996*

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Alvin Meentemeier** 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.

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **James J. Noone** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

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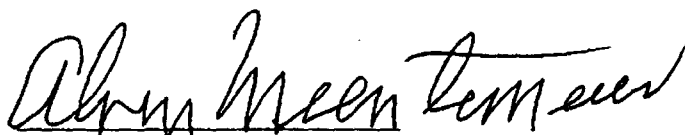
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Concurring Arbitrators' Signatures

Name

Industry Chairperson

Pauline Mistretta, Esq.


Alvin Meentemeier

Industry Panelist

Industry Panelist

James J. Noone

Date of Decision: September 2, 1994

Award #93-2130

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Pauline Mistretta, Esq.** know 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.

STATE OF: *New Jersey*

SS:

COUNTY OF: *union*

On this *30th* day of *August*, 1994, before me personally appeared **Alvin Meentemeier** 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.

Pamela G. Rhodes

PAMELA G. RHODES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 17, 1995

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **James J. Noone** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

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Concurring Arbitrators' Signatures

Name

Industry Chairperson

Pauline Mistretta, Esq.

Industry Panelist

Alvin Meentemeier

Industry Panelist



James J. Noone

Date of Decision: September 2, 1994

Award #93-2130

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Pauline Mistretta, Esq.** know 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.

STATE OF:

SS:

COUNTY OF:

On this day of , 1994, before me personally appeared **Alvin Meentemeier** 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.

STATE OF:

New Jersey

COUNTY OF:

Bergen

SS:

On this / day of *Sept* , 1994, before me personally appeared **James J. Noone** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

Kathleen S. Ruh

**KATHLEEN S. RUH
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES
JAN. 18 1998**