

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Andrew T. Miltenberg
Bruce Miltenberg

93-03161

Name of Respondents

Shearson Lehman Brothers, Inc.
Wedbush Morgan Securities
Brooklyn Capital & Sec. Trading Inc.
Johnson, McKenney & Carr Securities Inc.
Lloyd Beirne
James Carroll
David Rybstein

REPRESENTATION

For Claimants Andrew T. Miltenberg (hereinafter referred to as "Claimant") and Bruce Miltenberg appeared Joseph DaProcida, Esq. of the law firm of Wexler & Burkhardt, P.C., Mitchel Field, NY.

Respondent Shearson Lehman Brothers, Inc. was represented by John E. Jenkins, Esq., Shearson Lehman Brothers, Inc., New York City, NY.

Respondent Wedbush Morgan Securities was represented by Thomas Campbell, Esq. of the law firm of Smith Campbell & Paduano, New York City, NY.

Respondent Brooklyn Capital & Securities Trading Inc. and David Rybstein were represented by David Rybstein, Brooklyn, NY.

Respondent Johnson, McKenney & Carr Securities, Inc. was represented by Elton Johnson, Long Beach, CA.

For Respondent Lloyd Beirne appeared Joseph Keenan, Esq. of the law firm of Bochat & Keenan, P.C., Garden City, NY.

For Respondent James Carroll appeared Herbert M. Jacobi, New York City, NY.

CASE INFORMATION

The Statement of Claim was filed on August 10, 1993. Claimant Andrew Miltenberg's Submission Agreement was signed on July 29, 1993 and Bruce Miltenberg's Submission Agreement was signed on August 30, 1993.

A Statement of Answer was filed on behalf of Respondent Shearson Lehman Brothers, Inc. on October 19, 1993. Shearson Lehman Brothers did not execute a Submission Agreement.

A Statement of Answer was filed on behalf of Respondent Wedbush Morgan Securities on March 10, 1994 and a Submission Agreement was executed on Wedbush Morgan's behalf on March 10, 1994.

A Statement of Answer was filed on behalf of Respondents Brooklyn Capital & Sec. Trading, Inc. and David Rybstein on October 19, 1993 and the Submission Agreements for these respondents was executed on October 19, 1993.

A Statement of Answer was filed on behalf of Respondent Johnson, McKenney & Carr on September 14, 1993 and a Submission Agreement was executed on November 30, 1993.

A Statement of Answer was filed by Respondent Lloyd Beirne November 24, 1993 and Respondent Beirne's Submission Agreement was signed on November 24, 1993.

A Statement of Answer was filed by Respondent James Carroll on October 5, 1994 and Respondent Carroll's Submission Agreement was signed on October 5, 1994.

HEARING INFORMATION

Pre-Hearing Conference:	September 23, 1994	-	One Session
Hearing Dates/Sessions:	October 5, 1994	-	Two Sessions
	October 21, 1994	-	Two Sessions

The hearings were held at the NASD offices located in New York City, New York.

CASE SUMMARY

Claimant Andrew Miltenberg alleged that in or about August, 1991, Respondent

Beirne, a registered representative with Shearson Lehman Brothers, Inc. ("Shearson"), solicited him to open an account at Shearson; that, thereafter, Respondent Beirne solicited Claimant Andrew Miltenberg to purchase 1,000 shares of Spectrum Pharmaceuticals Corporation ("Spectrum") stock; and that Respondent Beirne informed Claimant that the investment involved no risk as Shearson was a market maker in the stock. Respondent Beirne advised Claimant that the Spectrum shares could not be purchased through Shearson. Therefore, Claimant alleged that he made the purchase through Merrill Lynch, Pierce, Fenner & Smith at a price of 6 3/8 per share for a total cost of \$6,375.00.

Claimant also alleged that Respondent Beirne subsequently solicited Claimant to purchase Best Acquisitions, Inc. ("Best Acquisitions") stock and was informed by both Respondents Carroll and Beirne that little risk was involved with this investment because Carroll was "controlling the Best Acquisitions situation." Claimant was allegedly guaranteed by the Respondents that he would not lose money on his investments. It was also alleged by the Claimant that because this stock also could not be purchased through Shearson, Respondent Beirne instructed Claimant to transfer \$35,000.00 to Wedbush Morgan Securities, Inc. ("Wedbush Morgan") which was the clearing broker for Johnson, McKenney & Carr ("Johnson, McKenney") so that the purchase could be made through Johnson, McKenney. Thereafter, funds in the amount of \$35,000.00 were allegedly transferred by the Claimant to Wedbush Morgan on November 22, 1991. Claimant received a trade confirmation in the mail dated November 26, 1991, showing the purchase of 17,000 shares of Best Acquisitions, Inc. at a price of \$2.00 per share. Several weeks later, there was allegedly a 2-1 stock split which resulted in Claimant owning 34,000 shares of Best Acquisitions. Further, Claimant alleged that he sold these shares on October 27, 1992 at a loss of \$28,586.50.

Claimant Andrew Miltenberg alleged that Respondents breached their fiduciary duty to make recommendations based on Claimant's best interest; that Respondents were negligent in their conduct constituting professional malpractice; that Respondents violated Section 10 of the Securities and Exchange Act of 1934; that Respondents violated Article III, Sections 2 and 18 of the NASD Rules of Fair Practice; and that Respondents are liable for common law fraud.

Respondent Lloyd Beirne denied all allegations of wrongdoing as asserted against him. Respondent Beirne maintained that he did not receive any commissions for any of the purchases that Claimant now complains of and that he did not receive any kind of compensation for the transactions in issue. Respondent Beirne maintained that he did not breach his fiduciary duty to either claimant as he did not owe either claimant any duty. Respondent Beirne also maintained that the securities which the claimants purchased were done so by the claimants based on their own investment decisions.

As his counterclaim, Respondent Beirne alleged that this claim damages his

reputation in the securities industry and also interfered with his ability to transfer his securities license from one firm to another.

Respondent James Carroll maintained that he is without sufficient information to form a belief as to the truth or accuracy of the allegations contained in the statement of claim; admitted that he was and still is a registered securities account executive; admitted that he was employed by Brooklyn Capital until approximately July, 1992; denied the allegation that the purchases of Spectrum Pharmaceutical Corporation and Best Acquisitions, Inc. were solicited by him while employed by Brooklyn Capital; and denied that Claimants are entitled to an award against him.

RELIEF REQUESTED

Claimant Andrew T. Miltenberg requested an award of \$34,649.00 plus interest at 9% annually from November 27, 1991, along with attorneys' fees, costs, and disbursements incurred in this arbitration.

Respondent Lloyd Beirne requested that the claims be dismissed in their entirety, and that he be awarded costs, and reasonable attorney fees. For his counterclaim, Respondent Beirne requested that an award of damages be assessed against the Claimants in his favor.

Respondent James Carroll requested that the claims be dismissed in their 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.

At the hearing, Claimants' counsel advised the arbitration panel that Claimant Bruce Miltenberg had withdrawn his claims against each of the named Respondents, with prejudice. Claimants' counsel further advised the panel that Claimant Andrew T. Miltenberg had withdrawn his claims against Shearson Lehman Brothers, Inc., Brooklyn Capital Securities, Inc., David Rybstein and Wedbush Morgan Securities, with prejudice, and wished to proceed against the remaining Respondents, Beirne, Carroll and Johnson, McKenney & Carr.

The arbitration panel made the following rulings as to Respondent Johnson, McKenney & Carr who filed an answer in this arbitration, but failed to appear at the (4) New York evidentiary hearings conducted in this matter without obtaining any adjournment/ postponement thereof:

- (1) Pursuant to Section 1 of the NASD Code of Arbitration Procedure

("Code") the panel found subject matter jurisdiction over this entire controversy and specifically as it related to Johnson, McKenney & Carr.

- (2) The panel found that Johnson, McKenney & Carr was an NASD member at the time this controversy arose.
- (3) Finally, the panel found that the NASD, pursuant to Sections 21, 26 and 29 of the Code, provided Johnson McKenney & Carr with "due notice" of all hearings conducted in this matter by regular and certified mail. The panel, therefore, determined to proceed with these hearings on October 5, 1994 without a representative from Johnson, McKenney & Carr whose absence was, as stated previously, unexcused. On October 21, 1994 Elton Johnson, representative for Johnson McKenney & Carr, telephoned the NASD offices and requested that the panel permit him to participate in the proceedings telephonically. The panel granted this request.

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. Claimant Andrew T. Miltenberg's request for damages be and hereby is denied;
2. Each party shall bear their respective costs, including attorneys' fees; and
3. All other claims be and hereby are denied.

FORUM FEES

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

1 pre-hearing session X \$300 = \$300.00

4 sessions X \$500 = \$2,000 minus hearing session deposit of 500 = \$1,500.00

TOTAL OUTSTANDING FEES = \$1,800.00

1. Claimant be and hereby is liable and shall pay to the NASD the sum of

\$800.00 representing the \$300.00 fee assessed for the pre-hearing conference and \$500.00 representing one-third of the outstanding forum fees assessed.

2. Respondent Lloyd Beirne be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.
3. Respondent James Carroll be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.

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

Concurring Arbitrators' Signatures:



Diane Getzler, Esq.
Public Arbitrator - Chairperson


Pauline Mistretta, Esq.
Industry Arbitrator

Edward M. Miller
Public Arbitrator

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

On this 19th day of December, 1994, before me personally appeared DIANE GETZLER known to me to be the individual described in and who executed the foregoing instrument and he/she duly acknowledged to me that he/she executed the same.


NOTARY PUBLIC
Commission Expires 9/30/99

Date of Decision: December 27, 1994

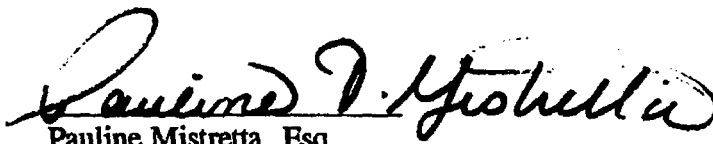
\$800.00 representing the \$300.00 fee assessed for the pre-hearing conference and \$500.00 representing one-third of the outstanding forum fees assessed.

2. Respondent Lloyd Beirne be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.
3. Respondent James Carroll be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.

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

Concurring Arbitrators' Signatures:

Diane Getzler, Esq.
Public Arbitrator - Chairperson

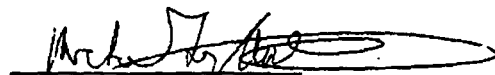

Pauline Mistretta, Esq.
Industry Arbitrator

Edward M. Miller
Public Arbitrator

STATE OF NEW YORK

COUNTY OF NEW YORK

On this 22^d day of December, 1994, before me personally appeared PAULINE MISTRETTA known to me to be the individual described in and who executed the foregoing instrument and ~~he~~/she duly acknowledged to me that ~~she~~ she executed the same.


MICHAEL GREG ANTONY
Notary Public, State of New York
No. 4520362
Qualified in Kings County
Date of Commission Oct. 31, 1995

Date of Decision: December 27, 1994

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2. Respondent Lloyd Beirne be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.
3. Respondent James Carroll be and hereby is liable and shall pay to the NASD the sum of \$500.00 representing one-third of the outstanding forum fees assessed.

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

Concurring Arbitrators' Signatures:

Diane Getzler, Esq.
Public Arbitrator - Chairperson

Pauline Mistretta, Esq.
Industry Arbitrator

Edward M. Miller
Public Arbitrator

STATE OF *New Jersey*
COUNTY OF *Monmouth*

On this 7 day of Dec, 1994, before me personally appeared Edward M. Miller known to me to be the individual described in and who executed the foregoing instrument and he/she duly acknowledged to me that he/she executed the same.

Regina A. Bless

REGINA A. BLESS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sept. 10, 1997

Date of Decision: December 27, 1994