

**NASD REGULATION, INC. AWARD****NASD Regulation, Inc. Office of Dispute Resolution**

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In the Matter of the Arbitration Between

**Names of Claimants**

Joseph N. & M. Lynn McDonough

96-00177

**Names of Respondents**

Kensington Wells, Inc.  
Abraham Mirman  
Elias Tacher  
Salvatore Tacher  
Adam Levy  
Roy Elterman  
Steven Vornea  
Marc Alan Luxenberg

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**REPRESENTATION**

For Claimants: Jeffrey Plotkin, Esq., New York, New York until his withdrawal as counsel on August 3, 1998. Thereafter, the Claimants appeared pro se.

For Respondent Abraham Mirman: David E. Robbins, Esq. of the law firm of Kaufmann, Feiner, Yamin, Gildin & Robbins, LLP, New York, New York.

For Respondent Steven Vornea: Laurie J. Dolinger, Esq. of the law firm of Gusrae, Kaplan & Bruno, New York, New York until her withdrawal as counsel on August 21, 1998.

For Respondent Adam Levy: Terry R. Weiss, Esq. of the law firm of Long Aldridge & Norman, Atlanta, Georgia until his withdrawal as counsel on February 13, 1998. Thereafter, Respondent Adam Levy was represented by Marc J. Ross, Esq. of the law firm of Sichenzia, Ross & Friedman, LLP, New York, New York.

For Respondents Elias Tacher, Salvatore Tacher, and Marc Alan Luxenberg: Terry R. Weiss, Esq. of the law firm of Long Aldridge & Norman, Atlanta, Georgia.

For Respondents Kensington Wells, Inc. and Roy Elterman: Terry R. Weiss, Esq. of the law firm of Long Aldridge & Norman, Atlanta, Georgia until his withdrawal as counsel on February 13, 1998.

### CASE INFORMATION

Statement of Claim filed: January 12, 1996.

Amended Statement of Claim filed: March 17, 1997.

Claimants' Submission Agreement signed: January 4, 1996 and March 11, 1997.

Statement of Answer of Respondents Kensington Wells, Inc. and Abraham Mirman filed on or about March 18, 1996.

Amended Answer of Respondents Kensington Wells, Inc., Elias Tacher, Salvatore Tacher, Adam Levy, Roy Elterman and Marc Alan Luxenberg and Cross-Claim Against Abraham Mirman filed: May 12, 1997.

Answer and Cross-Claim of Steven Vornea filed: May 30, 1997.

Respondent Elias Tacher's Submission Agreement signed: May 8, 1997.

Respondent Abraham Mirman's Submission Agreement signed: May 6, 1996.

Respondent Marc Alan Luxenberg's Submission Agreement signed: May 13, 1997.

Respondent Kensington Wells, Inc.'s Submission Agreement signed: May 6, 1996.

Respondents Adam Levy, Roy Elterman, Salvatore Tacher and Steven Vornea did not file executed Submission Agreements.

### HEARING INFORMATION

Two pre-hearing conferences were conducted in this matter on January 13, 1997 and August 11, 1998 with the Chairperson. The evidentiary hearing was conducted on September 1, 2 and 3, 1998 in Atlanta, Georgia, lasting a total of six sessions.

### CASE SUMMARY

Claimants alleged the following: that Respondent Mirman, in collaboration with Respondent Vornea, without notice to the Claimants and without their consent or authorization, sold the Claimants' shares of stock in Videolan Technologies, Inc. and warrant holdings from their account. Further, Respondent Mirman, without notice to the Claimants and without their consent or authorization, used the proceeds of the shares of stock of Videolan Technologies, Inc. to purchase shares of stock in Xechem International, Inc. At no time did the Claimants give Mr. Mirman or Mr. Vornea discretionary authority to trade their account without prior consent. The Claimants were charged excessive and fraudulent gross commissions on all of the trades in their Kensington Wells, Inc. account.

Respondents maintained that Claimant Joseph N. McDonough was an experienced investor who was informed of, and at all times knew or should have known of, the risks attendant to each securities trade he made. Respondents further asserted that Claimants authorized, consented to, or ratified every trade, failed to exercise due diligence or otherwise exercise reasonable care to mitigate damages. Respondents next maintained that Claimants' alleged losses were caused by their own conduct or market forces beyond the control of Respondents and under the facts and law applicable to this case, there is no basis whatsoever to hold any Respondent responsible for any losses Claimants may have experienced as a result

of Claimants' own investment decisions.

Respondent Abraham Mirman further denied all allegations of wrongdoing and asserted the following: Claimants' account was profitable while he was their broker. With respect to the claim of excessive commissions, Claimants admitted in their Amended Statement of Claim that it was not he but the other Respondents who set commission policy. Further, what Claimants believed were commissions charged to them were, in substantial part, sales credits from the spread and were not markups or markdowns paid by Claimants. With respect to the claim of unsuitability, Claimants, during the same period, purchased and sold similar lower priced, speculative securities and, in that account, all trades were self-directed by Claimants and Claimants exacerbated their risk by maintaining significant margin debit balances. Further, with respect to the claim that on October 11, 1995, Mr. Mirman sold more of a stock than he was authorized to sell and that he purchased another stock on the same day, without authorization, Claimants had a trading pattern of paying for stock purchases through the liquidation of stock.

Respondents Kensington Wells, Inc., Elias Tacher, Salvatore Tacher, Roy Elterman, Adam Levy and Marc Luxenberg asserted a cross-claim for indemnification against Respondent Abraham Mirman.

Respondent Steven Vornea maintained that at no time did he participate in the management or direct supervision of Claimants' account, nor did he directly or indirectly control or supervise Abraham Mirman, the registered representative for Claimants' account. Respondent Steven Vornea asserted a cross-claim against Respondent Abraham Mirman alleging that if the arbitrators find Steven Vornea liable, then he must be indemnified by Abraham Mirman for all damages to Steven Vornea.

#### **RELIEF REQUESTED**

Claimants requested the following:

- a. compensatory damages in the sum of \$175,000.00 with interest from the date of the award at the Georgia legal rate;
- b. excessive commissions charged on the account of the Claimants in the amount of \$28,500.00;
- c. punitive and exemplary damages in an amount to be determined by the arbitration panel;
- d. repayment of attorneys' fees paid by the Claimants in the amount of \$42,991.50;
- e. repayment of the non-refundable filing fee and hearing session deposit in the amount of \$950.00;
- f. repayment of the cost to attend the hearing in Atlanta, Georgia in the amount of \$1,250.00; and,
- g. all costs of the hearing.

Respondents requested a dismissal of all claims asserted against them and that all costs of this arbitration be borne by the Claimants.

Respondents Kensington Wells, Inc., Elias Tacher, Salvatore Tacher, Roy Elterman, Adam Levy and Marc Luxenberg further requested indemnification from Respondent Abraham Mirman.

Respondent Steven Vornea further requested that the arbitration panel assess all amounts for which he may be found liable against Respondent Abraham Mirman and requested an award of his legal fees and interest thereon as the panel deemed appropriate.

Respondent Abraham Mirman further requested a dismissal of all cross-claims asserted against him, an award of his attorneys' fees incurred and expungement of all references to this arbitration proceeding from his CRD record.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The parties present at the hearing 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 present at the hearing agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

Upon review of the file and the representations made by/on behalf of the Claimants, the undersigned arbitrators have determined that Respondent Steven Vornea has been properly served with the Statement of Claim pursuant to Rule 10302 and Rule 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondent Steven Vornea has received due notice of the hearing as required under Rule 10315 of the Code and that the evidentiary hearing in this matter would proceed pursuant to Rule 10318 of the Code without Steven Vornea present.

Respondents Adam Levy, Roy Elterman, Salvatore Tacher and Steven Vornea did not file with the NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure and having answered the claim, and appeared at the pre-hearing conferences in this matter are bound by the determination of the arbitration panel on all issues submitted.

Pursuant to the bankruptcy filing of Respondent Kensington Wells, Inc. and the automatic stay thereof, the arbitration panel reached no determination with regard to the claims asserted against this entity.

Prior to the commencement of the evidentiary hearing, NASD Regulation, Inc. was informed that the Claimants had entered into settlement agreements with Respondents Adam Levy, Elias Tacher, Salvatore Tacher and Marc Luxenberg and had dismissed, without prejudice, all claims against Respondent Roy Elterman.

Prior to the commencement of the evidentiary hearing, NASD Regulation, Inc. was informed that Respondents Elias Tacher, Salvatore Tacher, Marc Luxenberg, Adam Levy and Roy Elterman had dismissed, without prejudice, the cross-claims asserted against Abraham Mirman.

#### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Respondent Abraham Mirman is liable and shall pay to the Claimants the sum of \$4,031.25 representing excessive commissions charged to the Claimants.

All other claims by the Claimants against the Respondent Abraham Mirman are denied.

The cross-claim asserted by Respondent Steven Vornea against Respondent Abraham Mirman is denied.

All claims against Respondent Steven Vornea are denied.

The cross-claim asserted by Respondent Kensington Wells, Inc. against Respondent Abraham Mirman is dismissed, without prejudice, pursuant to the bankruptcy filing by this entity.

Respondent Abraham Mirman's request that all references to this arbitration proceeding be expunged from his CRD record is denied.

#### OTHER FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, NASD Regulation, Inc. shall retain the 200.00 claim filing fee paid by the Claimants.

Pursuant to Rule 10332 of the Code of Arbitration Procedure, Respondents Elias Tacher, Salvatore Tacher, Adam Levy, Roy Elterman and Marc Luxenberg are assessed, jointly and severally, the \$500.00 claim filing fee for the cross-claim.

Pursuant to Rule 10332 of the Code of Arbitration Procedure, Respondent Steven Vornea is assessed the \$500.00 claim filing fee for the cross-claim.

Pursuant to Rule 10319 of the Code of Arbitration Procedure, Respondent Abraham Mirman is assessed the sum of \$375.00 representing one-half of the postponement fee for the hearings scheduled to be conducted on February 11 and 12, 1997.

#### FORUM FEES

Pursuant to Rule 10332c of the Code of Arbitration Procedure, forum fees in the sum of \$5,100.00 (two pre-hearing conferences-Chairperson x \$300.00 plus six sessions x \$750.00) are assessed as follows:

Claimants are assessed the sum of \$2,550.00 less the \$750.00 on deposit in partial satisfaction thereof leaving a balance due in the sum of \$1,800.00.

Respondent Abraham Mirman is assessed the sum of \$2,550.00.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution

#### Concurring Arbitrators' Signatures

Name

Public/Industry

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph Carlisi, Esq.

Public

\_\_\_\_\_/s/\_\_\_\_\_  
P. Robert Slotkin, Esq.

Public

\_\_\_\_\_/s/\_\_\_\_\_  
Barbara L. Guzman

Industry

Date of Decision: October 2, 1998