

NASD REGULATION, INC. AWARD

In the Matter of the Arbitration Between

Names of Claimants

**E M R G MEDICAL GROUP, INC AND
DR. ROYCE BROUGH**

and

Case No. 96-02301

Names of Respondents

**D.E. WINE INVESTMENTS, INC., AND
RANDALL BATTEN**

REPRESENTATION

For Claimants: E M R G Medical Group, Inc. and Dr. Royce Brough

**Danny McKay, CEO of E M R G Medical Group, Inc., located in DeKalb,
Mississippi**

For Respondents: D.E. Wine Investments, Inc. and Randall Batten

**Jenifer L. Melby Esquire of Spencer and Associates, located in Houston,
Texas.**

CASE INFORMATION

Claimants' Statement of Claim filed on or about: May 28, 1996

Respondents' Statement of Answer filed on or about: August 8, 1996.

**Submission Agreements signed: E M R G Medical Group, Inc.: April 1, 1996
By Royce D. Brough, Jr., M.D., Ph.D., Chief Medical**

Dr. Royce Brough: April 1, 1996

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D. E. Wine Investments, Inc.: August 7, 1996
By W. Randall Miller, Vice President

Randall Batten: August 7, 1996

HEARING INFORMATION

Pre-Hearing Conference: None held.
Hearing Dates/Sessions: August 11, 1998 for one (1) hearing session.
Hearing Location: Houston, Texas.

CASE SUMMARY

Claimants Dr. Royce Brough ("Brough") and E M R G Medical Group, Inc. through its authorized representative Dr. Royce Brough ("Claimants") in September, 1993 opened an account at D.E. Wine Investments, Inc. ("D.E. Wine") with Randy Batten ("Batten") as the account executive. Claimants alleged that Batten enticed him to invest \$140,000 in 50,000 shares of Alter Sales stock which was ultimately sold for \$13,837.75 and a loss of \$126,162.25. Claimants alleged that Batten also enticed them to invest \$33,569 in 200,000 shares of Pan World Minerals International, Inc. which was ultimately sold for 11,451 and a loss of \$22,118.

Claimants alleged Dr. Brough had general investment objectives to avoid risk and preserve his assets, that the stocks were unsuitable and that he was not a sophisticated investor. Claimants alleged the stocks were thinly traded and unlisted, that a prudent investment advisor should not have made such unsuitable recommendations and that the asset allocation was improper. Claimants

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alleged misrepresentations and omissions, a breach of implied contract and wrongful interference, and a failure to supervise by D.E. Wine.

Respondents denied the Claimants' allegations and asserted that Dr. Brough was the instigator of the trades and made the investment decisions upon his own investigation of the two stocks in issue. Mr. Batten alleged that he explained the risks involved in the stocks. Respondents alleged that Brough stated his 1993 income was \$80,000, had a personal net worth of \$250,000 and his company was worth \$1.25 Million. The purchases of Alter Sales were in different months. With respect to Pan World, Respondents allegedly secured a non recommended offer to purchase from Brough before the purchase. Respondent claimed no legal responsibility for executing unsolicited orders. Respondents listed in detail affirmative defenses including waiver, causation, lack of reliance, failure to mitigate, ratification, statute of limitations and laches.

Relief Requested

Claimants requested actual damages of \$168,538; punitive damages of \$150,000, costs, expenses and disbursements including attorney's fees.

Respondents requested the claims be rejected or denied.

Other Matters

At the opening of the hearing, Claimants, through a representative, Danny McKay, made a motion or request by a long distance conference phone call to postpone the hearing on the ground

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that Claimants had been unable to obtain counsel. The panel adjourned the hearing to permit Mr McKay to furnish the NASD with a letter of authorization from the Claimants and a postponement fee in order to hear the motion. Upon reconvening, NASD confirmed receipt of a letter of authorization which was read into the record and a copy of a check being sent to the NASD for the postponement fee. The panel marked into evidence prior correspondence and notices which evidence:

- 1) that this case had been reset twice previously.
- 2) In January of 1998, Counsel for Claimants withdrew as the representative of Claimants and Claimants were sent notice of the August 11, 1998 hearing date in Houston.
- 3) Respondents engaged new counsel, Spencer and Associates, who advised all parties by letter dated June 9, 1998 of their representation.
- 4) Spencer and Associates served document requests upon Claimants and received no response. Additionally, Spencer and Associates attempted to obtain a response and cooperation from Claimants which failed. Spencer and Associates then made a motion to dismiss by letter dated August 4, 1998 for failure to comply with discovery, exchange documents or provide witness lists. An Order was issued on August 7, 1998 directing Claimants to comply with discovery by overnight response and advising Claimants that the claim could be dismissed as a sanction for failure to comply

The panel heard the arguments of Claimants on their motion for postponement. Respondents objected to the motion for postponement and requested that the panel dismiss the case under Rule

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10305 of the Code of Arbitration Procedure ("the Code"). After careful consideration, the panel decided to deny the motion for postponement and grant the request for dismissal.

AWARD

After considering the pleadings, the testimony and the evidence, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. that the claims of Claimants, Dr. Royce Brough and E M R G Medical Group, Inc be dismissed, without prejudice; and
2. that with the exception of forum fees addressed below, all claims and relief requested not specifically awarded are hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session. There was one (1) session x \$750 = \$750 in forum fees. Pursuant to Rule 10332(b) of the NASD Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, the NASD Regulation, Inc. shall retain the non-refundable filing fee in the amount of \$200 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously submitted by Claimants, E M R G Medical Group, Inc. and Royce

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D. Brough, Jr., MD. The NASD Regulation, Inc. Office of Dispute Resolution shall also retain the \$375 postponement fee previously paid by Claimants E M R G Medical Group, Inc. and Royce D. Brough, Jr., MD as well as the \$375 postponement fee previously paid by Respondents, D.E. Wine Investments, Inc. and Randall Batten.

Pursuant to Rule 10333 of the Code, Respondent, D.E. Wine Investments, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$350 for its member surcharge.

Arbitrators' Signatures:

Donald H. Fidler, Esq. Date August 17, 1998
Donald H. Fidler, Esq.
Public Arbitrator, Chairman

Sherry R. Wetsch, Esq. Date August 14, 1998
Sherry R. Wetsch, Esq.
Public Arbitrator, Panelist

Mobley E. Cox, Jr. Date August 14, 1998
Mobley E. Cox, Jr.
Industry Arbitrator, Panelist

Date served by the NASD: August 17, 1998