

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Dr. John A. Diddams, Dr. Craig G. Stien,  
Joyce Smyth, Sandy Miller, Gail DeMarse,  
Fran Poisson-Ilnicky, Kay Mitchell,  
Denise Libby, Linda Paquet, and Karen Maki

93-00008

Name of Respondents

Offerman & Company  
Wyman C. Johnson

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REPRESENTATION

For all Claimants at the hearing: David P. Pearson, Esq. of Winthrop & Weinstine, P.A., St. Paul, Minnesota.

For all Respondents at the hearing: Patricia S. Bartholomew, Esq. of Offerman & Company, Minneapolis, Minnesota and Steven M. Phillips, Esq. of Popham Haik Schnobrich & Kaufman, Ltd., Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed by all claimants: January 4, 1993.

Claimants, Dr. John Diddams, Sandy Miller, and Fran Poisson-Ilnicky's Submission Agreements signed on: December 21, 1992. Dr. Craig Stien's Submission Agreement signed on: January 15, 1993. Joyce Smith, Gail DeMarse, and Denise Libby's Submission Agreements signed on: December 22, 1992. Kay Mitchell and Linda Paquet's Submission Agreements signed on: December 23, 1992. Karen Maki's Submission Agreement signed on: December 24, 1992.

Joint Statement of Answer and Counterclaim filed by Respondents on: March 22, 1993.

Respondents, Offerman & Company and Wyman C. Johnson's Submission Agreements signed on: March 18, 1993.

### HEARING INFORMATION

Hearing Dates/Sessions: October 18, 1993 for two (2) sessions:  
October 19, 1993 for two (2) sessions;  
October 20, 1993 for two (2) sessions;  
October 21, 1993 for two (2) sessions;  
October 22, 1993 for one (1) session.

Hearing Location: Minneapolis, Minnesota.

### CASE SUMMARY

Claimants, Dr. John A. Diddams, Dr. Craig G. Stien, Joyce Smyth, Sandy Miller, Gail DeMarse, Fran Piosson-Ilnicky, Kay Mitchell, Denise Libby, Linda Paquet, Karen Maki (collectively "Claimants") alleged that Respondent Offerman & Company ("Offerman") through its agent, Respondent, Wyman Johnson ("Johnson") recommended and purchased unsuitable investments and failed to disclose material facts about the securities notwithstanding the Claimants conservative investment objectives for their account held with Offerman. Claimants alleged that Offerman and Johnson are liable for negligence, suitability, breach of duty, fraud, breach of common law fiduciary duty, failure to supervise and aiding and abetting.

Claimants further alleged that their claim is based upon the following investments: Bonds: Allegheny Beverage Corporation, American Continental Corporation, Aristar, Inc., Astronics Corporation, BSN Corporation, Brock Hotel Corporation, Burnup & Sims, Inc., Drug Systems, Inc., Farm House Foods Corp., First Republic Bank Corp., Green Tree Acceptance, Inc., Homestead National Corp., Integrated Resources, Inc., Lyman Lumber Co., Munsingwear, Inc., National Patent Development Corp., Nichols SE, Inc., RB Industries, Inc., Sea Galley Stores, Inc., Southmark Corp., Washington St. PPSS Nucl., Wickes Companies, Inc., Winners Corp. Stocks: American Reality Trust, Inc., Corporate Income FD Unit, Diversified Energies, Inc., ERC Industries, Inc., Ensource, Inc., Freeport McMoran, Inc. Patrick Petroleum Co., Southmark Corp., VMS Hotel Investment Fund, VMS Short Term Income Trust, Manville Corp. Limited Partnerships: Minneapolis Airport Hotel Investors L.P., San Francisco International Airport Hometel L.P., VMS Mortgage Investors L.P., Damson Oil and Gas L.P.

Respondents Offerman and Johnson alleged that neither of them represented that the high yield, high risk securities chosen by the Claimants and purchased in the accounts were anything but high yield, high risk. Offerman and Johnson also alleged that Johnson had no fiduciary duty to claimants because he

was not an investment adviser. Offerman and Johnson further alleged that claimants Diddams and Stien were highly educated, experienced investors making informed, diversified investment decisions.

Respondents Offerman and Johnson set forth the following affirmative defenses: failure to state a claim upon which relief can be granted, lack of the claim to state a legal basis, all claims relating to securities issued by American Continental Corporation must be dismissed with prejudice in conformity with the settlement already entered into with Offerman in their class action litigation regarding securities issued by American Continental Corporation, statutes of limitation, assumption of the risk, and ratification.

In their counterclaim, Offerman and Johnson alleged that claimants Diddams and Stien assumed full responsibility to direct the investments in the pension and profit sharing plans as the fiduciaries, and that they have full responsibility for the results.

In response to the counterclaim, Claimants alleged that regardless of whether Diddams and Stien were trustees, the primary fault and responsibility rests with Respondents. Offerman and Johnson had the duty to recommend suitable investments and to properly disclose the risks of the investments they were recommending.

#### **RELIEF REQUESTED**

Claimants requested actual damages in excess of \$600,000.00, damages in the amount of \$400,000.00 which would have been what they would have earned if their money had been invested in suitable investments, or, alternatively rescission damages along with an amount equal to the value of their accounts if their money had been invested in suitable investments., punitive damages in the amount of \$250,000.00, attorney's fees and costs. Claimants also requested that the counterclaim be dismissed.

Respondents requested that the Statement of Claim be dismissed with prejudice and that they be awarded their costs, disbursements and attorney's fees. In the alternative, if the panel finds damages to the pension and profit sharing plans, Offerman and Johnson requests the panel find the damages occurred outside Offerman and Johnson's association with Diddams and Stien, or find Diddams and Stien responsible for those damages by virtue of their fiduciary duties, and granting such other and further relief as the panel deems just and equitable.

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

Claimants filed a memorandum in opposition to the Respondents' motion to dismiss certain claims relating to American Continental Securities on the basis that Claimants were not member of the class action involving American Continental securities. The panel denied the motion.

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.

### **OTHER COSTS**

Respondent Offerman & Company shall pay Claimant's expert witness fees in the amount of \$15,000.00.

### **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. Respondents, Offerman and Company and Wyman Johnson, shall be and hereby are jointly and severally liable for and shall pay to the Claimants, actual damages in the amount of \$250,000.00 plus interest in the amount of \$50,000.00, for a total award of Three Hundred Thousand Dollars (\$300,000.00). The Award shall be divided among the claimants as set forth below:

- a. Dr. Diddams and Dr. Stien shall receive \$120,000.00 each;
- b. the remaining claimants shall divide \$60,000.00 in relation to the distribution formulas set forth in their pension and profit sharing plan as of May 20, 1989;

2. Claimants' request for punitive damages is denied;

3. Each of the parties shall bear their own costs and expenses, including attorney's fees, other than those specifically enumerated for herein;

4. All other requests not specifically enumerated for herein are denied;

### **Counterclaim**

5. Respondents' counterclaim is denied.

**FORUM FEES**

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

9 sessions X \$1000 = \$9000 minus hearing session deposit of \$1000 = \$8000.

The NASD shall retain the nonrefundable filing fee in the amount of \$250 and the hearing session deposit in the amount of \$1000 which were previously deposited by the Claimants. The NASD shall also retain the nonrefundable filing fee in the amount of \$500 for the counterclaim which was also previously deposited by the Respondents. The hearing session deposit in the amount of \$1000 for the counterclaim will be credited toward the final amount due against Respondent Offerman & Company.

The additional Forum fees in the amount of \$7000 are assessed against Respondent Offerman & Company.

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

**By The Arbitration Panel:**

**Dated:**

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| <u>1-7-94</u> | s/s | <u>Katherine M. Merrill, Esq.</u><br>Katherine M. Merrill, Esq.<br>Presiding, Public Arbitrator |
| <u>1-5-94</u> | s/s | <u>Angela R. Banga, Esq.</u><br>Angela R. Banga, Esq.<br>Public Arbitrator                      |
| <u>1-4-94</u> | s/s | <u>James Nyquist</u><br>James Nyquist<br>Industry Arbitrator                                    |

Date Award Served By The NASD: 1-13-94