

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Phillip J. Nessler

93-03496

Name of Respondent

Dickinson & Co.

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on September 7, 1993, Claimant Phillip J. Nessler, who appeared Pro Se, alleged that on December 4, 1992, Mr. Steven Shipley of Respondent Dickinson & Co. called him to propose that he sell his 1,000 shares of Alco and buy 2,000 shares of Trinity Bio with a net cost of \$1,900.00 whereby Claimant agreed and Respondent, by and through the supervisor Mr. Ed Galvan, confirmed the agreement at a net cost of \$1,900.00. Claimant further alleged that on December 8, and December 10, 1992 he called Respondent about his concern for not having confirmation of the sale of Alco and subsequently, on December 11, when Claimant called Respondent, by and through Mr. Shipley, he was told that the Respondent was selling the Alco at 5.8125 and Claimant would owe \$2,637.00, instead of \$1,900.00 whereby the confirmation slip showed the trade to be December 9, 1992. Claimant contended that the excuse for not making the trade on December 4, was that there was a foul-up in the trading department. Claimant further contended that the closing price for Alco on December 4, 1992 was 6 7/16 and there was never any discussion of a limit price on the sale of Alco, neither day order nor good-until-canceled, contrary to the explanation of Respondent's auditor. Claimant further contended on January 22, 1993 Respondent by and through Mr. Shipley called again to propose taking the profits in 2,000 shares in Trinity Bio and buying 2,500 shares of TNC Media, Inc. at 4 3/8 whereby it would essentially be an even money change-out and again, there was no limit order placed on the sale of Trinity Bio. at which time, again, Mr. Galvan confirmed the proposed trades. Claimant asserted that when Respondent, by and through Mr. Shipley, called to tell him that the TNC would cost 5 instead of 4 3/8, Claimant instructed him to change the trade to 1,000 shares Trinity Bio sale and 1,000 shares of TNC to be bought, at which time Respondent, by and through Mr. Shipley then called to ask if Claimant could go back to the original plan for acquiring 2,500 shares of TNC if he could get it at 4 3/8 and Claimant agreed, at which time,

Mr. Galvan did not confirm either of these conferences. Claimant further asserted that on subsequent days, he called Respondent to ask for confirmation of the sale of Trinity Bio and on February 2, 1993, Claimant requested a confirmation slip on the sale of Trinity Bio, at which time Respondent told him he sold it at 5 1/8 whereby on February 4, 1993, Mr. Shipley said the Trinity Bio sale netted \$10,225.00. Claimant further alleged that on February 5, 1993, he instructed Respondent, by and through Mr. Shipley, to sell his TNC shares and send him a check whereby Claimant was told that 7-8 days would be required for the check, at which time, Mr. Galvan verified his desire to sell. Claimant further contended that on February 16, 1993, Respondent, by and through Mr. Galvan, advised him that the Trinity Bio was never sold at 5 1/8, which was not the price it should have been sold on January 22. Claimant further asserted that the Trinity Bio was finally sold by 300 shares on February 9, for a cash call, and 1,700 shares on February 16; both transactions at 4 1/2 whereby Claimant finally received \$1,250.00 for the difference between 5 1/8 and 4 1/2. Claimant further asserted that on March 4, 1993, Claimant mailed a letter to Mr. Galvan instructing him on closing his account and to issue him 1,000 shares of Helione stock which he had previously purchased and Claimant was advised that it would take 3-4 weeks for him to receive the stock certificate. Claimant further alleged that he finally received the stock certificate five months later on July 1, 1993. Claimant further contended that due to Respondent's failure to properly execute trades and failure to deliver stock, caused him to sustain losses.

Respondent Dickinson & Co., by and through their in-house counsel Thomas M. Swartwood, maintained that Claimant Philip J. Nessler states that he agreed to "selling 1,000 shares of Alco and buy 2,000 shares of Trinity Bio with a net cost to him of \$1,900.00" whereby for that statement to be correct, he must have agreed to a limit order for both transactions, and in fact, Claimant indicated he wanted to net a certain price. Respondent further maintained that when Claimant's limit order was not filled, his broker contacted him, and Claimant ordered him to sell the Alco. Respondent contended that Claimant did not question the purchase of Trinity shares, nor did he question the sale of Alco in December 1992 until June 1993. Respondent contended that all the trades referred to were properly confirmed to Claimant and were reflected in his regular monthly statements, as were all the transactions in question, and of course, no confirmation is sent out when a trade is not executed. Respondent further contended that although Claimant does not suggest anywhere that he gave his broker a market order, had he done so he would have received \$6,437.50 and he would have had to pay only an additional \$625.00, not \$737.50 whereby in calculating his alleged damages, Claimant wants the benefit of a limit order that he now asserted he did not give to his broker, and this is simply unfair. Respondent asserted that Claimant bought 2,000 Trinity shares in December 4, 1992 for \$8,425.00 and he sold them for \$10,200.00, taking into account the adjustment made by Respondent. Respondent further asserted that Claimant appears to be demanding payment of 5 5/8, although he refers to a price of "5/8", but he offers no reason or evidence to justify that price and in fact, the closing bid price for Trinity shares on January 22, 1993 was 5 1/4 not "5/8" as he alleges. Respondent further maintained that adjusting for a reasonable markdown of 4%, he was entitled to no more than \$5.04 that day, but because the broker apparently

confirmed a higher price to him. Respondent paid him an adjustment bringing his net proceeds to \$5.10 per share versus a purchase price of \$4.20. Respondent further asserted that Claimant demands payment for an alleged decline in value of shares of Hellionetics when he requested that a certificate be sent to him in connection with closing his account and Claimant was notified that the shares were in his account as of March 31, 1993 and April 30, 1993 whereby his shares were delivered out of his account on June 28, 1993. Respondent further contended that at no time was Claimant precluded from selling his shares, nor does he suggest or offer any evidence that he sold them, and as he apparently lost nothing, he is not entitled to any recovery especially when he was fully apprised of his position at regular intervals.

RELIEF REQUESTED

Claimant Phillip J. Nessler requested the sum of \$2,987.50 in actual damages together with Punitive damages.

Respondent Dickinson & Co. requested the claim be dismissed.

AWARD

Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Dan H. Lee, Jr., was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant on August 31, 1993 and by the Respondent on November 9, 1993.

And, the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent Dickinson & Co. is liable and shall pay to the Claimant Phillip J. Nessler the sum of \$1,250.00 in damages.
2. The parties shall bear their respective costs.
3. The \$125.00 filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant Phillip J. Nessler shall be retained by the NASD, Inc.

Page Four
Award 93-03496

AFFIRMATION

I, **DAN H. LEE, JR.**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.

A handwritten signature in dark ink, appearing to read "Dan H. Lee, Jr.", is written over a horizontal line.

Signature of Arbitrator

DATE OF DECISION: March 2, 1994