

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Michael A. Jirele,

Claimant,

v.

No. 95-01055

Dickinson & Company,

Respondent.

REPRESENTATION OF PARTIES

Claimant Michael A. Jirele was represented by Paul N. Young of Securities Arbitration Group, Inc. located in Marina Del Ray, California.

Respondent Dickinson & Co. was represented by Kasey M. Kincaid, Esquire of Faigre & Benson and Barbara Bennett, Esquire of Dickinson & Co. both located in Des Moines, Iowa.

CASE INFORMATION

Claimant Michael A. Jirele's Statement of Claim was filed on or about March 1, 1995.

Claimant Michael A. Jirele's Submission Agreement was signed on February 22, 1995.

Respondent Dickinson & Co.'s Statement of Answer was filed on or about May 12, 1995.

Respondent Dickinson & Co.'s Submission Agreement was signed on May 10, 1995, by Barbara Bennett, Vice President.

HEARING INFORMATION

A pre-hearing conference was held on May 10, 1996 for one (1) pre-hearing session before one arbitrator.

The hearing was held on: September 17, 1996 for two (2) sessions;
September 18, 1996 for two (2) sessions;
September 19, 1996 for two (2) sessions; and
September 20, 1996 for two (2) sessions.

The hearing was held in Oklahoma City, Oklahoma.

CASE SUMMARY

In the Statement of Claim, Michael A. Jirele ("Claimant") alleged that Dickinson & Co. ("Respondent") defrauded him and lost all of his retirement savings. Claimant asserted that Respondent invested his money in very high risk, speculative securities contrary to his stated objective of long term growth with safety of principal. Claimant asserted that the following securities transactions, which Respondent allegedly recommended and induced him into taking, were at issue:

- (1) purchase of ATC for \$2,750, which dropped in value to \$79 or less;
- (2) purchase of Envirogen, causing a loss of over \$550;
- (3) purchase of Alco International on 11/18/92 for a gain of \$710;
- (4) sale of Callaway Golf, which jumped in price/value by 6 times within six weeks;
- (5) purchase of Great American Recreation Co. on 11/20/92 for \$19,000, which declined to \$16,550 when sold in January, 1993;
- (6) conversion of Claimant's cash account into a margin account on or about January 22, 1993, in which Respondent supposedly promised to uphold the investment objective of strict safety of principal;
- (7) purchase of Oncogene on 1/12/93 and 1/13/93 for a total of \$33,625, which resulted in a \$14,623 loss;
- (8) purchase of Harris and Harris Group, Inc. on 2/9/93 for \$8,087, which resulted in a \$2,450 loss when sold on 6/8/93;
- (9) purchase of Maxicare on 5/4/93 for \$2,025, which resulted in a \$425 loss when sold in three weeks;
- (10) purchase of Fossil in May, 1993, for \$15,370, which resulted in a \$717 gain when sold in July, 1993;
- (11) conversion of corporate bonds held at HY Management into margin;
- (12) purchase of Argosy Gaming Co. in May, 1993, of which 125 shares were purchased initially unauthorized by the Claimant and 200 shares were sold unauthorized, for \$254,898, which resulted in a \$17,598 gain;
- (13) purchase of Station Casinos from 6/1/93 through 6/22/93 for \$282,615, which resulted in a \$4,000 gain;
- (14) purchase of Gulfwest Oil Co. in June, 1993, for \$3,000, which resulted in a \$1,138 loss when sold eight weeks later;

- (15) purchase of First Cash Pawn Shop in June, 1993, for \$9,250, which resulted in a \$1,288 loss when sold in January, 1994;
- (16) purchase of Aldila, which resulted in a \$1,500 gain;
- (17) purchase of Communication Intelligence Corp. on 6/17/93, which was totally unauthorized by the Claimant, and which resulted in a \$1,138 loss;
- (18) purchases of Conversion Industries on 7/28/93, 8/31/93, 9/2/93, 12/9/93, 12/30/93, 1/21/94, 3/31/94, 4/5/94, and 4/15/94 for \$336,690, which resulted in a \$194,664 loss when sold on 2/16/94, 6/24/94, and 6/27/94;
- (19) purchase of Conversion Financial on 8/19/93 for \$2,898, which resulted in a \$811 loss when sold in January of 1994;
- (20) purchase of Cobra Golf Co. in October, 1993, for \$33,525, which resulted in a \$4,200 loss when sold five months later;
- (21) purchase of Mirage Resorts for \$4,560, which resulted in a \$90 profit;
- (22) purchases of Royal Grip on 11/4/93 and 1/18/94 for \$65,860, which resulted in a \$34,134 loss when sold in May of 1994;
- (23) purchase of Franklin Supply and Elsag Bailey Controls, which resulted in a \$200 gain;
- (24) purchase of Reno Air on 12/4/93, 12/13/93, and 1/6/94 for \$83,197, which resulted in a \$27,561 loss when sold in March and April of 1994;
- (25) purchase of American REIT on 12/7/93 for \$44,400, which resulted in a \$10,031 realized loss when 4,000 of the 5,000 shares purchased were sold, and a \$2,000 unrealized loss on the remaining 1,000 shares;
- (26) purchase of Fortune Petroleum on 12/10/93 for \$8,025, which resulted in a \$2,082 when sold on 3/15/94;
- (27) purchase of Search Capital, which resulted in a \$200 gain when sold;
- (28) purchase of Circon Corp., which resulted in a \$288 loss when sold;
- (29) purchase of Parkervision for \$1,437, which would result in a \$500 loss if sold;
- (30) purchase of Photonics on 1/11/94 for \$26,205, which resulted in a \$9,979 loss when sold on 4/6/94;
- (31) purchase of Tseng on 2/16/94 for \$71,555, which resulted in a \$30,384 loss when sold on June 13, 1994;
- (32) purchase of 250 shares of Biosepra, Inc. on 3/24/94;
- (33) purchase of 5,000 shares of Conversion Industries on 3/31/94;
- (34) purchase of 4,000 shares of Conversion Industries in April of 1994; and
- (35) purchase of Interville in May, 1994, for \$33,430, which resulted in a realized loss of over \$6,800 when 1,500 of the 3,000 shares purchased were sold in July of 1994.

Claimant made the following legal claims against Respondent: (1) negligence for unsuitable investments; (2) breach of agreement and immoral and unethical conduct; (3) misrepresentation and fraudulent use of manipulative and deceptive practices; (4) violations of the NASD Rules of Fair Procedure, including Article III, Sections 1, 2, 18, 27, and 35; (5) fraud in securities transactions and unauthorized transactions; (6) breach of fiduciary duty; (7) churning, excessive and undisclosed

commissions, and excessive and unnecessary margin interest; (8) failure to supervise; and (9) violation of SEC Rule 15c1-2, Manipulative and Deceptive Practices.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated: that all transactions were explained to Claimant in advance; that Claimant authorized all transactions; that all commissions Claimant incurred were fair and within industry guidelines; that the transactions Claimant entered into were suitable with regard to his background of education and investment goal of capital appreciation; and that Claimant received confirmations for all transactions, he did not object to any of these transactions, and had thereby ratified the transactions. Respondent made the following affirmative defenses: (1) Claimant failed to state a claim upon which relief could be granted; (2) Claimant was barred from recovery by the doctrine of waiver; (3) Claimant was barred from recovery by the doctrine of estoppel; (4) Claimant had suffered no damages as a result of any alleged wrongful action or inaction of Respondent; (5) Claimant's claims were barred or reduced due to his own negligence; (6) Claimant's losses, if any, were caused or contributed by parties over whom Respondent did not have control and over whom Respondent was not responsible; and (7) Claimant's claim was barred, in whole or in part, by the applicable statute of limitations.

RELIEF REQUESTED

Claimant Michael A. Jirele requested: an award in the amount of \$337,135 for compensatory damages resulting from capital/principal losses, plus interest in the sum of \$67,427 (2.5 years @ 8.00%); an award in the amount of \$90,322.00 for compensatory damages resulting from commissions and margin interest paid, plus interest in the sum of \$21,677.00 (3 years @ 8.00%); an award in the amount of \$27,556.00 for compensatory damages resulting from corporate bond losses and margin interest paid; an award of punitive damages in an undetermined amount; an award of costs of arbitration; and an award of attorneys' fees.

Respondent Dickinson & Co. requested that the claims asserted against it be denied in their entirety.

OTHER ISSUES CONSIDERED & DECIDED

Prior to hearing and at the hearing, Claimant Michael A. Jirele moved to sanction Respondent Dickinson & Co. for non-compliance with discovery pursuant to Section 10325 of the Code of Arbitration Procedure. The undersigned arbitrators have determined to grant this motion, the sanction of which is set out in the award below.

On or about January 17, 1996, Dickinson & Co. submitted a motion to dismiss all claims related to the purchase of CVD stock in accordance with Section 10301(d)(2) of the Code of Arbitration Procedure to which Michael A. Jirele file a response on or about February 8, 1996. After

considering the motion and response, the arbitrators decided to deny the motion or about April 17, 1996.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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) That Respondent Dickinson & Co. is liable for and shall pay to Claimant Michael A. Jirele the sum of \$60,000 in compensatory damages;
- (2) That Respondent Dickinson & Co. is liable for and shall pay to Claimant Michael A. Jirele the amount of \$3,000 as a sanction for non-compliance or untimely compliance with discovery in accordance with Section 10325 of the Code of Arbitration Procedure; and
- (3) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300. There were eight (8) hearing sessions x \$750 = \$6,000 in forum fees. Total forum fees are \$300 + \$6,000 = \$6,300. Pursuant to Section 10332(b) of the code of Arbitration Procedure (the "Code"), 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 Section 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution 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 deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Michael A. Jirele.

Respondent Dickinson & Co. is liable for and shall pay the member surcharge fee in the amount of \$350 pursuant to Section 10333 of the Code. Respondent Dickinson & Co. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$5,550 in forum fees. Respondent Dickinson & Co. is liable for and shall pay to Claimant Michael A. Jirele the sum of \$950 as reimbursement for the hearing session deposit and filing fee.

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

Signed:

Dated:

John Preston, Esquire

October 21, 1996

John Preston, Esquire

Public Arbitrator, Presiding Chair

Edwin O'Brien

October 22, 1996

Edwin O'Brien

Public Arbitrator

Anne M. Long-Larsen

October 21, 1996

Anne M. Long-Larsen

Industry Arbitrator

Date served by NASD Regulation, Inc. : October 25, 1996