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**NASDR AWARD**

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimant

Frank L. Comes

and

Names of Respondents

Kirkpatrick, Pettis, Smith, Polian, Incorporated,  
Dickinson and Company and  
Robert Vernon

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Securities Dealers, Inc.

1994

Case Number 95-03045 All Rights Reserved  
(consolidated with 95-0405 1)

**REPRESENTATION OF PARTIES**

Frank L. Comes ("Claimant") was represented by Michael A. Dee, Esquire of Shearer, Templer & Pingel, P.C. located in West Des Moines, Iowa.

Kirkpatrick, Pettis, Smith, Polian, Inc. and Robert Vernon ("Respondents") were represented by James M. Bausch, Esquire of Cline, Williams, Wright, Johnson & Oldfather located in Lincoln, Nebraska.

Dickinson & Company and Robert Vernon ("Respondents") were represented by Lisa A. Nielsen, Esquire and David Harris, Esquire of Greensfelder, Hemker & Gale, P.C. located in St. Louis, Missouri.

**CASE INFORMATION**

The Statements of Claim were filed on or about June 23, 1995 and August 23, 1995

The Submission Agreements of the Claimant were signed on June 20, 1995 and August 15, 1995.

The Joint Statement of Answer of Respondents Kirkpatrick, Pettis, Smith, Polian, Inc. and Robert Vernon was filed on or about October 11, 1995.

The Joint Statement of Answer of Respondents Dickinson & Co. and Robert Vernon was filed on or about September 12, 1995

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The Submission Agreement of Respondent Kirkpatrick, Pettis, Smith, Polian, Inc. was signed on October 9, 1995 by Scott C. Hoyt, Executive Vice President, General Counsel and Secretary.

The Submission Agreements of Respondent Robert Vernon were signed on September 6, 1995.

The Submission Agreement of Respondent Dickinson & Company was signed on September 8, 1995 by Barbara Bennett, Vice President-Legal.

### **HEARING INFORMATION**

The hearing was held in Omaha, Nebraska on August 15, 1996 for three (3) sessions and on August 16, 1996 for two (2) sessions.

### **CASE SUMMARY**

According to the Statements of Claim, Frank L. Comes ("Comes") began placing investments with Robert Vernon ("Vernon") at Dickinson & Company ("Dickinson") in approximately 1988 after being contacted by Vernon. When Vernon left Dickinson and began employment at Kirkpatrick, Pettis, Smith and Polian ("Kirkpatrick") in approximately October of 1990, Comes opened trading and investment accounts with Kirkpatrick. Comes claimed to have no education, training or experience in financial markets or investments and that he relied exclusively on the Respondents to provide him with information and analysis. According to the Claimant, the Respondents bought securities on the Claimant's behalf at artificially inflated prices and sold securities at artificially deflated prices from March of 1989 to October of 1990, costing Comes approximately \$3,000 and from October of 1990 to January of 1995, costing Comes about \$5,100. The Claimant alleged that from about March of 1989 to January of 1995, Respondents executed transactions which were unsuitable, failed to investigate or conduct due diligence and misrepresented the nature, risk and future value of recommended investments. As alleged, some of the recommended investments were: PDG-Environmental, Inc. - Asbestec Industries, Inc. stock in which Claimant lost \$11,500, Datamax stock in which Claimant lost approximately \$60,000, Computer Communications in which Claimant lost \$27,000, Astro Enterprises-Prime Air, Inc. stock in which Claimant lost \$11,159, Independent Entertainment Group in which Claimant lost about \$10,000 and Aquatec, Inc. convertible preferred stock in which Claimant lost \$35,000. Comes claimed to have lost additional monies in the following companies due to the Respondents: Discovery Distributing Corporation - Trend Vision Technology \$3250.00; Appoint Inc./Standard Logic, Inc. \$68,000.00; and Computer Communications \$27,000.00. Claimant made other specific allegations against the Respondents including, but not limited to, violations of the Iowa Code and regulations of the Securities and Exchange Commission, breach of fiduciary duty, negligent misrepresentation, fraudulent misrepresentation, common law fraud and breach of contract. Despite demand, Respondents have refused to pay Claimant for losses.

In their Joint Statement of Answer, Dickinson & Co. and Robert Vernon denied the allegations set forth in the Statement of Claim. Dickinson and Vernon asserted the following affirmative defense!;

1. To the extent that the allegations related to alleged conduct or transactions that occurred **after** Vernon **left** Dickinson, such allegations were the subject matter of another, unrelated arbitration filed by Comes against Vernon and Kirkpatrick and should have been dismissed ;
2. To the extent that the allegations related to transactions or conduct that allegedly occurred while Vernon was at Dickinson prior to October 12, 1990, such allegations or theories were barred by the applicable statute of limitations;
3. To the extent that the allegations related to alleged conduct or transactions that occurred **after** Vernon **left** Dickinson, Comes did not have a right to arbitrate as against Dickinson. No written agreement existed because the scope of the parties' arbitration agreement only covered disputes relating to transactions between Comes and Dickinson, not other broker-dealers. In addition, there was not an agreement to arbitrate under Sections 1 and 12 of the NASDR Code of Arbitration **Procedure**, because Comes was not a customer of Dickinson at the time other transactions took place and the transactions did not arise out of or in connection with Dickinson's business; and
4. The allegations contained in the Statement of Claim failed to state a claim. Comes failed to **identify** with the requisite specificity any material fact the Dickinson and/or Vernon either knew or should have known, but failed to disclose to Comes prior to his investment transactions, or any untrue representation of material fact made by Dickinson and/or Vernon to Comes prior to any of his investment transactions. Comes further failed to **identify** with the requisite specificity how the investments were allegedly unsuitable or inappropriate for him.

In Kirkpatrick, Pettis, Smith, Polian, Inc. and Robert Vernon's Statement of Answer, they denied responsibility, in whole or in part, for any alleged damages to Comes due to transactions or any conduct that allegedly occurred before Vernon became a registered representative for Kirkpatrick. Kirkpatrick and Vernon asserted the following affirmative defenses:

1. Certain of the transactions or conduct that allegedly occurred while Vernon was a register representative of Kirkpatrick were barred by applicable statutes of **limitation**;
2. To the extent that the allegations in the Statement of Claim related to alleged conduct or transactions that occurred before Vernon became a registered representative fbr Kirkpatrick on October 12, 1990, Comes did not have a right to arbitrate against Kirkpatrick. The scope of the parties' arbitration agreement only covered disputes

relating to transactions between Comes and Kirkpatrick, not other broker-dealers. In addition, there was not an agreement to arbitrate under Sections 1 and 12 of the NASDR Code of Arbitration Procedure, because Comes was not a customer of Kirkpatrick at the time the transactions took place and the transactions did not arise out of or in connection with Kirkpatrick's business;

3. The allegations contained in the Statement of Claim failed to state a claim. Comes; failed to identify with requisite specificity any material fact that Kirkpatrick and/or Vernon either knew or should have known, but failed to disclose to Comes prior to his investment transactions, or any untrue representations of material fact made by Kirkpatrick and/or Vernon to Comes prior to any of his investment transactions. Comes further failed to identify with the requisite specificity how the investments were allegedly unsuitable or inappropriate for him;
4. Comes' causes of action were barred by the doctrines of waiver and estoppel;
5. To the extent that the allegations contained in the Statement of Claim related to alleged conduct or transactions that occurred before Vernon became a registered representative for Kirkpatrick on October 12, 1990, such allegations were the subject matter of another, unrelated arbitration filed by Comes against Vernon and his former broker-dealer, Dickinson, and should be dismissed from this arbitration; and
6. Pursuant to the provisions of the application and agreement, the relationship between Kirkpatrick and Vernon and Comes was governed by Nebraska law.

#### **RELIEF REQUESTED**

Claimant requested an award against Respondents, Dickinson & Company and Robert Vernon in the amount of \$133,100.00 in actual damages and an undisclosed amount of punitive damages plus commissions, attorneys' fees, interest and costs. Claimant requested an award against Respondents, Kirkpatrick, Pettis, Smith Polian, Inc and Robert Vernon in the sum of \$225,150. in actual damages and an undisclosed amount of punitive damages plus commissions, attorneys' fees, interest and costs.

Respondents Dickinson & Co., Inc. and Robert Vernon requested that the Statement of Claim be dismissed.

Respondents Kirkpatrick, Pettis, Smith, Polian, Inc. and Robert Vernon requested that all claims asserted against them be denied in their entirety and that they be awarded costs and attorneys' fees.

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**OTHER ISSUES CONSIDERED & DECIDED**

On or about October 5, 1995, the Claimant filed a motion to consolidate NASDR Case Number 95-03045 captioned Frank L. Comes v. Dickinson & Co. and Robert Vernon with NASDR Case Number 95-04051 captioned Frank L. Comes v. Kirkpatrick, Pettis, Smith, Polian, Inc. and Robert Vernon. After reviewing the motion and all related documents, the arbitrators determined on or about May 16, 1996 that the motion was granted.

On or about September 27, 1995 and October 13, 1995, the Respondents filed motions to dismiss in accordance with Section 16 of the NASDR Code of Arbitration Procedure (the "Code"). After reviewing and considering the motions and all related submissions, the arbitrators decided to reserve their ruling until after the hearing on the merits.

At hearing, the Claimant stated that his claims of negligence against all Respondents were withdrawn with prejudice.

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains on file with the NASDR.

**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. The Statements of Claim submitted by Frank L. Comes against Dickinson & Co., Inc., Kirkpatrick Pettis, Smith, Polian, Inc. and Robert Vernon are hereby denied and dismissed in their entirety with prejudice;
2. The parties shall bear their own costs including attorneys' fees except for forum fees specifically enumerated herein; and
3. All relief requested not specifically granted herein is hereby denied in its entirety.

**FORUM FEES**

Forum fees are calculated at the rate of \$750.00 per hearing session. There were five (5) hearing sessions x \$750.00 = \$3,750.00 in forum fees. 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.

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Pursuant to Section 10332(c) of the Code, the National Association of Securities Dealers Regulation, Inc. ("NASDR") shall retain the **non-refundable** filing fees in the total amount of \$400 and shall retain as forum fees the hearing session deposit in the amount of \$750 previously deposited with the NASDR by the Claimant Frank L. Comes. Claimant Frank L. Comes is hereby liable for and shall pay to the National Association of Securities Dealers Regulation, Inc. the amount of \$500 in additional forum fees.

Respondent Dickinson & Co. is liable for and shall pay to the NASDR the sum of \$1,250 in forum fees. Respondent Dickinson & Co. is also liable for and shall pay to the NASDR the \$350 member surcharge assessed in accordance with Section 10333 of the Code.

Respondent Kirkpatrick, Pettis, Smith, Polian, Inc. is hereby liable for and shall pay to the NASDR the amount of \$1,250 in forum fees. Respondent Kirkpatrick, Pettis, Smith, Polian, Inc. is also liable for and shall pay to the NASDR the amount of \$350 for the member surcharge assessed in accordance with Section 10333 of the Code.

The NASDR shall retain postponement fees in the amount of \$750 previously deposited with the NASDR by the Claimant **frank** L. Comes.

**Fees are payable to the National Association of Securities Dealers Regulation, Inc.**

Signed:

Dated:

Thomas J. Tarsnev, Esquire  
Thomas J. Tarsnev, Esquire  
Public Arbitrator, Presiding Chair

October 15, 1996

Richard N. Berkshire, Esquire  
Richard N. Berkshire, Esquire  
Public Arbitrator

October 9, 1996

Loren E. Dessonville, Esquire  
Loren E. Dessonville, Esquire  
Industry Arbitrator

October 14, 1996

Date served by the NASDR: October 15, 1996