

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

James K. Peters,

Claimant,

and

No. 95-05849

Dickinson & Co., and Cynthia L. Cooper,

Respondents.

REPRESENTATION OF PARTIES

Claimant James K. Peters was represented by Jim Marlen, Esquire of Dallas, Texas.

Respondent Dickinson & Co. was represented by Barbara Bennett, Esquire of Dickinson & Co., located in Des Moines, Iowa.

Respondent Cynthia L. Cooper was represented by Patrick Lanier, Esquire of Austin, Texas.

CASE INFORMATION

James K. Peters' Statement of Claim was filed on or about December 14, 1995. James K. Peters' Supplemental Claim was filed on or about January 15, 1997. James K. Peters' Submission Agreement was signed on November 3, 1995.

Dickinson & Co.'s Statement of Answer was filed on or about March 20, 1996. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a properly executed Submission Agreement from Dickinson & Co.

Cynthia L. Cooper's Statement of Answer was filed on or about February 26, 1997. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a properly executed Submission Agreement from Cynthia L. Cooper.

HEARING INFORMATION

Pre-hearing conferences were held on: July 24, 1996 for one (1) session; October 8, 1996 for one (1) session; and February 28, 1997 for one (1) session.

The hearing was held on: April 21, 1997 for two (2) session; April 22, 1997 for two (2) sessions; and April 23, 1997 for two (2) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

James K. Peters ("Claimant") brought this action to recover losses allegedly sustained as a result of Dickinson & Co. ("Dickinson") and Austin, Texas branch manager Cynthia L. Cooper's ("Ms. Cooper") failure to supervise the misrepresentations and omissions of material facts on the part of Dickinson's representatives responsible for Claimant's account.

Claimant stated that when one of Dickinson's brokers contacted him he informed this broker about a settlement of \$210,000 that he (Claimant) was about to come into as a result of work related injuries. Although Claimant proclaimed that he, and everyone in his family, had no investment background prior to his dealings with Dickinson, he informed this broker that he (Claimant) was interested in income producing investments, but was concerned with low risk and protection of principal as well. According to Claimant, Dickinson's broker responded that these objectives could be accommodated and that Claimant could make more money than what he had. Claimant stated that he then deposited \$140,000 with Dickinson, which was in April 1994. Claimant further stated that shortly thereafter the broker began asking Claimant for more money to pay for additional investments. Claimant admitted that he did not really understand the statements that he received, but asserted that he did not once receive any written material prior to making an investment, and thereby completely relied on Dickinson's broker for the handling of the account. Claimant also asserted that this broker used high pressure sales tactics and purchased investments for Claimant on margin and in new issues, without explaining what margin was or its risks, and without explaining the nature of new issue investments or that they carried a higher degree of risk. Furthermore, Claimant alleged that: Respondents disseminated to him false, misleading, or outdated information about the issuers' current financial picture, operations, product development, risk levels, and future business prospects; brokers were given incomplete, inaccurate, and misleading information about new issues that was relayed to Claimant; Respondents omitted telling brokers information that was necessary in order to not make the sales presentation not misleading; and Respondents minimized or ignored negative news about the issuers of Dickinson recommended investments, failed to disclose the potential liabilities of companies and issuers, and failed to disclose that the market for the security was dominated and controlled by Respondents.

Claimant asserted the following causes of action: (1) violations of federal and state securities laws; (2) violations of the Texas Deceptive Trade Practices Act; (3) negligence/gross negligence/breach of industry standards; (4) breach of contract; (5) breach of duty, fiduciary and otherwise; (6) common law fraud - misrepresentations and omissions; (7) *respondeat superior*; (8) negligence in hiring and retaining Kelly Sutton and Kurt Novey, both registered representatives of Dickinson; (9) aiding and

abetting liability; and (10) failure to supervise.

Dickinson denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on its part. Dickinson asserted that Claimant has failed to allege even the most rudimentary aspects of any purported claim. Dickinson further stated that, Claimant, while alleging fraud, has not even bothered to identify the person who allegedly committed the fraud, or the securities purportedly purchased as a result. Dickinson argued that since the NASD rules prohibit nonspecific conclusory allegations, Claimant must be directed to file a Statement of Claim specifying the acts complained of with respect to each of the respondents named, or dismissal should be granted.

Ms. Cooper denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on her part. Ms. Cooper asserted the following defenses: Claimant has not asserted a basis for any claim as against Ms. Cooper and fails to set forth any basis on which facts and/or law provide a private cause of action for violations of any of the Self Regulatory Organization Rules claimed to have been violated by Respondents or that the Texas Deceptive Trade Practice Act applies to the purchases and/or sale of securities to Claimant; Claimant authorized and was fully aware of all securities transactions in his account; Claimant's calculation of losses in his Statement of Claim fails to show what securities and/or alleged sales form the basis of the claimed losses and whether the losses are actual or paper; and Claimant offers no indication of what misstatements and/or omissions are alleged to have been made by whom to him regarding any alleged transactions on which he bases his claimed losses in the account.

Additionally, Ms. Cooper asserted the following affirmative defenses: (1) no right of action exists for any alleged wrongdoing upon which Claimant now relies to support his claim to recover any alleged losses as against Ms. Cooper individually; (2) on information and belief, Claimant has failed to include all profits and losses in his account as a Claimant, and therefore, this Statement of Claim cannot fully adjudicate the handling of the account as he only wishes to complain as to the securities on which he failed to earn a profit and refuses to disclose the final status of the securities transferred to another broker/dealer or dealers; (3) Claimant's claims are barred by laches and/or estoppel, and by various statutes of limitations; (4) Claimant has caused or contributed to any alleged damages asserted against Ms. Cooper; (5) Claimant was fully aware from the outset of opening his account with Dickinson in 1994 of all the risks of profit and loss associated with investing in securities, and voluntarily assumed such risk; and (6) any damages allegedly suffered by Claimant were caused by unforeseen market factors and conditions effecting the value of the securities in Claimant's account and demands for cash withdrawals necessitating sales of securities at less than opportune times, for which Ms. Cooper should not now be held liable or responsible for in any way.

RELIEF REQUESTED

James K. Peters requested an award for: actual damages of approximately \$45,000; punitive damages of at least three times actual damages; attorneys' fees; pre-judgment and post-judgment interest; costs

of pursuing this arbitration claim, including expert witness fees; and offset of any tax liability incurred on recovery.

Dickinson & Co. requested that the Statement of Claim be dismissed, or in the alternative, that James K. Peters be directed to clarify the Statement of Claim.

Cynthia L. Cooper requested that the Statement of claim be denied as to her individually in its entirety and that she recover all her costs and attorney fees incurred in the arbitration of this case.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent Dickinson & Co. did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to § 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

Respondent Cynthia L. Cooper did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to § 10301 of the Code and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

Originally, James K. Peters named Dickinson Holding Corp., the parent company of Dickinson & Co., Marshall Swartwood, Chairman of the Board of Directors and President of Dickinson & Co., Kurt Novey, National Sales Manager of Dickinson & Co., and Kelly Sutton, Branch Manager of the Dallas office of Dickinson & Co., as co-respondents. Because Dickinson Holding Corp. is not required to submit to arbitration and declined voluntary submission, it was administratively dismissed from these proceedings. Upon consideration of the motion by Marshall Swartwood for dismissal, the undersigned panel of arbitrators granted said motion with prejudice. Finally, pursuant to agreements reached by the parties, the claims by James K. Peters against Kurt Novey and Kelly Sutton were settled and thereby dismissed.

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 the 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 Dickinson & Co. is liable for and shall pay James K. Peter's actual damages in the amount of \$33,636;
2. That Dickinson & Co. is liable for and shall pay James K. Peter's expert fees in the amount of \$2,637;
3. That Dickinson & Co. is liable for and shall pay James K. Peter's legal fees in the amount of \$15,000;
4. 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 \$400 per hearing session and \$300 for each pre-hearing conference, if any. There were three (3) pre-hearing conferences \times \$300 = \$900, and there were six (6) hearing sessions \times \$400 = \$2,400 in forum fees. Total forum fee are thus \$900 + \$2,400 = \$3,300. Pursuant to § 10332(b) of the NASD 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 § 10322(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$120 and shall **retain** as forum fees the hearing session deposit in the amount of \$400 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by James K. Peters.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Dickinson & Co.

Dickinson & Co. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$3,300 (= \$3,300 total forum fees - \$400 hearing session deposit by James K. Peters + \$400 postponement fee for March postponement).

Dickinson & Co. is liable for and shall reimburse James K. Peters for his filing fee in the amount of \$120 and for his hearing session deposit in the amount of \$400.

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

Concurring Arbitrators' Signatures

/s/ Charles P. Aberg

May 23, 1997

Charles P. Aberg, Esquire
Chairperson
Public Arbitrator

Dated:

/s/ Joe S. Shepherd

May 5, 1997

Joe S. Shepherd
Panelist
Public Arbitrator

Dated:

/s/ Jack R. Settles

May 9, 1997

Jack R. Settles
Panelist
Industry Arbitrator

Dated:

For NASD use only:

Date Award was served on the parties: May 23, 1997