

N.A.S.D. REGULATION AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

Elizabeth D. Meehan

96-00167

Name of Respondents

Schroder Wertheim & Co., Inc.  
Dickinson & Co.  
Kethe A. Cicconi  
William Alan King

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**REPRESENTATION**

Claimant Elizabeth D. Meehan ("Claimant") was represented by Alfred J.T. Rubega, Esq., Concord, NH.

Respondents Schroder Wertheim & Co., Inc. ("Schroder") and Dickinson & Co. ("Dickinson") were represented by Barbara Bennett, Esq., Dickinson & Co., Des Moines, IA.

Respondent Kethe A. Cicconi ("Cicconi") was represented by Peter M. Saparoff, Esq., Mintz, Levin, Cohn, Ferris, Boston, MA.

Respondent William Alan King ("King") was represented by Simon S. Kogan, Esq., New York, NY.

**CASE INFORMATION**

The Statement of Claim was filed January 11, 1996.

Claimant's Uniform Submission Agreement was signed January 4, 1996.

The Joint Statement of Answer of Schroder and Dickinson was filed March 13, 1996.

Dickinson's Uniform Submission Agreement was signed March 13, 1996.

Schroder's Uniform Submission Agreement was signed July 1, 1996.

Cicconi's Statement of Answer was filed April 1, 1996.

Cicconi's Crossclaim was filed April 25, 1996.

Cicconi's Uniform Submission Agreement was signed March 11, 1996.

King's Statement of Answer was filed April 1, 1996.

King did not submit an executed agreement to arbitrate.

### HEARING INFORMATION

Hearing Dates/Sessions: March 5, 1997/two sessions  
March 6, 1997/two sessions  
March 7, 1997/two sessions

Hearing Location: NASD Regulation District Office  
Boston, MA

Hearing Dates/Sessions: May 28, 1997/two sessions  
May 29, 1997/two sessions

Hearing Location: American Arbitration Association  
Boston, MA

### CASE SUMMARY

Claimant alleged, among other things, that Respondents King, Cicconi, Dickinson and Schroder (collectively "Respondents") were negligent in the management of her account in that through misrepresentations and omissions of material fact Respondents convinced Claimant to authorize totally unsuitable investments. Claimant alleged in addition, that the unsuitable inducements resulted in a failure to diversify, improper use of margin debt and excessive trading in her account. Claimant alleged that Schroder and Dickinson failed to adequately supervise King and Cicconi resulting in an abuse of their fiduciary duties to Claimant.

Claimant alleged that she is a completely untrained and unsophisticated investor who is employed as a reading teacher. Claimant further alleged that following an inheritance of approximately \$400,000.00 she requested Respondents assist her in managing it. Claimant alleged that Respondents were informed that the funds were to be used exclusively to generate income to pay education tuition expenses of her four children, with any remaining funds after the children's education to be put towards her and her husband's retirement. Claimant alleged that on more than one occasions she expressly informed both Respondents King and Cicconi that this was all the money she had and that it must be invested in low risk funds and that she could not take chances with these funds. Claimant asserted that she trusted Respondents and the representations they made to her regarding the care they would take in managing her account.

Claimant alleged that shortly after the account was opened, King recommended that she trade in options and encouraged her to use her margin account. Claimant asserted that as she did not understand how investing worked, and based upon King's assurances that the use of options and margin debt was suitable for her, Claimant agreed. Claimant alleged that at no time did King or Cicconi explain the extent of the risk her account was subjected to and, in fact, assured Claimant that producing the income she requested could be done with low risk.

Claimant alleged that a few months later she was given an article which was very critical of Dickinson and she became very alarmed, but due to Respondents' assurances, did not pursue things any further, trusting in Respondents' representations that things would be all right. In fact, Claimant alleged that Dickinson sent her a reply to the article to allay her concerns. Then, in March 1995, King left Dickinson. Claimant alleged that Cicconi recommended that Claimant get out of options and invest in other things such as mutual funds. Claimant alleged that at that time, Cicconi said that while the return

would not be as great in mutual funds Claimant would not have to worry. Then in April 1995, Claimant asserted that King called her and informed her that she had lost money in her account because King was given incorrect information by Dickinson which he based recommendations to her on. In addition, Claimant alleged that for the first time, King admitted that options were very risky and that Dickinson stock were not good and that is why she had lost money on them.

Claimant alleged that the management of her account by Respondents was in gross violation of suitability standards required by law, and the NASD's "know your customer" rule. Claimant alleged that Respondents' actions violated the antifraud provisions of the 1933 and 1934 Securities Acts, SEC Rule 10b-5, the New Hampshire Securities Act RSA 421-B, and the regulations promulgated thereunder. In addition, Claimant alleged that Respondents acts and omissions, if not deliberate, resulted in negligence and breached the contract which Claimant had with Respondents.

Respondents Schroder and Dickinson denied any and all liability for any alleged losses asserted in the Statement of Claim. Schroder and Dickinson maintained that they are not participants in or perpetrators of any broad litany of unethical or illegal sales and trading practices enumerated in Claimant's Statement of Claim. Dickinson is a full service stock brokerage firm and they have a contractual relationship with Schroder whereby Schroder, as a clearing broker, provides clearance and settlement services for customer accounts introduced by Dickinson, the introducing broker.

Dickinson and Schroder maintained that at the time Claimant opened her account in 1994, she represented that she was 47 years old, a teacher, had a net worth of \$800,000.00, a liquid net worth of \$450,000.00, an annual income of \$140,000.00, and that she had ten years of experience investment in stocks. Dickinson and Schroder maintained that Claimant confirmed that her investment objectives were growth, short term trading and income and that she could tolerate risk. Dickinson and Schroder maintained that at no time did Claimant make the firms aware that she could not afford to lose any or all of the investment or that the money was earmarked for her children's education or her retirement. Dickinson and Schroder maintained that Claim stated a desire to have her portfolio produce \$5,500.00-\$6,000.00 per month and it required that she reallocate her assets to securities which could potentially outperform the relatively low yielding stocks she inherited. Dickinson and Schroder maintained that Claimant was fully informed about the use of a margin account and that Claimant was an active informed investor.

Dickinson and Schroder raised the affirmative defenses of a failure to state a claim upon which relief can be granted; waiver; estoppel; contributory negligence and a failure to exercise due diligence; any losses suffered were caused by or contributed to by the acts of parties over whom Dickinson and Schroder were not responsible; and the applicable statute of limitations.

King denied each and every allegation of wrong-doing as asserted which were attributed to Respondent King in the Statement of Claim. King maintained there was not excessive trading in Claimant's account for the purpose of generating commissions nor were any unauthorized trades executed in Claimant's account. King maintained that all transactions in Claimant's account were suitable for Claimant and that he made no misrepresentations nor omissions of material facts to Claimant regarding transactions in her account.

King raised the affirmative defenses of a failure to state a cause of action to justify an award; laches; each transaction was authorized and represent Claimant's own decisions; ratification; and that the Statement of Claim lacks the specificity to provide King with notice of the specific claims being made against him.

Cicconi denied all allegations of wrong-doing as asserted in Claimant's Statement of Claim. Cicconi maintained that in October 1994 senior members of Dickinson Compliance and Management, including Lyle Perlmutter ("Perlmutter"), met with Cicconi and King to review the Meehan account and that King's investment proposals for Claimant were approved by Dickinson Compliance and Management. In addition, Cicconi maintained that Dickinson senior management indicated that they were going to monitor all activity in Claimant's account as well. Cicconi maintained that Perlmutter -- not Cicconi -- signed Claimant's new account form and the Options Agreement. Cicconi maintained that Perlmutter signed off on all options trading in Claimant's account since Perlmutter was the registered options principal.

Cicconi raised the affirmative defenses of a failure to state a claim; failure to allege fraud with particularity; assumption of risk; contributory negligence; waiver; ratification; acquiescence and estoppel. In addition, Cicconi stated that he reasonably complied with all procedures, policies, practices, decisions and instructions of Dickinson.

### **RELIEF REQUESTED**

Claimant requested out-of-pocket damages of \$156,712.00; margin interest of \$4,526.00; lost opportunity costs of approximately \$20,617.00; punitive damages; and the costs and expenses of this arbitration including attorney's fees.

Respondents Dickinson and Schroder requested that Claimant's claims be dismissed in their entirety and costs be assessed to Claimant.

Respondent King requested an entry of an award dismissing the claims and that the costs and disbursements of this proceeding be assessed to Claimant.

Respondent Cicconi requested that no award be entered in favor of Claimant against him or that any award be reduced by the percentage to which Claimant's negligence contributed to any losses or damages allegedly suffered. Respondent Cicconi also sought an award against Dickinson with respect to his legal fees, costs and expenses and any amounts of settlement paid or awards assessed against Respondent Cicconi. Finally, Respondent Cicconi sought an award against Dickinson for contribution if Respondent Cicconi were to be held liable to Claimant for any award.

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

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.

Pursuant to the by-laws of the NASD and Rule 10301 of the NASD Regulation Code of Arbitration Procedure, the panel determined that Respondent King was required to submit to this arbitration notwithstanding his failure to file an executed Submission Agreement. Therefore, King is bound by the panel's rulings and determinations.

After consideration of the Motion to Adjourn submitted by Respondent King and the responses of all other parties, the panel granted Respondent King's Motion to Adjourn the hearing days scheduled for November 21, 1996 and November 22, 1996.

During the hearing on May 28, 1997, Respondents' counsel made a joint request to Arbitrator Malcolm Maples that he recuse himself from the panel. After deliberation, Arbitrator Maples granted their request and recused himself. Thereupon, all parties agreed that the arbitration proceedings should go forward with the remaining two arbitrators and all parties therefore elected not to request the NASD Regulation to appoint a replacement arbitrator for Arbitrator Maples.

At the hearing on May 29, 1997, the panel considered Respondent Schroder's Motion to Dismiss and the Responses of the other parties, and granted the motion. Therefore, Schroder was dismissed from the further proceedings in the arbitration.

Also at the hearing on May 29, 1997, Respondent Cicconi, on the record, dismissed the cross claims against Dickinson.

The panel granted the parties' request that they submit documents and post-hearing briefs in response to requests from the parties and the panel. The date for the completion of these submissions was June 20, 1997, whereupon the record was closed except for the issuance of this award.

### DISCUSSION & RATIONALE

The panel makes the following observations, not for the purposes of expressing findings of fact or legal conclusions, but in order to explain key elements of the rationale behind the award.

The central claims of this case were allegations by Claimant that Respondent King and Respondent Cicconi, acting as registered representatives of Respondent Dickinson, recommended unsuitable transactions in securities and engaged in churning. Claimant asked for damages of \$161,328.00 plus opportunity costs, attorney's fees, costs and punitive damages. In the course of the arbitration, there were also suggestions that Respondent King engaged in unauthorized trading in this account. Because these allegations were not pled, the panel did not consider them, although it took the underlying facts into account in considering the unsuitability and churning claims.

Although the panel found Claimant to be a credible witness, it also found that she knew or should have known that her investment goals could not be achieved without the acceptance of some risk and that her investment portfolio involved some risk. The panel also found, however, that some of the recommendations made by Respondent King were not suitable for Claimant in light of her lack of sophistication and investment experience, investment objectives, financial situation, and needs. The panel noted that Respondents King and Dickinson combined Claimant's inheritance with her husband's income and assets on the new account documents even though the account was solely in Claimant's name:

- (a) The account was excessively concentrated in three speculative and/or high risk stocks: American Sensors, Inc., Autotote, Inc. and Telefonos de Mexico SA.
- (b) The account was invested in Dickinson's holding company, Dickinson Holding Corp, with no effort to ameliorate the conflict of interest.
- (c) Shares of Designs Inc. were sold on November 21, 1994 and repurchased only 17 days later.

After considering all of the testimony and evidence, the panel found that Respondent King either knew these recommendations were unsuitable or acted with a reckless disregard of the obvious risks and

dangers inherent in them. The panel also found that Respondent Dickinson failed to supervise Respondent King in his making of unsuitable recommendations. In this regard, the panel notes that Dickinson was almost immediately aware that this account presented special compliance issues, but effective steps to monitor Respondent King's activities were not taken. Under these circumstances, the large number of trades in risky stocks by an unsophisticated investor, the questionable use of margin borrowing, the high returns needed to cover costs of trading, and the existence of questionable trades (including the above-mentioned in-and-out trades in Designs, Inc. and an investment in Respondent Dickinson's holding company) should have alerted Respondent Dickinson that its supervisory efforts were inadequate.

No allegations of wrong-doing were pled or otherwise alleged against Respondent Schroder. Thus, the panel dismissed the claims against it. The panel did not find any compelling evidence that Respondent Cicconi was legally responsible for Claimant's losses.

The panel has calculated damages based on the losses resulting from the unsuitable recommendations:

American Sensors, Inc.	\$ 55,187.50
Autotote, Inc.	27,800.00
Designs, Inc.	2,050.00
Dickinson Holding Corp.	8,875.00
Telefonos de Mexico SA	<u>29,950.95</u>
Total Loss	\$123,863.45

Under all of the circumstances of the case, the panel declined to award Claimant compensation for failure to realize market gains, pre-award interest, attorney's fees, costs or punitive damages.

#### AWARD

Therefore, the panel, after considering the pleadings, the testimony and the evidence presented at the hearing as well as the post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. That Respondents William King and Dickinson & Co., are jointly and severally liable to and shall pay damages to Claimant of \$123,863.45.
2. That Respondents William King and Dickinson & Co. are jointly and severally liable to and shall pay to Claimant ten percent (10%) simple interest per annum on the full amount of this award if not paid within thirty (30) days of receipt of this award, which interest shall commence thirty days from the date of receipt on the full amount or any unpaid portion thereof.
3. That Respondents William King and Dickinson & Co. are jointly and severally liable to and shall reimburse directly to Claimant the \$900.00 hearing session deposit which Claimant submitted to the NASD Regulation.
4. That the claims against Respondent Schroder Wertheim & Co., Inc. are dismissed.
5. That the claims against Respondent Kethe Cicconi are denied.

6. That the claims for a failure to realize market gains or lost opportunity and pre-award interest are denied.
7. That the claim for punitive damages is denied.
8. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of Forum Fees as specified below.
9. That any and all relief not specifically addressed herein is denied.

**FORUM FEES**

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

10 sessions x \$750.00 = \$7,500.00

Forum Fees are assessed to Respondent Dickinson & Co. Respondent shall receive credit for the \$900.00 hearing session deposit previously submitted to the NASD Regulation by Claimant, and reimbursed to Claimant by Respondent Dickinson & Co., leaving a net Forum Fees assessment due from Respondent Dickinson & Co. of \$6,600.00.

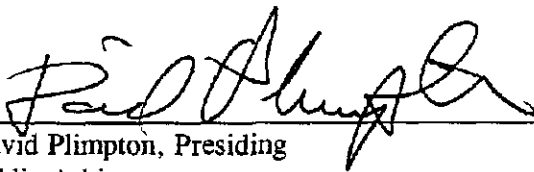
Pursuant to Rule 10333, Respondents Dickinson and Schroder are each assessed a member surcharge of \$350.00.

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

DATE

CONCURRING ARBITRATORS' SIGNATURES

7/3/97

  
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David Plimpton, Presiding  
Public Arbitrator

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John M. Baker  
Industry Arbitrator

Date Decision Served by NASD Regulation:

July 11, 1997

6. That the claims for a failure to realize market gains or lost opportunity and pre-award interest are denied.
7. That the claim for punitive damages is denied.
8. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of Forum Fees as specified below.
9. That any and all relief not specifically addressed herein is denied.

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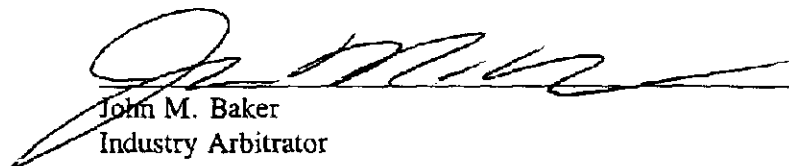
**DATE**

**CONCURRING ARBITRATORS' SIGNATURES**

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David Plimpton, Presiding  
Public Arbitrator

7/7/97

  
John M. Baker  
Industry Arbitrator

Date Decision Served by NASD Regulation:

July 11, 1997