

**Award**  
**NASD Regulation, Inc.**

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In the Matter of the Arbitration Between:

Gregory H. Madding and Murray G. Bodine, (Claimants) vs. First Security Van Kasper, Inc. and First Security Corporation, (Respondents).

Case Number: 99-02645

Hearing Site: San Francisco, California.

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**REPRESENTATION OF PARTIES**

Gregory H. Madding and Murray G. Bodine hereinafter collectively referred to as "Claimants": Jeffrey R. Chanin, Esq., Keker & Van Nest, San Francisco, California.

First Security Van Kasper, Inc. and First Security Corporation hereinafter collectively referred to as "Respondents": Michael J. Lawson, Esq., Steefel Levitt & Weiss, San Francisco, California.

**CASE INFORMATION**

Statement of Claim filed on or about: June 8, 1999.

Greg Madding signed the Uniform Submission Agreement: June 8, 1999.

Murray Bodine signed the Uniform Submission Agreement: June 14, 1999.

Statement of Answer filed by Respondents on or about: August 23, 1999.

First Security Van Kasper executed the Uniform Submission Agreement: July 20, 1999.

First Security Corp. executed the Uniform Submission Agreement: July 19, 1999.

**CASE SUMMARY**

**Claimants' Case Summary**

Claimants Greg H. Madding and Murray G. Bodine assert five causes of action against Respondents First Security Van Kasper – breach of contract, breach of the covenant of good faith and fair dealing, conversion, failure to pay wages, and unfair business practices, and one cause of action, conversion, against its corporate parent, Respondent First Security Corporation. These claims arise from the willful refusal of Respondent First Security Van Kasper's predecessor-in-interest, Van Kasper & Company ("VKCO"), (1) to convey to each Claimant 6,000 shares of VKCO stock immediately before the February 12, 1999 merger with First Security Corporation and (2) to allow each Claimant to purchase an additional 13,785 shares of VKCO stock at the "annual offering price" of \$16.52 per share immediately before the merger.

Under the express terms of Claimants' Employment and Equity Agreement with VKCO, Claimants each were entitled to a "Special Bonus" whereby each could increase his 1.5% equity interest in VKCO to a 3% equity interest by receiving (1) 6,000 fully-paid shares of VKCO stock

(the "Fully-Paid Shares"), and (2) an option to purchase additional shares of VKCO stock, at the offering price "as set annually by the [VKCO] Board of Directors," as needed to bring his individual holdings to 3% (the "Additional Shares"). The Special Bonus became due immediately upon a change of control due to a reorganization, unless VKCO was the surviving or acquiring company in the reorganization and the reorganization plan (in this case, the Merger Agreement) specifically provided for the continuation of the Special Bonus. Neither of these exceptions existed; First Security acquired all of the stock and control of VKCO, and the Merger Agreement did not specifically provide for a continuation of the Special Bonus.

In September 1998, First Security and VKCO executed a Merger Agreement whereby First Security would acquire all of VKCO's stock for \$100 million, VKCO would become a wholly-owned subsidiary and operating division of First Security Corporation, and each VKCO shareholder would receive First Security Corporation common stock in exchange for his/her shares of VKCO stock at the close of the merger, subject to a 25% holdback to be disbursed upon the achievement of three- and four-year performance goals by the new subsidiary, First Security Van Kasper. The First Security merger, which closed on February 12, 1999, effected a change of control due to a Reorganization in which VKCO was not the surviving or acquiring company, and in which the reorganization plan did not specifically provide for continuation of the Special Bonus. Under the terms of the Merger Agreement and Claimants' October 7, 1997 Employment and Equity Agreement with VKCO, Claimants' rights to the Special Bonus were to vest immediately. VKCO honored a nearly-identical acceleration provision in the Company's Long-Term Incentive Plan ("LTIP"), permitting all of the options granted thereunder to accelerate and vest immediately.

Nevertheless, after VKCO's Board unanimously consented to the First Security Merger Agreement, VKCO first attempted to mislead Claimants about VKCO's ability to honor the Special Bonus, then threatened to terminate Claimants should they pursue their contract rights, and then reset the offering price of the Additional Shares portion of the Special Bonus so as to remove completely the entire value of the Additional Shares. At that time, the annual offering price set by resolution of the VKCO Board of Directors was \$16.52, but VKCO "offered" the Additional Shares to Claimants at \$115 per share, a price not only far in excess of the offering price "as set annually by the [VKCO] Board of Directors," but well higher than the market price of the First Security shares to be exchanged for each share of VKCO stock upon the merger. VKCO also refused to convey to Claimants until shortly before the arbitration hearing the Fully-Paid Shares portion of the Special Bonus.

Claimants therefore request: (1) a finding that Respondent First Security Van Kasper breached the October 6, 1997 Equity and Employment Agreement providing for payment of a Special Bonus upon consummation of a merger, as well as the implied, contractual covenant of good faith and fair dealing; (2) a finding that both Respondents have committed the torts of conversion, (3) a finding that Respondent FSVK wrongfully withheld Claimants' employment compensation in violation of Labor Code § 216 and committed an unfair business practice under

B&P Code § 17200, by misleading and threatening Claimants and by willfully refusing to convey Claimants' Special Bonus Shares at the agreed-upon time and at the agreed-upon price set forth in the Employment and Equity Agreement; (4) an award that Respondents convey to each of Claimants the equivalent number of shares of First Security Corporation stock as should have been exchanged for each of Claimants' Additional Shares of VKCO stock, less the proper purchase price for those shares (\$227,718), at "annual" price of \$16.52 per share; (5) additional compensatory damages, according to proof; (6) exemplary and punitive damages according to proof; (7) prejudgment interest; and (8) Claimants' actual fees and costs incurred to obtain their unpaid compensation, including their attorneys fees, which are mandatory under Labor Code § 216.

Respondents' Case Summary

1. Under the terms of Claimants' Employment and Equity Agreement (the Agreement") with Van Kasper & Company ("VKCO"), Claimants were each entitled to a "special one time bonus" of 6,000 fully-paid shares of VKCO stock if they were employed by VKCO on June 30, 2000.
2. Claimants voluntarily resigned from employment with VKCO in March, 2000. Thus, unless the special bonus was accelerated under the specific conditions described in the Agreement, Claimants are not entitled to receive the special bonus.
3. The Agreement contains a typo on page three, paragraph (b). The second line of that paragraph should read, "...the Company is not the surviving or acquiring company, and in which no plan or ..."
4. Under the Agreement, if VKCO is not the surviving or acquiring company in a Reorganization, the special bonus may be accelerated in only two circumstances: (1) under subparagraph (b) on page three, in the event of a Reorganization in which no plan or agreement respecting the Reorganization is established which specifically provides for the continuation of the special bonus and the change, conversion or exchange of stock relating to the special bonus under this agreement for securities of another corporation; or (2) under subparagraph (c) on page three, in the event of a Reorganization in which there is a reorganization agreement which undertakes to continue the special bonus and to provide for the change, conversion or exchange of the stock attributable to the special bonus, if Claimants are severed from employment by the acquiring Company, without cause.
5. The Merger Agreement between VKCO and First Security Corporation ("FSCO") undertakes to continue the special bonus and to provide for the change, conversion or exchange of stock attributable to the special bonus for FSCO securities. As a result, the special bonus did not accelerate. Because Claimants left VKCO's employment prior to June 30, 2000, they are not entitled to the special bonus, and they are not entitled to the 3% "top up" additional shares.

6. The VKCO Board, in approving the merger with FSCO, approved the "Company Share Price" as set forth in Section 3.2 of the Merger Agreement. Pursuant to Section 3.2, the "Company Share Price" was established at \$110.55 per share.
7. Upon the closing of the merger transaction on February 12, 1999, pursuant to the Merger Agreement, 6,000 shares of VKCO preferred stock for each Claimant were tendered to the exchange agent and were exchanged for FSCO shares in accordance with the exchange ratio set forth in the Merger Agreement.
8. The exchanged FSCO shares were promptly delivered into a segregated VKCO account. Those shares, together with the dividends paid with respect to those shares, have at all times been maintained in a segregated account solely for the benefit of Claimants.
9. As a matter of law, Claimants' contingent right to receive the 6,000 special bonus shares is not "wages" for the purposes of the California Labor Code.
10. Respondents are entitled to an award in their favor, dismissing all claims, with each side to bear its own attorneys' fees and costs.

#### **OTHER ISSUES CONSIDERED AND 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.

#### **FINDINGS & AWARD**

The Panel spent considerable time analyzing and interpreting the ambiguous employment agreement upon which both claimants and respondents rely in order to reach a conclusion on the merits of the dispute before them. The following analysis represents some of the reasoning the Arbitrators employed.

The first relevant section "Special Bonus" on page 2 clearly provides for a one time special bonus of fully paid unrestricted shares equal to the number of shares purchased on date of employment if Madding and Bodine were employed by VKCO on June 30, 2000. The arbitrators interpret the number of shares to be 6000 shares only. According to this paragraph, receipt of these shares is conditioned upon being employed until June 30, 2000. However, change of control due to Reorganization or Dissolution would accelerate the receipt of 6000 shares upon certain subsequent conditions. Madding and Bodine voluntarily resigned from employment with VKCO in March 2000. Thus, the Special Bonus would have to be accelerated under specific conditions described in the agreement.

The arbitrators found that Reorganization occurred on February 12, 1999 in which Van Kasper was not the surviving or acquiring company. According to the agreement when the Special Bonus is issued under paragraphs "b" or "c" describing conditions of a reorganization on page 4, Madding and Bodine may increase their holdings to 3% of the preferred shares outstanding as of June 30, 2000 (the "top up" shares), or adjusted under paragraph "c", at the offering price set annually by the Board of Directors.

The Arbitrators then analyzed both paragraphs "b" and "c". If VKCO were not the surviving company and a continuation of the special bonus plan was undertaken, section "c" of the agreement would apply. It would allow Madding and Bodine to "top up" to 3% of the outstanding preferred shares if they were terminated for no cause, a scenario which could occur if there would be a duplication of their franchise investment banking business by an acquiring company. Respondents have taken the position that this is the only instance in which the "top up" opportunity could have occurred. The arbitrators noted that if this condition occurred, paragraph "c" provides that payment for the "top up" shares needed to be made with 20 days following notice of severance. However, all the shares held would then immediately have to be tendered to the Company under the terms of the Buy/Sell Agreement. This would trigger an instant buy/sell obligation at a price set annually by the Board of Directors. This investment opportunity does not indicate any discernible financial advantage since Madding and Bodine's purchase price of the "top up" shares was also to be set annually by the Board of Directors. In any event, since Madding and Bodine were not terminated because of a duplication of their franchise business, section "c" does not apply.

The meaning of section "b" regarding the discontinuation of the agreement upon reorganization was considered by the arbitrators using both the words "or" and "and". The contract reads that the special bonus will be discontinued in case of a Reorganization in which the Company is not the surviving company or in which no plan or agreement provides for the continuation of the special bonus. If the word "and" were substituted as Respondents suggest, both conditions would have to be present for the Special Bonus to kick in. Evidence was presented which suggests a typographical error occurred in which "or" was inadvertently substituted for the word "and". Nonetheless, the Arbitrators did find that Reorganization occurred in which Van Kasper was not the surviving company, and a plan was eventually established that did provide for the continuation of the Special Bonus. Therefore, section "b" is satisfied.

If the word "or" were applied, a "top up" opportunity for Madding and Bodine would occur simply if there were a reorganization in which VKCO was not the surviving company. If that were the case, section "c" would not have to have been included in the employment agreement because the fact of whether or not a continuation of the plan for the special bonus was undertaken would be irrelevant. The only relevance would be a reorganization in which VKCO was not the surviving company. For a reorganization to have been the only criteria for Madding and Bodine to have been able to "top off" also does not comport with Madding and Bodine's

contention that they should have been able to "top up" to 3% by operation of contract on June 30, 2000 even if no reorganization occurred. Therefore, the Arbitrators rejected the theory that the only condition for acceleration of "top up" shares was a reorganization in which VKCO was the not the surviving company.

For these reasons, the Special Bonus provision of page 4 of the Employment Agreement did not issue under "b" or "c" and the Claimants are not entitled to purchase additional "top up" shares of VKCO preferred stock.

The Arbitrators believe that all parties to the Agreement were knowledgeable and sophisticated. The agreement was flawed and subject to substantial misunderstanding. The panel did not find the flawed nature of the employment agreement to be the result of fraud or other malfeasance of any party. The Arbitrators believe the Partial Compromise Agreement of February 2000 which provided for delivery of the 6000 shares (converted to the appropriate amount of First Security Corp. stock) to each Claimant and no "top up" shares to be the best expression of an equitable solution to an ambiguous agreement.

The Arbitrators, therefore, deny all claims of the Claimants. However, they grant the payment of dividends from the Effective Date of the Merger on the 6000 shares transferred to claimants pursuant to the terms of the Partial Compromise Agreement. All parties are to bear their own costs and attorney's fees.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:  
Initial claim filing fee = \$600

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter First Security Van Kasper, Inc., the member firm, is a party.

Member surcharge	= \$2,500
Pre-hearing process fee	= \$ 600
Hearing process fee	= \$4,500

### **Forum Fees and Assessments**

The Arbitrator Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Six (6) Pre-hearing session(s) with a single arbitrator x \$450 = \$2,700

Pre-hearing conference(s):    December 3, 1999    1 session;  
   December 14, 1999    1 session;  
   January 5, 2000    1 session;  
   January 13, 2000    1 session;  
   January 31, 2000    1 session;  
   March 17, 2000    1 session.

Two (2) Pre-hearing session(s) with Panel x \$1,200 = \$ 2,400

Pre-hearing conference(s):    January 19, 2000    1 session;  
   February 23, 2000    1 session.

Twelve (12) Hearing sessions x \$1,200 = \$14,400

Hearing Date(s):    March 27, 2000    2 sessions;  
   March 28, 2000    2 sessions;  
   March 29, 2000    2 sessions;  
   May 1, 2000    2 sessions;  
   May 2, 2000    2 sessions;  
   May 3, 2000    2 sessions;

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Total Forum Fees = \$19,500

1. The Panel has assessed 50% of the forum fees in the amount of \$9,750 to the Claimants.
2. The Panel has assessed 50% of the forum fees in the amount of \$9,750 to the Respondents.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested tape copies = \$205

2. Respondents requested tape copies = \$135

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 600
Forum Fees	= \$ 9,750
<u>Administrative Costs</u>	<u>= \$ 205</u>
Total Fees	= \$10,555
<u>Less payments</u>	<u>= \$ 2,005</u>
Balance Due NASD Regulation, Inc.	= \$ 8,550

2. Respondent First Security Van Kasper, Inc. is solely liable for:

Member Fees	= \$7,600
<u>Administrative Costs</u>	<u>= \$ 135</u>
Total Fees	= \$7,735
<u>Less payments</u>	<u>= \$3,235</u>
Balance Due NASD Regulation, Inc.	= \$4,500

3. Respondents First Security Van Kasper, Inc. and First Security Corporation are jointly and severally liable for:

<u>Forum Fees</u>	<u>= \$9,750</u>
Balance Due NASD Regulation, Inc.	= \$9,750

All balances are due and payable to NASD Regulation, Inc.



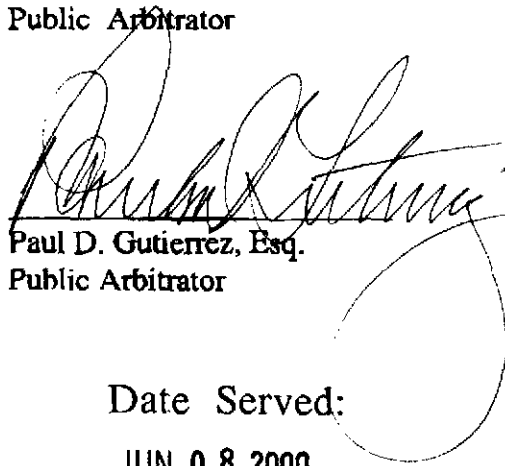
**Concurring Arbitrators' Signature(s)**

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Ruth V. Glick, Esq.  
Industry Arbitrator, Presiding Chair

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Thomas D. Reese, Esq.  
Public Arbitrator

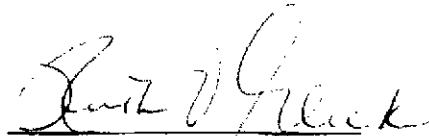
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Signature Date

  
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Paul D. Gutierrez, Esq.  
Public Arbitrator

  
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Signature Date

Date Served:  
JUN 08 2000

**Concurring Arbitrators' Signature(s)**



Ruth V. Glick, Esq.  
Industry Arbitrator, Presiding Chair

5/31/02  
Signature Date

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Thomas D. Reese, Esq.  
Public Arbitrator

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Signature Date

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Paul D. Gutierrez, Esq.  
Public Arbitrator

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Signature Date

Date Served:  
JUN 08 2000