

## AWARD

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Name of Claimant

Tom F. Trautman, individually  
and as custodian for his IRA account &  
N. Jane Gallivan Trautman

and

95-06031

Name of Respondent

Olde Discount Corporation  
Brian W. Spencer

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### REPRESENTATION OF PARTIES

Tom F. Trautman, individually and as custodian for his IRA account & N. Jane Gallivan Trautman ("Claimants") were represented by Richard H. Goldberg, Esq., Friedlob, Sanderson, Raskin, Paulson and Tourtillot, L.L.C., Denver, Colorado.

Olde Discount Corporation ("Respondent Olde") and Brian W. Spencer ("Respondent Spencer") were represented by Howard M. Klausmeier, Esq., Olde Discount Corporation, Detroit, Michigan and Ronald P. Kane, Esq. Gomberg, Kane & Fischer, Ltd., Chicago, Illinois.

### CASE INFORMATION

The Statement of Claim was filed on or about December 27, 1995. Amended Statement of Claim was filed on or about March 19, 1996. Submission Agreement of Claimants Tom F. Trautman, individually and as custodian for his IRA account & N. Jane Gallivan Trautman was signed on January 17, 1996.

Statement of Answer was filed by Respondents Olde Discount Corporation and Brian W. Spencer on or about March 7, 1996. Submission Agreement of Respondent Olde Discount Corporation was signed on January 31, 1996 by Thomas P. Fitzgerald. Submission Agreement of Respondent Brian W. Spencer was signed on March 19, 1996.

### **HEARING INFORMATION**

A pre-hearing conference was held on March 7, 1997 for one (1) session, presided by James B. Eichberg.

The hearing was held on April 29, 1997 for two (2) sessions, April 30, 1997 for two (2) sessions, May 1, 1997 for two (2) sessions, June 9, 1997 for two (2) sessions and June 10, 1997 for two (2) sessions in Denver, Colorado for a total of one (1) pre-hearing and ten (10) hearing sessions.

### **CASE SUMMARY**

Claimants alleged that Respondent Spencer recommended and advised them to purchase securities which were inconsistent with their stated investment objectives. Claimants further stated that the recommendations were made with the intent to deceive, manipulate or defraud, or in reckless disregard of their investment objectives. Specifically, Claimants alleged that the actions of Respondents constituted violations of the NASD Rules of Fair Practice, violations of the securities laws of the State of Michigan, breach of fiduciary duty, negligence, and extreme and outrageous conduct.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that Mr. Trautman stated both in writing and orally that he was an aggressive, speculative investor with over fifteen years of experience trading stocks and bonds. It was stated that Mr. Trautman specifically told Respondent Spencer that he wanted to use his individual account for aggressive speculative trading that could reap investment yields of up to \$30,000 per month. Respondents also asserted the affirmative defenses of estoppel, waiver, ratification and statute of limitations.

### **RELIEF REQUESTED**

In the Amended Statement of Claim, Claimants requested an award in their favor against Respondents Olde Discount Corporation and Brain W. Spencer, jointly and severally, as follows:

- ▶ for actual damages, under all claims, in the form of trading losses in an amount no less than \$276,273, the actual amount to be proven at the arbitration hearing;
- ▶ for damages for severe emotional distress in an amount no less than \$2,000,000, the actual amount to be proven at the arbitration hearing;
- ▶ for exemplary damages for Claims brought for breach of fiduciary duty, negligence and extreme and outrageous conduct in an amount no less than \$4,000,000, the amount to be proven at the arbitration hearing in order to punish Respondents for their oppressive, fraudulent and/or malicious conduct practiced against Claimants, and to deter future conduct from being practiced against Claimants and others;

- ▶ for reasonable attorneys' fees due to respondents' breach of fiduciary duty and violation of MSA 19.776(a)(410, MCL 451.810;
- ▶ for margin interest paid in the Claimants' account for unsuitable investments;
- ▶ for interest, as provided by law;
- ▶ for costs, expenses, and expert witness fees; and
- ▶ for such other and further relief as the Arbitration Panel deems just and proper.

Respondents requested that the claims asserted against them be dismissed in its entirety and that they be awarded their costs and attorneys' fees. Respondents further requested that all mention of the allegations be expunged from the permanent record of Brian W. Spencer.

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

At the commencement of the hearings held on April 29, 1997, Claimants' counsel clarified that the Statement of Claim should have listed N. Jane Gallivan Trautman as a Claimant relating to the joint account of Tom W. Trautman and N. Jane Gallivan Trautman. This clarification was accepted by counsel for Respondents.

At the conclusion of Claimants' case in chief, Respondents asserted a Motion to Dismiss. After considering the pleadings, the testimony and the evidence presented the Motion was granted in part by dismissing the claims in total as they relate to Tom W. Trautman, as Custodian for the Tom W. Trautman IRA, N. Jane Trautman, individually, and Tom W. Trautman and N. Jane Gallivan Trautman joint account. The only claims that remain are those of fraud, negligence, suitability, and money damages relating to the individual account of Tom W. Trautman.

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. all claims asserted in this matter shall be and hereby are dismissed and denied in their entirety. The undersigned arbitrators specifically find that the Claimant failed to meet his burden of proof that Respondents Brian W. Spencer and Olde Discount Corporation made unsuitable recommendations and/or committed fraud.

2. Each party shall bear its own costs, expenses and fees, including attorneys' fees and expert witness fees, incurred in this matter not specifically enumerated herein.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) session x \$300 and were ten (10) sessions x \$1,500 = \$15,300 in forum fees. Pursuant to §10332(b) 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 §10332(c) of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$300 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,500 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimants Tom F. Trautman, individually and as custodian for his IRA account & N. Jane Gallivan Trautman. Claimant Tom F. Trautman shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$6,150 as forum fees. Respondent Olde Discount Corporation shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$7,650 as the balance due for forum fees.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$500 previously paid by Respondent Olde Discount Corporation.

Postponement fees in the amount of \$500 shall be and hereby are assessed to Claimant Tom W. Trautman. Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

/s/ James B. Eichberg  
James B. Eichberg  
Public Arbitrator, Presiding Chair

June 13, 1997

/s/ James E. Nesland, Esq.  
James E. Nesland, Esq.  
Public Arbitrator

June 13, 1997

/s/ Devra Perch  
Devra Perch  
Industry Arbitrator

June 13, 1997