

## **AWARD**

### **NASD Regulation, Inc. Office of Dispute Resolution**

**In the Matter of the Arbitration Between**

Ole L. Nilssen,

Claimant,

and

No. 95-06092

Olde Discount Corp.;  
Robert G. DeVita; and  
Bruce Brattin,

Respondents,

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### **REPRESENTATION OF PARTIES**

For Claimant: Ole L. Nilssen ("Nilssen") was represented by Thomas F. Burke, Esq., of Chicago, Illinois.

For Respondents: Olde Discount Corp. ("Olde"), Robert G. DeVita ("DeVita"), and Bruce Brattin ("Brattin") were represented by David T. Doyle, Esq. and Karen Brink, Esq. of Olde Discount Corp., located in Detroit, Michigan.

### **CASE INFORMATION**

Claimant's Statement of Claim was filed on: December 29, 1995.

Claimant's Response to Respondent's Motion to Dismiss was filed on: April 1, 1996.

Claimant's Submission Agreement signed on: December 9, 1995.

Respondents' Statement of Answer and Motion to Dismiss was filed on: February 29, 1996.

Olde's Submission Agreement was signed on: January 23, 1996 by Thomas P. Fitzgerald, General Counsel of Olde Discount Corp.

Mr. DeVita's Submission Agreement was signed on: February 1, 1996.

Mr. Brattin's Submission Agreement was signed on: February 2, 1996.

### **HEARING INFORMATION**

Pre-Hearing Conferences: August 20, 1996 for one (1) session.  
The hearing was held on: September 25, 1996 for two (2) sessions;  
September 26, 1996 for two (2) sessions; and  
October 23, 1996 for three (3) sessions.

Hearing Location: Chicago, Illinois.

### **CASE SUMMARY**

Claimant Nilssen alleged that Respondents made misrepresentations and omissions of material facts, failed to properly supervise, and conducted unauthorized trading. Nilssen asserted that his account's net equity fell several times, and each time Respondents would claim that such declines were only temporary and could be reversed. Finally, according to Nilssen, all trading in the account was ceased pursuant to his order. Nilssen further asserted that he agreed to open another account, but stipulated that no stocks were to be purchased with a price-to-earnings ("P/E") ratio higher than 30:1 without his approval. According to Nilssen, on January 18, 1995, DeVita purchased 4,000 shares of Stratacom, Inc. for \$146,001.75, which had a P/E ratio greater than 30:1, and which was supposed to be a day trade. Nilssen asserted that when he discovered the purchase open the next day, he instructed Respondents to sell the stock, which was done at a sale price of \$137,160.75. Claimant Nilssen made the following legal claims: (1) violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; (2) common law fraud; (3) willful and Wanton Misconduct; (4) violation of the Illinois Consumer Fraud and Deceptive Practices Act; and (5) violation of Illinois Securities Law of 1953.

Respondents Olde, DeVita, and Brattin denied the allegations set forth in the Statement of Claim. Respondents stated that Nilssen's account suffered losses due to the general market decline of mid-1994 and Nilssen's short-term trading philosophy. Respondents Olde, DeVita, and Brattin further asserted that from the time Nilssen opened his account to the time he closed his accounts, he made profits of greater than \$36,000 on investments recommended by Brattin and DeVita. Respondents Olde, DeVita, and Brattin made the following affirmative defenses: (1) Claimant has failed to state a claim upon which relief can be granted; (2) Claimant's claims are barred by the applicable statutes of limitation; (3) Claimant's claims are barred by the statute of frauds; (4) Claimant has failed to mitigate his damages; (5) Claimant's claims are barred under the doctrines of laches, waiver, estoppel and ratification; (6) Respondents' obligations, if any, to Claimant have been fully paid, satisfied and discharged; (7) Claimant's claims are barred by want or failure of consideration; (8) Claimant assumed the risk of his transactions; (9) Economic, industry, corporate and market conditions, and not Respondents were responsible for Claimant's losses, if any; and (10) Respondents acted in good

faith at all times and did not induce Claimant's investments, and thus Olde cannot be held liable as a control person.

### **RELIEF REQUESTED**

Claimant Mr. Nilssen requested an award in the amount of \$96,141.00 in compensatory damages, plus pre-judgment interest, post-judgment interest, costs, and attorney fees.

Respondents Olde, Mr. DeVita, and Mr. Brattin requested that the claims asserted against them be dismissed in their entirety, that the securities industry records of Mr. Brattin and Mr. DeVita be expunged of the claims brought against them in this matter, and that they be awarded their costs and attorney fees.

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

Respondents Olde, Mr. DeVita, and Mr. Brattin, in their pleadings, moved to dismiss the Statement of Claim on the following contentions: (1) Claimant has not suffered any damages; (2) Claimant has failed to state a claim upon which relief can be granted because Claimant's accounts are governed by Michigan Law; and (3) Claimant's claims against Respondents for transactions prior to January, 1995, must be dismissed for failure to comply with the applicable statute of limitations. Claimant Ole L. Nilssen denied these contentions, with the exception of the choice of law provision for which he sought leave to amend his Statement of Claim to assert violations of the Michigan Uniform Securities Act § 19.776. After careful consideration, the undersigned panel of arbitrators ruled on this motion and response on July 18, 1996 as follows:

1. The Panel denied Respondents' assertion that Claimant had not suffered any damages.
2. The Panel granted Respondents' motion to dismiss Claimant's legal claims based on violations of Illinois law since they did not assert causes of action under Michigan law. The Panel also granted Claimant's request to amend his Statement of Claim to substitute the new legal claim based on Michigan law that was set out in Claimant's April 1, 1996 response.
3. The Panel granted the motion to dismiss pursuant to the statute of limitations with respect to all allegedly unlawful transactions in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, except the January 18, 1995 trade by Respondent DeVita.

Claimant's post-hearing submissions contained a Motion to Amend the Pleadings to include a count based on negligence. Respondents opposed that Motion. The parties' post-hearing submissions also included statements on the interpretation of the Michigan Uniform Securities Act and their respective claims for attorneys' fees and expenses. Upon review of the Motion and the Responsive pleading filed, the Panel has determined that the Motion shall be granted.

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 NASD Regulation, Inc. Office of Dispute Resolution.

### **AWARD**

After considering all 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 Statement of Claim, and all amended claims, are dismissed with prejudice and denied in their entirety with respect to all Respondents;
2. Any record of the claims in this arbitration shall be expunged from the CRD record of Respondent Robert G. DeVita;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein;
3. All other claims and requests for relief not specifically awarded here are hereby denied with prejudice.

### **FORUM FEES**

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed: One (1) pre-hearing conference session x \$300 = \$300.00; Seven (7) hearing sessions x \$500 = \$3,500.00; Total forum fees = \$3,800.00.

Pursuant to §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$150 and shall **retain** as forum fees the hearing session deposit in the amount of \$950.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Ole L. Nilssen.

Claimant Ole L. Nilssen is liable for and shall pay forum fees in the amount of \$950.00 (One-half the \$3,800 total forum fees - \$950.00 hearing session deposit).

Respondent Olde Discount Corp. is liable for and shall pay forum fees in the amount of \$1,900 (One-half of the \$3,800 total forum fees).

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent Olde Discount Corp.

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

Dated:

/s/ David A. Youngerman, Esquire  
David A. Youngerman, Esquire  
Public Arbitrator, Presiding Chair

January 25, 1997

/s/ Sy Nagorsky, CPA  
Sy Nagorsky, CPA  
Public Arbitrator

January 27, 1997

/s/ Gwendolyn J. Bandt  
Gwendolyn J. Bandt  
Industry Arbitrator

February 4, 1997

For Dispute Resolution Use Only  
Date of Service: February 5, 1997