

FINAL ORDER

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Gerald Gudmonson,

Claimant,

v.

No. 96-02158

Olde Discount Corporation,
John Zabrocki, Lance Ziesemer, and
David Wood,

Respondents.

REPRESENTATION OF PARTIES

Claimant Gerald Gudmonson ("Claimant") was represented by Rebecca E. Bender, Esq. of Law Offices of Rebecca E. Bender, P.A. located in Minneapolis, Minnesota.

Respondents Olde Discount Corporation, John Zabrocki, Lance Ziesemer, and David Wood ("Respondents") were represented by Lisa S. Fildes, Esq. of Olde Discount Corporation located in Detroit, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about May 21, 1996.

Claimant's letter to William G. Haviland clarifying the Statement of Claim was filed on or about July 1, 1996.

Claimant's Submission Agreement was signed on March 29, 1996.

The Joint Statement of Answer was filed on or about August 29, 1996.

The Statement of Answer of David Wood was filed on or about August 5, 1996.

The Submission Agreement of Olde Discount Corporation was signed on July 24, 1996 by Thomas P. Fitzgerald, General Counsel of Olde Discount Corporation.

The Submission Agreement of John Zabrocki was signed on August 23, 1996.

The Submission Agreement of Lance Ziesemer was signed on August 19, 1996.

The Submission Agreement of David Wood was signed on August 2, 1996.

HEARING INFORMATION

The telephonic pre-hearing conference was held on April 1, 1997 for one (1) session.

The hearing was held on May 13, 1997 for one (1) session; August 20, 1997 for three (3) sessions; August 21, 1997 for two (2) sessions; and July 13, 1998 for one (1) session. The hearing location was Minneapolis, Minnesota.

CASE SUMMARY

Claimant opened a brokerage account in 1994 at Olde Discount Corporation's Minneapolis, Minnesota branch office. Olde Discount Corporation is a registered broker-dealer and member of the National Association of Securities Dealers, Inc. John Zabrocki, Lance Ziesemer and David Wood are or were registered representatives of Olde Discount Corporation. This claim arises out of securities transactions executed in that account.

In the Statement of Claim, Claimant asserted that he advised Respondents that he was looking for a steady, moderate return and was not willing to lose his principal to achieve this return. Claimant alleged that, contrary to his instructions, Respondents sold him highly speculative and risky investments including Retix, Amtech, Gentex and Netframe. Claimant contended that these investments were unsuitable based on his conservative investment objectives, net worth, and limited investment experience. Claimant also asserted that Respondents engaged in fraud and misrepresentation involving their failure to disclose the risks associated with margin trading. Claimant further contended that his account was churned or turned over 7.2 times on an annualized basis. Claimant asserted claims, including: violation of Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. §78 (j); violation of Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. §78 (t); violation of § 80A.01, et seq. of the Minnesota Blue Sky Law; breach of contract; violation of Minn. Stat. § 325F.68, et seq.; common law fraud; negligent misrepresentation/negligence; and liability against Respondents under respondeat superior.

Respondents denied all liability in the Joint Statement of Answer. Respondents alleged that Claimant was an aggressive and experienced investor who understood and acknowledged the risks involved with the investments at issue. Respondents contended that, on the account

application, Claimant represented that he had four years of trading experience, averaging 30 trades per year and 200 shares per trade. Respondents asserted that Claimant certified his annual income to be \$50,000 and combined net worth to be \$60,000. Respondents contended that the securities at issue were suitable investments which were consistent with Claimant's expressed investment objectives, risk tolerance, as well as his prior investment history. Respondents contended that they fully disclosed all risks associated with the securities at issue, as well as margin trading, and that Claimant accepted those risks. Respondents denied that the account was churned.

During the course of this proceeding, Claimant's counsel, Rebecca E. Bender, asserted that Claimant could not receive a fair hearing in the NASD arbitration forum as a result of pending litigation against the NASD involving one of Ms. Bender's other clients. Claimant's counsel alleged that the NASD, through its arbitrators and staff, was retaliating against her as the result of this pending litigation. Claimant's counsel contended that this litigation created a perceived and actual conflict with respect to her representation of Claimant in the NASD arbitration forum. Claimant also asserted that Arbitrators Bergerson and Kelly conducted the hearing in a prejudicial manner. With respect to these issues, Claimant requested: (1) that the NASD dismiss this case without prejudice to Claimant's right to re-file this case in an alternative forum; or (2) that the arbitration panel dismiss this case without prejudice to Claimant's right to re-file this case in an alternative forum; or (3) that Arbitrators Bergerson and Kelly withdraw pursuant to Canon II(e) of the Code of Ethics for Arbitrators in Commercial Disputes.

Respondents, through their counsel Lisa S. Fildes, asserted that Ms. Bender's actions represented an effort to eviscerate the value of the arbitration forum - speed, efficiency and economy - as well as to vexatiously multiply the costs of this proceeding. Respondents alleged that Claimant's counsel was responsible for multiple prior postponements and delays. Respondents contended that, on one occasion, Claimant obtained an *ex parte* Order from the Fourth District Court of Minnesota to stay one of the scheduled hearing dates. Respondents asserted that Claimant subsequently sought a temporary injunction and stay of proceedings from the Court which was denied by the Honorable Deborah Hedlund, who referred the parties to the arbitration panel. Respondents maintained that, at the scheduled hearing date, after Claimant's counsel explained to the panel why she felt the NASD was not an impartial forum, the panel nevertheless decided to go forward with the hearing. Respondents contended that Claimant's counsel could not proceed with the hearing, despite the ruling of the court and arbitration panel, because she had previously released her witnesses. Respondents alleged that Claimant's counsel requested that Arbitrator Kelly withdraw in an attempt to wrongfully delay another subsequent hearing.

As addressed in *Other Issues Considered and Decided*, Claimant's Motion for Dismissal Without Prejudice was denied the arbitration panel, and Arbitrators Bergerson and Kelly decided not to withdraw from the panel.

On July 9, 1998, Claimant filed a Motion for Adjournment of the hearing which was scheduled to reconvene on July 13, 1998. Claimant's counsel contended that she was unable to proceed as a result of her high-risk pregnancy. Claimant's counsel asserted that her doctor advised her to avoid stressful work activity, such as a four day arbitration, until the end of her pregnancy. Claimant's counsel asserted that she would not risk her baby's life in order to proceed with the hearing. In their response, Respondents contended that Ms. Bender's suggestion of medical hardship, which was withheld to the last minute, was designed to create a "Hobson's choice" for the panel, with Claimant's counsel having already tainted the process with allegations of bias. Respondents contended that, having known of her pregnancy for months, Ms. Bender had the opportunity and obligation to retain co-counsel who could go forward in the event of medical complications. After careful consideration, Claimant's Motion for Adjournment was denied by the panel.

At the July 13, 1998 hearing, Claimant's counsel made a statement reiterating her objection to proceeding in, what she viewed as, a biased NASD arbitration forum, with tainted arbitrators and NASD misconduct. Claimant's counsel also stated that she would not endanger the life of her unborn child by proceeding with the hearing. After her statement, Claimant and his counsel left the hearing, despite the panel's request that they remain. Thereafter, Respondents made a Motion for Dismissal with Prejudice on the basis that Claimant has failed to state a cause of action against Respondents and that Claimant has failed to meet his burden of proof. Respondents also requested that the panel enter an order of expungement deleting all reference to this matter from the Central Registration Depository of the NASD.

RELIEF REQUESTED

In the Statement of Claim and related correspondence, Claimant requested: out-of-pocket and market adjusted damages between \$30,000 and \$50,000; twice the amount Claimant paid in commissions; rescission; punitive damages; attorney fees; prejudgement margin interest; prejudgement interest; post-judgment interest, costs, filing fees and other disbursements; and such other relief as deemed just and equitable.

In their Statement of Answer, Respondents requested that the Statement of Claim be dismissed in its entirety with prejudice.

OTHER ISSUES CONSIDERED & DECIDED

Claimant's request that the NASD transfer this matter to the arbitration forum of the New York Stock Exchange was denied by the Director of Arbitration because the NASD lacked the authority to transfer any case to another forum, and because the NASD Code of Arbitration Procedure ("Code") does not provide for a dismissal without prejudice absent the consent of the opposing parties to the arbitration, and such consent was not given by Respondents.

Claimant's Motion To Dismiss Claimant's Case Without Prejudice was denied by a unanimous decision of the arbitration panel on July 8, 1998.

After considering the respective positions of the parties, as well as ²⁸Canon II(e) of the Code of Ethics for Arbitrators in Commercial Disputes, Arbitrators Bergerson and Kelly decided not to withdraw from the panel.

Respondents' Motion for Sanctions and Costs was denied at the conclusion of the July 13, 1998 hearing.

Respondents' request that the panel enter an order of expungement deleting all reference to this matter from the Central Registration Depository of the NASD was also denied at the conclusion of the July 13, 1998 hearing.

FINAL ORDER

The undersigned arbitrators have unanimously decided in full and final resolution of this matter as follows:

- (1) That Respondents' Motion to Dismiss with Prejudice is hereby GRANTED;
- (2) That other than forum fees which are specified below, the parties shall each bear their own costs, attorney fees and expenses incurred in this matter; and
- (3) That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each pre-hearing conference, if any. There were seven (7) hearing sessions x \$500 = \$3,500 in forum fees. There was one (1) pre-hearing conference x \$300 = \$300 in forum fees. Total forum fees = \$3,800. Pursuant to §10332(b) of 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 §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 refund the hearing session deposit in the amount of \$500 previously deposited by the Claimant.

Pursuant to §10332(c) of the Code, Respondent Olde Discount Corporation is liable for and shall pay all forum fees in the amount of \$3,800.

Pursuant to Rule 10333 of the Code, Respondent Olde Discount Corporation has paid to NASD Regulation, Inc. the \$300 member surcharge previously invoiced.

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

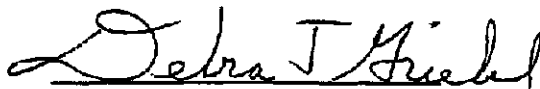
Concurring Arbitrators' Signatures:


David R. Bergerson, Esq.

Chairperson

Public Arbitrator

7/15/98
Dated:



Debra Jean Griebel

Panelist

Public Arbitrator

7-20-98
Dated:



John Robert Kelly

Panelist

Industry Arbitrator

7/16/98
Dated:

For NASD Regulation use only:
Date Final Order served on parties:

July 21, 1998