

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

John Wesley Key

Names of Respondents

**Olde Discount Corporation
Ted Harter**

**96-05397
Master File**

CONSOLIDATED WITH

In the Matter of the Arbitration Between

Name of Claimant

John Wesley Key

Names of Respondents

**Olde Discount Corporation
Edward B. Harter
John P. Donovan**

98-01100

REPRESENTATION

For Claimant: Jeffrey P. Coleman, Esq. of Bonner, Hogan & Coleman, P.A., Clearwater, Florida until his withdrawal on or about September 9, 1997. Thereafter, on October 15, 1997, Claimant's representative was Norman Meyers of Tampa, Florida, until his withdrawal on or about January 15, 1999. Thereafter, J. Benton Stewart, II, Esq. of Clark, Charlton, Martino & Borders, P.A., Tampa, Florida entered an appearance on behalf of Claimant.

For Respondent Olde Discount Corporation ("Olde"): Donald P. Wray, Jr., Assistant Vice President and Corporate Attorney, Olde Discount Corporation, Detroit, Michigan.

Respondent Edward B. Harter f/k/a Ted Harter ("Harter") did not appear.

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For Respondent John P. Donovan ("Donovan"): Thomas H. McLain, Jr., Esq. of Fisher & Sauls, P.A., St. Petersburg, Florida.

CASE INFORMATION

Statement of Claim filed in NASD Arbitration Number 96-05397: December 6, 1996.

Statement of Claim filed in NASD Arbitration Number 98-01100: March 24, 1998.

Claimant's Submission Agreement signed: March 16, 1998.

Respondent Olde's Statement of Answer filed: May 12, 1997.

Respondent Olde's Submission Agreement signed: June 25, 1998.

Respondent Harter did not file a Statement of Answer.

Respondent Harter did not execute a Submission Agreement.

Respondent Donovan's Statement of Answer and Cross-Claim against Respondent Olde filed: July 6, 1998.

Respondent Donovan's Submission Agreement signed: June 27, 1998.

HEARING INFORMATION

On June 19, 1997, August 21, 1998, December 4, 1998, January 15, 1999 and February 11, 1999, the arbitration panel conducted telephonic pre-hearing conferences which lasted one (1) session each.

On April 8, 1999, the evidentiary hearing which lasted three (3) sessions was conducted in Tampa, Florida.

CASE SUMMARY

Claimant alleged the following: Respondents acted in total disregard of Claimant's stated investment objectives and deceived Claimant by inducing him to sign a blank second new account form and margin agreement. Instead of opening an IRA account, Respondents opened a margin account and recklessly proceeded to purchase, without authorization, \$197,000.00 worth of highly speculative stocks. Claimant suffered severe losses to his principal, incurred a federal tax liability and had to pay margin interest due to Respondents' reckless actions. Respondents' tortious acts were egregious.

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Respondent Olde asserted the following: Claimant's allegations represent nothing more than an attempt to hold Respondent Olde and its brokers responsible for losses incurred as a result of Claimant's own investment strategy. Throughout the life of the account, Claimant directed all of his trading activity and understood the attendant risks. Claimant now wants to blame Respondent Olde for uncontrollable market swings and for his own faulty investment decisions. The facts in this case make clear that neither Respondent Olde or its brokers can be held liable for Claimant's losses.

Respondent Donovan alleged that he has been improperly named as a party since the Statement of Claim in NASD Arbitration Case Number 98-01100 does not suggest that he committed any fraudulent or unfair practices with respect to Claimant's account. Respondent Donovan alleged that he was named solely as a supervising employee which, as a matter of law, does not subject him to personal liability.

Respondent Donovan asserted a cross-claim for contribution and/or indemnification against Respondent Olde as follows: There are no allegations in the Statement of Claim that Respondent Donovan took any actions or failed to act in any way outside the course and scope of his employment. Therefore, Respondent Donovan is without fault, and any liability would be the sole responsibility of Respondent Olde.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$134,660.25, treble punitive damages in the amount of \$269,320.50, margin interest of \$1,287.00, administrative fees, costs and attorneys' fees.

Respondent Olde requested that the claim be dismissed in its entirety.

Respondent Donovan requested a dismissal of all claims asserted against him. Further, Respondent Donovan requested contribution and/or indemnification from Respondent Olde in the event he is found liable to the Claimant.

OTHER ISSUES CONSIDERED & DECIDED

On September 12, 1997, Claimant filed a motion to postpone the hearings scheduled to commence on September 29, 1997 which was granted by the panel. The panel assessed the \$750.00 postponement fee against the Claimant.

On December 2, 1998, Respondent Olde filed a motion to postpone the hearings scheduled to commence on December 7, 1998 which was granted by the panel. The panel assessed the \$750.00 postponement fee against the Respondent Olde.

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On December 7, 1998, the arbitration panel ordered Respondent Olde to reimburse arbitrator Peter Boyd his travel expenses in the sum of \$522.00 which he incurred when he flew from New York to Florida in anticipation of the hearings scheduled to commence on December 7, 1998, which were subsequently postponed at the request of Respondent Olde.

On January 14, 1999, Respondent Olde filed a motion to postpone the hearings scheduled for January 18, 1999 which was granted by the panel. The panel assessed the \$1,000.00 postponement fee against the Claimant.

On February 10, 1999, the Claimant filed with NASD Regulation, Inc. a notice of dismissal, with prejudice, with respect to Respondent Donovan.

On April 6, 1999, Respondent Olde filed a motion to recuse the arbitration panel. The motion alleged that the panel's order which required Respondent Olde to reimburse arbitrator Peter Boyd for travel expenses he incurred as a result of the postponement of the hearings scheduled to commence on December 7, 1998 reflected sufficient bias to justify a finding of arbitrator misconduct and alleged appearance of bias. On April 6, 1999, Claimant filed an opposition to the motion to recuse. On April 7, 1999, the arbitration panel denied the motion to recuse.

At the evidentiary hearing on April 8, 1999, Respondent Olde renewed their motion to recuse the panel based on an alleged appearance of bias due to the panel's December 7, 1998 ruling. The panel reaffirmed its April 6, 1998 ruling denying Respondent Olde's motion to recuse the arbitration panel and reaffirmed their ability to remain fair and impartial. The panel based its ruling on The Arbitrator's Manual, Cannon II (E)(2), in that the challenge was not substantial, all arbitrators stated they could decide the case based solely on the evidence and law, and withdrawal would cause unfair delay. Thereafter, Respondent Olde left the hearing room and pursuant to Rule 10318 of the NASD Code of Arbitration Procedure ("Code"), the arbitration panel determined to continue with the hearing without Olde present.

Further, at the evidentiary hearing on April 8, 1999, the arbitration panel reaffirmed its ruling on December 7, 1998, directing Respondent Olde to reimburse arbitrator Peter Boyd his travel expenses. The arbitrators determined that Respondent Olde should reimburse arbitrator Peter Boyd the sum of \$334.00 rather than \$522.00, pursuant to 3rd. ed. Moore's Federal Practice, Vol. 7, Sec. 37.23 and 37.51(9)(d), (10); and, Wright, Miller & Marcus, Federal Practice and Procedure, Vol. 8A, Sec. 2284.

Claimant's counsel stated at the evidentiary hearing on April 8, 1999, that an award against Harter was not sought.

The panel strongly recommends that the Central Registration Depository ("CRD") record of Respondent Harter reflect the fraud, unsuitable investments and violations of fiduciary responsibility proven in this case. Further, the panel strongly recommends that NASD Regulation, Inc. appoint an independent special master to closely monitor Respondent Olde's

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compliance procedures because of its proven and recurrent fraudulent practices, failure to supervise and failure to follow its own operating procedures.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Respondent Olde is found liable and shall pay to the Claimant compensatory damages in the amount of \$47,927.00, pre-judgment interest specifically excluded.

Respondent Olde is found liable and shall pay to the Claimant punitive damages in the amount of \$67,696.00. Punitive damages are awarded pursuant to Mastrobuono vs. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Davis vs. Prudential Securities, Inc., 59 F. 3rd 1186 (11th Cir. 1995); and, Olde Discount Corp. vs. Dartley, 218 N.J.L.J. 114, p.26, Col.6 (N.Y. Sup.Ct. 1997).

All claims against Respondent Harter are dismissed with prejudice.

Respondent Donovan's cross-claim is dismissed with prejudice.

All issues of entitlement to and amount, if any, of attorneys' fees and costs are referred to a court of competent jurisdiction.

Respondent Olde is found liable and shall pay to arbitrator Peter Boyd the sum of \$334.00 representing reimbursement of the expenses he incurred for travel to the hearings scheduled to commence on December 7, 1998 and thereafter adjourned (see "Other Issues").

FORUM FEES

Pursuant to Rule 10332(c) of the Code, forum fees in the amount of \$6,000.00 (3 sessions x \$750.00 plus 5 pre-hearing conferences with the panel x \$750.00) are assessed as follows:

Respondent Olde is assessed the amount of \$6,000.00 for which NASD Regulation, Inc. shall retain the sum of \$750.00 previously deposited by Respondent Olde in partial satisfaction thereof leaving a balance due in the sum of \$5,250.00.

OTHER FEES

Pursuant to Rule 10332(a) of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$200.00 in NASD Arbitration Case Number 96-05397.

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Pursuant to Rule 10332(a) of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$200.00 in NASD Arbitration Case Number 98-01100.

Pursuant to Rule 10319(b) of the Code, Claimant has paid to NASD Regulation, Inc. the \$750.00 postponement fee for the hearings scheduled to commence September 29, 1997.

Pursuant to Rule 10319(b) of the Code, Claimant shall pay to NASD Regulation, Inc. the \$1,000.00 postponement fee for the hearings scheduled to commence January 18, 1999.

Pursuant to Rule 10333(a) of the Code, Respondent Olde has paid to NASD Regulation, Inc. the \$350.00 member surcharge previously invoiced in NASD Arbitration Case Number 96-05397.

Pursuant to Rule 10333(a) of the Code, Respondent Olde has paid to NASD Regulation, Inc. the \$1,500.00 member surcharge previously invoiced in NASD Arbitration Case Number 98-01100.

Pursuant to Rule 10319(b) of the Code, Respondent Olde has paid to NASD Regulation, Inc. the \$750.00 postponement fee for the hearings scheduled to commence December 7, 1998.

Pursuant to Rule 10333(d) of the Code, Respondent Olde shall pay to NASD Regulation, Inc. the \$200.00 pre-hearing process fee.

Pursuant to Rule 10205(a) of the Code, Respondent Donovan shall pay to NASD Regulation, Inc. the cross-claim filing fee of \$500.00.

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

Concurring Arbitrators' Signatures

_____/S/
John R. Phillips, Esq.

Public/Industry

_____/S/
Peter H. Boyd

Public/Chairman

_____/S/
Thomas R. Carlsen

Public/Panelist

Industry/Panelist

Date of Decision: June 3, 1999

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Pursuant to Rule 10333(d) of the Code, Respondent Olde shall pay to NASD Regulation, Inc. the \$200.00 pre-hearing process fee.

Pursuant to Rule 10205(a) of the Code, Respondent Donovan shall pay to NASD Regulation, Inc. the cross-claim filing fee of \$500.00.

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

Concurring Arbitrators' Signatures

John R. Phillips, Esq.

Public/Industry

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Public/Panelist

Thomas R. Carlson

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Pursuant to Rule 10319(b) of the Code, Claimant has paid to NASD Regulation, Inc. the \$750.00 postponement fee for the hearings scheduled to commence September 29, 1997.

Pursuant to Rule 10319(b) of the Code, Claimant shall pay to NASD Regulation, Inc. the \$1,000.00 postponement fee for the hearings scheduled to commence January 18, 1999.

Pursuant to Rule 10333(a) of the Code, Respondent Oide has paid to NASD Regulation, Inc. the \$350.00 member surcharge previously invoiced in NASD Arbitration Case Number 96-05397.

Pursuant to Rule 10333(a) of the Code, Respondent Oide has paid to NASD Regulation, Inc. the \$1,500.00 member surcharge previously invoiced in NASD Arbitration Case Number 98-01100.

Pursuant to Rule 10319(b) of the Code, Respondent Oide has paid to NASD Regulation, Inc. the \$750.00 postponement fee for the hearings scheduled to commence December 7, 1998.

Pursuant to Rule 10333(d) of the Code, Respondent Oide shall pay to NASD Regulation, Inc. the \$200.00 pre-hearing process fee.

Pursuant to Rule 10305(a) of the Code, Respondent Donovan shall pay to NASD Regulation, Inc. the cross-claim filing fee of \$500.00.

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

Concurring Arbitrators' Signatures

Public/Industry

John R. Phillips, Esq.

Public/Chairman

Peter H. Boyd

Public/Panelist

Thomas R. Carlson

Industry/Panelist

8.9.00 5/25/99
Date of Decision: