

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Reatha M. Swanagan;
Leonard Gene Swanagan; and
Talmadge F. Swanagan

98-00087

Name of Respondents

Olde Discount Corporation; and
Anthony Ducato

REPRESENTATION

For Claimants: Reatha M. Swanagan; Leonard Gene Swanagan; and Talmadge F. Swanagan ("Swanagan" or "Claimants") were represented by Daniel A. Edelman, Esq. and Sheila A. O'Laughlin, Esq., of Edelman & Combs, located in Chicago, Illinois.

For Respondents: Olde Discount Corporation ("Olde") and Anthony Ducato ("Ducato") were represented by Kurt W. Lofgren, Esq. and Donald Wray, Esq. of Olde Discount Corporation, located in Detroit, Michigan.

CASE INFORMATION

Statement of Claim filed: January 9, 1998.

Claimant's Submission Agreement signed on: January 5, 1998.

Statement of Answer filed by Respondents on: May 21, 1998.

Respondent Olde's Submission Agreement signed on: April 9, 1998.

Respondent Ducato's Submission Agreement signed on: May 14, 1998.

HEARING INFORMATION

Pre-Hearing Conference: September 29, 1998 for one session before the panel.

Hearing Dates/Sessions: January 12, 1999 for two sessions;
January 13, 1999 for two sessions;
January 14, 1999 for two sessions;
February 2, 1999 for two sessions; and
February 14, 1999 for two sessions.

Hearing Location: Chicago, Illinois

CASE SUMMARY

Claimants alleged that Respondent Ducato, while employed by or acting as an agent for Respondent Olde, induced the Swanagans to purchase securities which were unsuitable given their prior investment experience, account objectives and lifestyle. It was alleged that as part of this activity, the account application was falsified to indicate the Swanagans were suitable for such investments and numerous short-term transactions were entered. The Claimants further alleged that the equity in the account was reduced by approximately \$70,000 as a result of the decline in the speculative securities and because of margin calls.

Respondents denied the material allegations of the claim, alleging that Swanagans were informed and knowledgeable investors who were fully aware of the risks of their chosen trading strategy. As asserted in the answer, all trading was pursuant to the Claimants' directives, including the change in the customer profile which occurred in response to the Claimants' decision to trade more aggressively. At that time, letters were sent advising the Claimants to notify the firm if the changes on the profile were inaccurate. No answer was received. In addition, it was alleged that no complaints were received about the handling of the account either verbally or in writing. Respondents also asserted several affirmative defenses.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for compensatory damages of \$70,000.00; punitive damages; and attorney's fees.

Respondents requested that the claim be dismissed.

OTHER ISSUES CONSIDERED & 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. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

A Claimant's Hearing Memorandum, that was withdrawn during argument on a motion to preclude, had been distributed to the panel chairman and completely read by him before the first hearing. That memorandum was re-submitted as a post hearing memorandum and timely reviewed for changes from the earlier submission.

The S.E.C. Release Issue 98-00175 was completely read by the panel chairman during the evening following the hearing session in which the panel received it.

Corporation is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$5,000.00 as additional forum fees. Fees are payable to the NASD Regulation, Inc., Office of Dispute Resolution.

Concurring Arbitrators' Signatures

Name

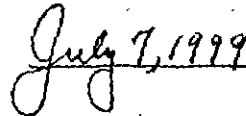
Date



Bradford S. Allen, Esq.

Public Arbitrator

Chairperson



Brian M. Sepe
Industry Arbitrator

Dissenting Arbitrator's Opinion and Signature

I would award the claimants Swanagans the following against the respondents Olde Discount Corporation and Anthony Ducato:

1. \$26, 000 for the reduction in the principal of their investment
2. Punitive damages in the amount of \$78,000 (three times the amount of the reduction of their principal)
3. Attorney fees in the amount of \$10,000 that would be payable to the Claimants' attorneys
4. The Payment of the forum fees by the respondents Olde Discount Corporation and Anthony Ducato:

Background

At the end of the final hearing on February 14, 1999 the claimants' Claimants' Post Hearing Memorandum was admitted into evidence by the Chair Arbitrator. Immediately after the conclusion of this final hearing an executive session was held by the three arbitrators at which time the Chair Arbitrator and the Industry Arbitrator voted to deny the claims of the claimants. This vote was made by these other two arbitrators without either of these two other arbitrators having read Claimants' Post Hearing Memorandum.

In addition it is the information and belief of this dissenting arbitrator that neither of these other two arbitrators read the Securities and Exchange Release Issue 98-175 ("SEC Issue 98 - 175") dated September 10, 1998 which was also admitted into evidence. SEC Issue 98-175 concerned an administrative order that found that the respondent Olde's

" . . . compensation, production, hiring and training policies combined

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Concurring Arbitrators' Signatures
Name

Date

Bradford S. Allen, Esq.
Public Arbitrator
Chairperson

Brian M. Sepe
Brian M. Sepe
Industry Arbitrator

7/16/99

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The industry arbitrator's casual comment, referred to by the dissenting arbitrator, was understood by the panel chairman, when said, as meaning no more than that he was impressed with the candor and professionalism of the young broker (not the Respondent Ducato) who had testified.

The panel chairman's N.A.S.D.R. arbitrator profile (distributed to all parties) fully discloses that he has earned his living as a "self-employed-private investor" subsequent to January 1, 1987.

Following receipt of the dissenting arbitrator's opinion, the arbitrators forming the majority decision of the panel have each again read the Post Hearing Memorandum of claimants, the S.E.C. Release Issue 98-00175 and the dissenting arbitrator's opinion.

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. The statement of claim is dismissed and denied in the entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

OTHER COSTS

Pursuant to Rule 10333 of the Code, the Respondent Olde Discount Corporation has paid to NASD Regulation, Inc. the \$1,000.00 member surcharge, the \$600.00 pre-hearing process fee and the \$1,500.00 hearing process fee previously invoiced.

FORUM FEES

Pursuant to Rule 10332[c] of the Code of Arbitration Procedure, the following Forum Fees are assessed: One pre-hearing before the panel x \$500.00 = \$500.00; Ten hearing sessions x \$500.00 per session = \$5,000.00; Total Forum Fees = \$5,500.00.

The NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$150.00 claim filing fee and, as forum fees, the \$500.00 hearing session deposit paid by the Claimants, Reatha M. Swanagan, Leonard Gene Swanagan and Talmadge F. Swanagan. In addition, Olde Discount

to create an environment in which certain Olde registered representatives engaged in a variety of sales practice abuses such as churning customer accounts, effecting unauthorized and unsuitable trades, and misrepresenting and omitting to disclose material facts to customers."

Arbitration Panel

The arbitration panel was stated to the claimants and respondents to consist of three arbitrators: two public arbitrators one of whom is this dissenter and the other who was the chairperson. The third arbitrator was stated to be an industry arbitrator.

During the executive sessions of this arbitration panel on February 2 and 14, 1999 the person who was the industry arbitrator stated that he intended to hire a person who was a witness called by the respondent. The chairperson "public" arbitrator states that he makes his living from investments and does not any longer practice law.

Reasons for this Dissent

The claimants include a retired married couple Reatha Swanagan and Talmadge Swanagan and their son Leonard Swanagan. The source of the "money" entrusted to the Respondents was Reatha Swanagan's retirement stock from her former employer GTE. Respondent Anthony Ducato admitted during the hearings that GTE was a blue chip stock.

Near the end of the four year time period during which the claimants had a relationship with the respondents the Swanagans become concerned because a friend of their son Leonard mentioned that margin accounts were risky and that both their [his parents'] "retirement money" and that they [the whole family] " had no business " being involved in such transactions.

The Swanagans lived in a lower income community "Maywood" located near the City of Chicago and through which a major freeway runs that connects Chicago with the rest of the metropolitan area. Olde and Ducato did not have any other customer that lived in this Maywood community.

Reatha Swanagan did not have any prior investment experience and her jobs throughout her life consisted of working as a factory worker or as a food service worker.

Her husband Talmadge operated a small family "business" out of their home which was a unincorporated sole proprietorship. At tax time Talmadge took the receipts - kept in a box at their home - and gave them to a unrelated third person who prepared their personal federal income tax returns without any affirmative or active participation by one of the Swanagans.

Leonard testified that he took engineering classes at a college. However Leonard neither finished college nor did he complete any engineering program. Also Leonard Swanagan has not held any financial, engineering or office jobs.

Respondents prepared "Special Ventures authorization" letter(s) that Olde and Anthony Ducato had the Swanagans sign. The "Special Ventures authorization" concerned risky stocks - not blue chip stocks. The respondents executed day and monthly trading after receiving this special ventures letter. This "authorization" did not mention or otherwise disclose that Olde and DuCato would get a commission of 33 per cent on such transactions instead of a 20 per cent commission that the respondents would otherwise receive. See the Securities and Exchange Commission Release mentioned above that states - at page 13 - that states this lack of disclosure was not proper.

The application forms for the accounts and the CPU for the accounts - while signed by the Swanagans - were only partially completed by the Swanagans. Much of the information on these forms was filled in by the respondent Anthony Ducato or other Olde employees. Mr. Ducato has a bachelor's degree in business administration with a pre-law from DuPaul University.

The information on such application forms and CPU's was not correct but rather overstated the net worth and liquid assets of the Swanagans. The form for one year states the gross income of Talmadge Swanagan to be \$60 K whereas the net income from such "business" was actually less than \$1 K as reported on the Swanagan's federal Schedule C.

Reatha Swanagan attended some first year college classes in Mississippi - over forty years ago - when she was a young person - but never completed college. Reatha never worked in any clerical, administrative or office job. During her wage earning years Reatha worked as either a factory worker or as a food service worker.

The Olde application form statements and the CPU statements to the effect that the Swanagans had 22 years of experience of trading were not accurate. The only exposure to stocks that any of the Swanagans had before their relationship with the respondents was Reatha Swanagan's receipt of her employer's stock and receipt of dividends from this employer's [GTE] stock. Reatha Swanagan worked for FTE for 18 years as a food service worker.

As to the reading understanding of the application matters, financial information, special ventures authorization letter and the financial statements sent to the parties Talmadge Swanagan did not even finish high school and was not financially literate enough to understand the significance of the special ventures authorization letter prepared by the respondents. The same was true as to the other financial application and forms prepared by the respondents. Their son Leonard Swanagan's name was placed on the account with his father Talmadge after Leonard's mother became sick.

At one time Leonard and Talmadge received a check for \$15 K for a truck from Mr. DuCato's assistant - necessary to keep the family's small "business" operating. (It was this respondent witness that the industry arbitrator stated that he intended to employ) However Mr. Ducato called Reatha Swanagan to inform her of this 15 K payment even though she was no longer listed on the Olde account.

Ultimately Talmadge Swanagan - due to old age - had to retire from his small "business". This family activity was then conducted by the son Leonard for some time before this family "business" ended.

Robert F. Brunn, Esq.
Public Arbitrator

Date

For ODR Use Only/Date of Decision: August 23, 1999