

AWARD
NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Raymond D. Kirby and Phyllis C. Kirby

and

99-01104
Indianapolis, Indiana

Name of Respondent

Olde Discount Corporation

REPRESENTATION OF PARTIES

Raymond D. Kirby and Phyllis C. Kirby ("Claimants") were represented by Mark E. Maddox, Esq., Maddox Koeller Hargett & Caruso, Indianapolis, Indiana and Patrick Carroll, Esq., Bloomington, Indiana.

Olde Discount Corporation ("Respondent") was represented by Robert P. Johnstone, Esq., Barnes & Thornburg, Indianapolis, Indiana.

CASE INFORMATION

The Statement of Claim was filed on or about March 9, 1999. Claimants' letter brief in opposition to Respondent's Motion to Strike was filed on or about November 17, 1999. Submission Agreement of Claimants Raymond D. Kirby and Phyllis C. Kirby was signed on March 7, 1999.

Answer and Affirmative Defenses of Olde Discount Corporation was filed on or about May 21, 1999. Respondent's Motion to Strike was filed on or about May 21, 1999.

CASE SUMMARY

Claimants alleged that during portions of the years 1994 through 1996, Respondent Olde: (1) made unsuitable recommendations to Mr. Kirby, (2) churned Mr. Kirby's account, (3) made various misrepresentations to Mr. Kirby, and (4) stood in the role of a fiduciary with respect to Mr. Kirby and breached its duty as a fiduciary to Mr. Kirby.

Respondent Olde denied the allegations set forth in the Statement of Claim. Specifically, Respondent Olde stated that Mr. Kirby controlled and directed the trading strategy which resulted in the losses described in the Statement of Claim. It was stated that Mr. Kirby (1) engaged in a similar trading strategy in 1988 (six years before the trades which are now at issue), (2) was fully aware of the risks

with investment decisions and chosen trading strategy, and (3) was in complete control of the account because he made his own investment decisions and exercised the final authority to accept or reject the suitable investment recommendations made by Olde. Respondent further stated that the losses resulted not from its actions but from Mr. Kirby's investment decisions, the normal fluctuations of the stock market, and the Kirby's lack of candor in providing financial information.

RELIEF REQUESTED

Claimants requested that judgment be entered against Respondent Olde for \$146,949.09, for loan interest in the amount of \$45,000.00, for statutory interest of 8% until the time of the entry of an award, for attorneys' fees in an amount equivalent to the contingent fee charged by Claimants' attorney, for filing and forum fees, and for punitive damages in an amount appropriate to punish Respondent for its acts and deter it and similarly situated brokerage firms from engaging in the same or similar conduct.

Respondent Olde requested that the claim be dismissed and that Claimants be assessed the costs and expenses of maintaining this baseless arbitration matter.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Olde Discount Corporation did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 (the "NASD").

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. Respondent Olde Discount Corporation shall be and hereby is liable for and shall pay to the Claimants Raymond D. and Phyllis C. Kirby the sum of \$56,000 (Fifty Six Thousand Dollars) as compensatory damages.

2. Respondent Olde Discount Corporation shall be and hereby is liable for and shall pay to the Claimants Raymond D. and Phyllis C. Kirby the sum of **\$20,000 (Twenty Thousand Dollars)** as attorneys fees. In making this award of attorneys fees, the undersigned arbitrators find they have authority to make this award of attorneys fees pursuant to I.C. 23-2-1-19.
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.
4. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$200.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is Olde Discount Corporation.

Member surcharge = \$1,500.00

Pre-hearing process fee = \$ 600.00

Hearing process fee = \$2,500.00

Forum Fees and Assessments

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Panel x \$750.00 = \$750.00

Pre-hearing conference(s): September 14, 1999 1 session

Six (6) Hearing sessions x \$750.00 = \$4,500.00

Hearing Date(s):	April 18, 2000	2 sessions	
	April 19, 2000	2 sessions	
	<u>April 20, 2000</u>	<u>2 sessions</u>	
Total Forum Fees			= \$5,250.00

The Arbitration Panel has assessed \$0.00 of the forum fees to Raymond D. Kirby and Phyllis C. Kirby.

The Arbitration Panel has assessed \$5,250.00 of the forum fees to Olde Discount Corporation.

Fee Summary

Claimants, Raymond D. Kirby and Phyllis C. Kirby, shall be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 200.00
<u>Forum Fees</u>	= \$ 0.00
Total Fees	= \$ 200.00
<u>Less payments</u>	= \$ 950.00
Balance to be refunded by NASD Regulation, Inc.	= \$ 750.00

Respondent, Olde Discount Corporation, shall be and hereby is liable for:

Member Fees	= \$4,600.00
<u>Forum Fees</u>	= \$5,250.00
Total Fees	= \$9,850.00
<u>Less payments</u>	= \$5,200.00
Balance Due NASD Regulation, Inc.	= \$4,650.00

All balances are due to NASD Regulation, Inc.

Dated:

Jerome O. Pitt
Public Arbitrator, Presiding Chair

Michael P. Bishop, Esq.
Public Arbitrator

Michael F. Fetsch, CFP
Industry Arbitrator

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Dated: 5/4/00


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OF SECURITIES DEALERS, INC.

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 4/27/2000