No. 06-995

# In The
# Supreme Court of the United States

DANE INVESTMENTS, L.L.C.,

*Petitioner,*

v.

H & R BLOCK FINANCIAL ADVISORS, INC.,
formerly known as Olde Discount Corporation,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Petitioner Dane Investments, L.L.C. respectfully submits this reply to the respondent's brief in opposition in this case.

The respondent, H & R Block Financial Advisors, Inc., formerly known as Olde Discount Corporation, raised a number of new points in its brief in opposition:

1. Respondent alleged "Petitioner's 'unconscionable results' theory was not presented to the Fifth Circuit." (Br.Opp. 8). Petitioner did present this theory, both in the petitioner's appellant brief (App. 2) and in oral argument before the Fifth Circuit.

2. Respondent alleged that the conflict among the circuit courts as to what standards for *vacatur* of an arbitral award are acceptable was not presented to the Fifth Circuit on appeal and, therefore, cannot be raised here (Br.Opp. 10-11). The conflict among the circuits was indeed raised in the petitioner's brief toand in oral argument before the Fifth Circuit (App. 2) but can only be decided by this Court. Therefore, it is properly brought before this Court.

3. Respondent contends that the arbitration panel considered the SEC consent decree because the Fifth Circuit said that the panel did so (Br.Opp. 13). Since there was no useable record made of the arbitration proceeding, the Fifth Circuit could not have known whether the panel considered it or not. In fact, the results of the arbitration proceedings indicate that the panel did not consider it. This issue does warrant further review by this Court because it dealt with all clients of the respondent at the same time petitioner was a client and shows that respondent was

violating securities laws in its dealings with its clients. (Pet. App. 18-72)

4. The issue of the lack of an audible tape recording of the arbitration proceedings was raised before the Fifth Circuit in the petitioner's appellant brief (App. 1) and in oral argument and thus is not waived. The tapes were inaudible in their entirety (App. 3-5) and, according to industry dispute practitioners, this result is a frequent occurrence.

5. The respondent argues "the purported 'conflict' that Dane advanced is irrelevant to what was, in essence, a factual dispute resolved by the arbitral panel against Petitioner" (Br.Opp. 13). Since there was no audible recording of the arbitral proceedings and no written explanation for the award or lack thereof, the petitioner and the courts do not know what facts and what law were considered. One of the difficulties on pressing any of the standards for *vacatur* arguments, including "manifest disregard," is that judicial application of those standards may be stymied by the lack of written explanation for an award. Arbitrators are not required to explain the basis for their decisions, and normally do not do so. *O.R. Sec. v. Professional Planning Assoc., Inc.*, 857 F.2d 742 (11th Cir. 1988). Thus, a reviewing court is in the unenviable position of having to assess "manifest disregard" by trying to infer from the facts of the case whether a decision reflects that the arbitrators appreciated the existence of a clearly governing legal principle, and, if so, whether they decided to ignore it. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp*., 103 F.3d 9 (2d Cir. 1997). The absence of explanation can reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998); *Campbell v. Cantor Fitzgerald & Co.,*

21 F. Supp. 2d 341, 345 (S.D.N.Y. 1998) (" . . . the court can infer from the absence of an explanation that the panel did not have a reasonable basis for its explanation . . . ").

6. Respondent's footnote 9 stating that "Perhaps recognizing that the case law does not support its proposed standard, Dane makes a fall-back argument: that 'unconscionable results' may be a species of 'manifest disregard of the law' . . . " (Br.Opp. 11) is erroneous. Petitioner believes the case law does support its proposed standard and was merely suggesting that the varying non-statutory standards may all be ways of applying or expressing either the statutory standards or the non-statutory standard of "manifest disregard of the law," especially since the concept of "manifest disregard of the law" has not been defined by this Court (Pet. 14-15).

7. Respondent stated in a number of places that petitioner opted for and initiated arbitration. Petitioner had no choice. Arbitration has been made mandatory by the securities brokerage industry and by this Court since the Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In fact, arbitration is not only mandatory, but must be held in a non-neutral forum (at least one of the three arbitrators must be from the securities industry), and is conducted and managed by an industry regulatory authority. Respondent also alleged that petitioner freely admitted that the hearing was fair. This is a question that is asked after every hearing and claimants are presented with a dilemma. If they answer no, will the arbitrators hold that against them when they make their decision? If they answer yes, and the claimant wants to appeal, their affirmation will be used to discredit them. It is an unfair question and should neither be asked nor answered.

8. There are a number of disagreements over the facts. The petitioner acknowledges that factual disagreements can and should be resolved if and when the writ is granted. However, the petitioner believes the statement made by respondent on page 4 of respondent's brief wherein respondent quoted from petitioner's brief and alleged that Dane Investments L.L.C. was established for the sole and primary purpose of trading securities, is not only a misquote but is also misleading and needs to be addressed. The respondent omitted the sentence from pages 3 and 4 of the petitioner's brief that preceded the quoted sentence, wherein the petitioner said "Gregory D. Wilt formed the petitioner, Dane Investments L.L.C., to hold his condominium rental income investments." The respondent only quoted the second sentence that said " . . . he also had his securities investments held by petitioner." (Pet. 4) Also, the petitioner wants to make it clear that Gregory Wilt was not a sophisticated investor and, previous to his dealings with respondent, had only bought stock, and conservative stock at that, and through coercion signed the "happiness letter" the respondent dictated to him.

## CONCLUSION

The issues raised in this reply brief and in the petition are of national importance and affect everyone who has a securities claim or dispute. To ensure the integrity of the present arbitration process for securities dispute resolution and to ensure that investors accept the present system as fair and impartial and to resolve conflicts among the circuits, the following questions which were raised in the petition should be addressed and answered:

a. If a U.S. citizen is to forfeit his right to trial by jury, which standards among the many standards for *vacatur* used in the varied circuits are acceptable and how are they defined?

b. If the Securities and Exchange Commission ("SEC") is charged with overseeing the securities arbitration process, then how are arbitrators to treat SEC consent and cease and desist decrees in arbitration proceedings?

c. If there are Self Regulatory Organization regulations requiring a verbatim record be made of arbitration proceedings so that there can be a record for judicial review, does the failure to make such a record deny a claimant his constitutional rights to due process and trial by jury or its equivalent?

For the foregoing reasons, and for those in the petition, the petition for writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment of the Court of Appeal vacated, and the case remanded for further consideration.

Respectfully submitted,

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*Counsel for Dane Investments, L.L.C.*

**IN THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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**NO. 05-30414**

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**DANE INVESTMENTS LLC**
**Plaintiff-Appellant**

**VERSUS**

**H & R BLOCK FINANCIAL ADVISORS, INC.**
**formerly known as Olde Discount Corporation**
**Defendant-Appellee**

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**On Appeal from the United States**
**District Court for the Eastern District of Louisiana**
**Honorable Peter Beer, Judge**

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**ORIGINAL BRIEF OF PLAINTIFF-APPELLANT,**
**DANE INVESTMENTS, L.L.C.**

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* * *

[6] The arbitrators did not properly record the hearing so, unfortunately, there is no transcript of the hearing, although attempts were made to transcribe the tapes.

* * *

[7] The District Court felt that the actions of Olde/H & R Block, in charging almost $800,000.00 to lose almost all of the appellant's assets, was unconscionable. However, on rehearing, the District Court felt compelled to place form over substance and reversed its prior judgment vacating the arbitration award.

* * *

[9] **B. Judicial Grounds for Vacatur**

The federal courts have utilized several non-statutory grounds for vacating arbitration awards.

* * *

May 25, 2004

James E. Stovall, L.L.C.
313 Lee Lane
Covington, Louisiana 70433

Dear JoAnn:

As per our telephone conversation today, I am writing to update you on the progress of the tape transcription of the Dane Investments v. H&R Block tapes.

When attempting to transcribe Tape 1, I found the tape to be blank. The tape does have a sticker which reads "No Audio." Tapes 2 through 6 are of poor recording quality. I am able to hear the questioning party, but the witness is, for the most part, inaudible.

Please let me know how to proceed with this transcription job.

Thank you,

Stacey McConnell

**JAMES E. STOVALL, L.L.C.**
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May 26, 2004

***Via Facsimile – 1-561-447-4938***

Ms. Janet Hart
NASD Dispute Resolution
Boca Center
5200 Town Center Circle
Tower 1 – Suite 200
Boca Raton, Florida 33486-1012

Re: NASD Dispute Resolution Arbitration Number 02-07739
Dane Investments, L.L.C. v. H&R Block Financial Advisors, Inc. Formerly Olde Discount Corporation

Dear Janet:

As you are aware, we had requested from you and received six (6) tapes from the above-referenced arbitration. However, when the transcriptionist attempted to transcribe the tapes provided she faxed the attached letter to me regarding their condition. Please contact me immediately upon receipt of this correspondence to advise if anything can be done to secure tapes that are audible.

Additionally, please note that my address has changed from 313 Lee Lane, Covington, Louisiana 70433 to 514 E.

Lockwood Street, Covington, Louisiana 70433. The telephone number and fax number are unchanged.

If you need anything further in order to comply with this request, please do not hesitate to contact me. Thank you for your attention.

Sincerely,

/s/ James E. Stovall
James E. Stovall

JES/jpd
Attachment