

Award
NASD Dispute Resolution

COPY

In the Matter of the Arbitration Between:

Jae Kennedy-Pearson, Colleen Cremerius and Florence Miller, Claimants v. A.G. Edwards & Sons, Inc. and Theodorus Burger, Respondents

Case Number: 03-00025

Hearing Site: San Francisco, California

Nature of the Dispute: Customers vs. Member and Associated Person

REPRESENTATION OF PARTIES

For Claimants:

John S. Perkins, Esq.
Law Offices of John S. Perkins
San Jose, California

For Respondents:

Daryl S. Landy, Esq.
Morgan, Lewis & Bockius LLP
Palo Alto, California

CASE INFORMATION

Statement of Claim filed: December 31, 2002

Claimants' Response to Motion to Bifurcate Claims, Proposed First Amended Statement of Claim and First Amended Statement of Claim filed: April 7, 2003

Claimants' Motion to Amend First Amended Statement of Claim, Points and Authority Memo Supporting Claimants' Motion to Amend First Amended Statement of Claim and Proposed Second Amended Statement of Claim by Claimants Jae Kennedy-Pearson, Colleen Cremerius and Florence Miller filed: September 22, 2003

Claimants' Third Amended Statement of Claim filed: June 22, 2005

Claimants' Response to Respondents' Motion to Dismiss, Arbitration Brief and Motion to Bar Respondents from Presenting Any Matter, Facts, Arguments or Defenses at the Time of Hearing filed: October 10, 2005

Claimants' Motion to Amend Their Statements of Claim According to Proof, Memorandum of Points and Authorities and Fourth Amended Statement of Claim to Conform to Proof filed: April 4, 2006

Claimant Jae Kennedy-Pearson's Uniform Submission Agreement signed: December 1, 2002

Claimant Colleen Cremerius' Uniform Submission Agreement signed: November 20, 2002

Claimant Florence Miller's Uniform Submission Agreement signed: December 17, 2002

General Denial and Motion for Bifurcation and to Establish Three Separate Actions filed by Respondents A.G. Edwards & Sons, Inc. ("A.G. Edwards") and Theodorus Burger: March 6, 2003

Joint Statement of Answer and Motion to Dismiss of Respondents A.G. Edwards and Theodorus Burger filed: October 8, 2004

Respondents' Pre-Hearing Arbitration Brief filed: May 16, 2005

Respondents' Statement of Answer to Third Amended Statement of Claim and Motion to Dismiss filed: September 27, 2005

Respondents' Opposition to Claimants' Motion to Bar Respondents from Presenting Any Matter, Facts, Arguments or Defenses at the Time of Hearing filed: October 13, 2005

CASE SUMMARY

Claimants alleged that they filed the above-referenced dispute against Respondents for professional negligence, negligent misrepresentation, fraud and intentional misrepresentation, breach of contract, breach of fiduciary duty, constructive fraud, and negligent failure to supervise in connection with Claimants' accounts. Claimants' dispute involved investments in Marvell stock and in various investment funds known as Roxbury, Rorer and Rittenhouse.

Respondents denied Claimants' allegations of wrongdoing and denied any liability to Claimants. Respondents also asserted various defenses.

RELIEF REQUESTED

In the Statement of Claim and First Amended Statement of Claim, Claimants requested damages as follows: \$600,000.00 for Pearson, \$160,000.00 for Cremerius, and \$600,000.00 for Miller. Claimants also requested attorney fees.

In the Second Amended Statement of Claim, Claimants requested damages in the amount of \$1,360,000.00, punitive damages in the amount of \$250,000.00, pre-judgment interest at the rate of 9% per annum on the amounts awarded as actual damages, costs and attorney fees.

In the Third Amended Statement of Claim, Claimants requested:

1. Investment related losses measured by either:

A) Net gains through appropriate investments

Cremerius - \$125,599.00

Miller - \$321,170.00

B) Out of pocket losses on accounts

Cremerius - \$119,421.00

Miller - \$171,865.00

Kennedy - \$254,782.00

2. Margin Expenses:

Cremerius - \$271.00

Kennedy - \$100,621.00

3. Recovery on forced sale of Marvell stock to clear margin, including short term gain error (Kennedy 10,000 shares) - \$614,005.00*

*This figure may be adjusted to 20,000 shares upon review of AGE Roseville records and will increase damages.

4. Commissions on Marvell sales (Kennedy) \$1,639.00.

5. Losses to clients through inability to deduct litigation expenses based upon AMT (40% of arbitration award).

6. Punitive damages.

7. NASD Disciplinary Referral.

Respondents requested:

1. Dismissal of Claimants' claims in their entirety;
2. An order that this matter be permanently expunged from Mr. Burger's Form U-4 on file with the NASD and Central Registration Depository;
3. An award of their NASD costs and fees; and
4. Such other relief as may be just, proper and provided by law.

OTHER ISSUES CONSIDERED AND DECIDED

On or about May 15, 2003, NASD Dispute Resolution ("NASD-DR") reviewed and considered the positions of the parties relative to Respondents' Motion for Bifurcation and to Establish Three Separate Actions. NASD-DR determined that the issues raised by the parties required factual determination and forwarded this issue to the Panel for determination.

On June 19, 2003, Claimant Florence Miller and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On June 20, 2003, Claimant Colleen Cremerius and Claimants' counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On July 7, 2003, NASD-DR received Waiver Agreement signed by Claimant Jae Kennedy-Pearson and Claimants' counsel expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

Respondents A.G. Edwards and Theodorus Burger did not file with NASD-DR properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("the Code") and, having answered Claimants' Claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The Panel noted the filing of Claimants' First Amended Statement of Claim and Second Amended Statement of Claim in accordance with Rule 10328(a) of the Code.

On May 23, 2005, the Panel reviewed and considered the positions of the parties relative to Respondents' Motion to Strike Claimants' Expert Report Relating to Account Number 728-125349 for Failure to Comply with NASD Code of Arbitration Procedure Rules 10328 and 10321(c) and Motion to Exclude Claimants' Expert Report Delivered to Counsel on May 20, 2005 for Failure to Comply with NASD Code of Arbitration Procedure Rule 10321(c). The Panel denied Respondents' Motions and ordered Claimants to file proposed Third Amended Claim regarding Claimant Jae Kennedy-Pearson's lost Marvell sales opportunity claim. The Panel also continued the hearing to October 17-21, 2005.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, testimony, and evidence presented at the hearing, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. The Panel denied Respondents' Motion for Bifurcation and to Establish Three Separate Actions and denied Respondents' Motion to Dismiss. The Panel also denied Claimants' Motion to Bar Respondents from Presenting Any Matter, Facts, Arguments or Defenses at the Time of Hearing and denied Claimants' Motion for Leave to File Fourth Amended Statement of Claim.
2. Respondents A.G. Edwards and Theodorus Burger are jointly and severally liable for and shall pay to Claimant Jae Kennedy-Pearson the sum of \$175,000.00.
3. Respondents A.G. Edwards and Theodorus Burger are jointly and severally liable for and shall pay to Claimant Florence Miller the sum of \$34,373.00.
4. Respondents A.G. Edwards and Theodorus Burger are jointly and severally liable for and shall pay to Claimant Colleen Cremerius the sum of \$12,000.00.
5. Claimants' claims for punitive damages are denied.
6. Respondent Theodorus Burger's request for an order that this matter be expunged from his file maintained by the NASD Central Registration Depository is denied.
7. Each party shall bear its own costs, including attorney's fees.
8. All other relief not expressly granted is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee = \$500.00

Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, A.G. Edwards is a party and the following fees are assessed:

Member Surcharge = \$2,800.00

Pre-Hearing Process Fee = \$ 750.00

Hearing Process Fee = \$5,000.00

Total Member Fees = \$8,550.00

Adjournment Fees

The following adjournment fees are assessed:

The Panel granted Claimants' request to postpone the June 29-July 1, 2004, hearing dates and determined that the parties shall split the \$1,200.00 postponement fee as follows: 50% jointly and severally to Claimants, and 50% jointly and severally to Respondents. The Panel has denied Claimants' request for reimbursement of their share of the postponement fee in connection with the postponed hearing dates of June 29-July 1, 2004.

The Panel granted Claimants' request to postpone the January 18-21, 2005, hearing dates and assessed the \$1,500.00 postponement fee jointly and severally to Claimants.

The Panel postponed the May 24-27, 2005, hearing dates and has waived the \$1,200.00 postponement fee previously assessed jointly and severally to Claimants.

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session.

Cancellation of May 24-27, 2005 hearing dates: = \$300.00

The Panel assessed the three-day cancellation fee of \$300.00 jointly and severally to Claimants.

Forum Fees and Assessments

The Panel assessed forum fees for each session conducted or each decision rendered on a discovery-related motion on the papers. A 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:

(2) Pre-hearing conference sessions with the Panel @ \$1,200.00/session = \$2,400.00

Pre-hearing conferences:	December 19, 2003	1 session
	June 21, 2004	1 session

(27) Hearing sessions @ \$1,200.00/session = \$32,400.00

Hearing Dates:	May 23, 2005	2 sessions
	October 17, 2005	2 sessions
	October 18, 2005	1 session
	October 19, 2005	2 sessions
	October 20, 2005	2 sessions
	October 21, 2005	2 sessions
	December 7, 2005	2 sessions
	December 8, 2005	2 sessions
	December 9, 2005	2 sessions
	December 10, 2005	2 sessions
	February 6, 2006	2 sessions
	February 7, 2006	2 sessions
	April 6, 2006	2 sessions
	April 7, 2006	2 sessions

Total Forum Fees = \$34,800.00

The Panel assessed \$17,400.00 in forum fees jointly and severally to Claimants Jae Kennedy-Pearson, Colleen Cremerius and Florence Miller.

The Panel assessed \$17,400.00 in forum fees jointly and severally to Respondents A.G. Edwards and Theodorus Burger.

Fee Summary

1. Claimants Jae Kennedy-Pearson, Colleen Cremerius and Florence Miller are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Adjournment Fees	= \$ 2,100.00
Three-Day Cancellation Fee	= \$ 300.00
<u>Forum Fees</u>	<u>= \$ 17,400.00</u>
Total Fees	= \$ 20,300.00
<u>Less Payments</u>	<u>= \$(1,700.00)</u>
Balance Due NASD-DR	= \$ 18,600.00

2. Respondent A.G. Edwards is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
<u>Less Payments</u>	<u>= \$(8,550.00)</u>
Balance Due NASD-DR	= \$ 0.00

3. Respondents A.G. Edwards and Theodorus Burger are charged jointly and severally with the following fees and costs:

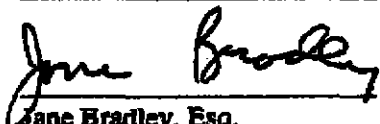
Adjournment Fees	= \$ 600.00
<u>Forum Fees</u>	<u>= \$ 17,400.00</u>
Total Fees	= \$ 18,000.00
<u>Less Payments by A.G. Edwards</u>	<u>= \$(1,800.00)</u>
Balance Due NASD-DR	= \$ 16,200.00

All balances are payable to NASD Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Jane Bradley, Esq.	-	Public Arbitrator, Presiding Chair
Mario Henry Barsotti	-	Public Arbitrator
Robert Fisher	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures



Jane Bradley, Esq.
Chair, Public Arbitrator

4-18-06

Signature Date

Mario Henry Barsotti
Public Arbitrator

Signature Date

Robert Fisher
Non-Public Arbitrator

Signature Date

4/21/06
Date of Service

ARBITRATION PANEL

Jane Bradley, Esq.	-	Public Arbitrator, Presiding Chair
Mario Henry Barsotti	-	Public Arbitrator
Robert Fisher	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Jane Bradley, Esq.
Chair, Public Arbitrator


Mario Henry Barsotti
Public Arbitrator

Signature Date


Signature Date

Robert Fisher
Non-Public Arbitrator

Signature Date


Date of Service

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Mario Henry Barsotti	-	Public Arbitrator
Robert Fisher	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Jane Bradley, Esq.
Chair, Public Arbitrator

Signature Date

Mario Henry Barsotti
Public Arbitrator

Signature Date

 4/19/06

Robert Fisher
Non-Public Arbitrator

Signature Date



Date of Service