

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Jennifer Bernard Trust, Nancy Lowendahl, Trustee (Claimant) v. A.G. Edwards & Sons, Inc. and Robert Alex Nogrady (Respondent)

Case Number: 03-01916

Hearing Site: New York, New York

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

**REPRESENTATION OF PARTIES**

Claimant Jennifer Bernard Trust, Nancy Lowendahl, Trustee ("Trust") hereinafter referred to as "Claimant": Sam Schwartz, Esq., previously Kenneth J. Rubinstein, Esq., Olshan Grundman Frome Rosenzweig & Wolosky, LLP, New York, NY.

Respondents A.G. Edwards & Sons, Inc. ("A.G. Edwards") and Robert Alex Nogrady ("Nogrady") hereinafter collectively referred to as "Respondents": M. Jane Matoesian, Esq., A.G. Edwards & Sons, Inc., St. Louis, MO.

**CASE INFORMATION**

Statement of Claim filed on or about: March 18, 2003.

Nancy Lowendahl signed the Uniform Submission Agreement: March 17, 2003.

Joint Statement of Answer and Counterclaim filed by Respondents on or about: May 12, 2003.

Respondent A.G. Edwards signed the Uniform Submission Agreement: April 25, 2003.

Respondent Nogrady signed the Uniform Submission Agreement: May 13, 2003.

**CASE SUMMARY**

Claimant asserted the following causes of action: negligence; breach of fiduciary duty; and unsuitability. The causes of action relate to unspecified securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In their Counterclaim, Respondents asserted the following cause of action: indemnification.

**RELIEF REQUESTED**

Claimant requested compensatory damages in the amount of \$400,000.00, plus interest; costs; attorneys' fees; and such other and further relief as the Panel may deem just and proper.

Respondents requested that the Statement of Claim be dismissed in its entirety; costs and expenses, including reasonable attorneys' fees; and such other relief deemed proper. On its Counterclaim, Respondents requested that should the Panel enter an Award in favor of Claimant, then Nancy Lowendahl, Trustee, be liable for all such damages; costs, including reasonable attorneys' fees; and such other relief the Panel deems proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On or about February 9, 2004, Respondents filed a motion to dismiss the Statement of Claim. On or about May 13, 2004, Claimant filed an opposition to the motion. After reviewing the parties' submissions, and after hearing oral argument, and after an Executive Session held by the Panel, the Panel granted Respondents' motion to dismiss.

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.

### **ARBITRATORS' REPORT**

A telephone conference was conducted by the Panel on June 22, 2004, for the purpose of addressing Respondents' motion to dismiss the Statement of Claim.

Upon reviewing the parties' respective submissions, and after entertaining oral argument (and the parties' respective positions), and after an Executive Session held by the Panel, the following Order is issued:

The Statement of Claim asserts three theories: negligence, breach of fiduciary duty and "unsuitability" as independent bases for relief. In support of these disparate theories, Claimant has asserted that when six investment accounts were opened with Respondents, Mr. And Mrs. Lowendahl were assured by an investment advisor (Robert Nogrady) affiliated with Respondent A. G. Edwards that these accounts would be handled in "conservative" manner. (See Claim, paragraph 8).

Claimant alleged that from the very beginning of their relationship, Mr. Nogrady "failed to properly monitor or otherwise oversee" the various accounts and various losses totaling "nearly \$400,000" were incurred. (See Claim, paragraphs 10, 12).

It is further alleged that upon "confronting" Mr. Nogrady about his "handling" of the account, Mr. Nogrady is reported to have "admitted his errors, apologized, and sent Mrs. Lowendahl a plant." (See Claim, paragraph 13).

After filing of the Claim, the parties engaged in extensive discovery; component parts of which were monitored by the Chair. At one stage in the underlying proceeding, on or about October 14, 2003, Respondents filed a Motion to Compel Production of Information and Documents which motion, inter alia, objected to Claimant's inability or refusal to respond to component parts of Respondents' discovery requests. Of particular concern to the Respondents was Claimant's inability to specify (in factual detail, or with the delineation of specific instances or trades) how Claimant's account was "mismanaged". By way of example, at paragraph 8 of said Motion, Respondents sought "specific information" regarding Claimant's allegations as to "unsuitability," and further requested the identity of trades believed to have been made "without

authorization". While the Claimant's counsel asserted during argument of the Motion to Compel that the account "in general" was mismanaged, it was hoped that during the course of the parties' continued dialogue and ongoing exchange of information that these specifics would be eventually unearthed. As a result, by Order dated December 1, 2003, the Chair sustained Claimant's objection to provide additional information at that juncture, but expressly reserved Respondents' right to move by motion for appropriate relief in the event it was later determined that a viable cause of action had not been pled or otherwise asserted.

By its Motion to Dismiss, made some two months later (to wit: February 9, 2004), Respondents have reiterated their position (*inter alia*) that Claimant's Statement of Claim is bereft of facts and that, by way of example, Claimant has failed to identify any specific recommendations that were "unsuitable," or acts that would comprise "negligence" on the part of Respondents. This failure or omission to correct the perceived deficiency in the pleadings continued through and including Claimant's opposition to the application. (No specific trades or instances of abuse, breach of fiduciary duty, and/or negligence were identified – pre or post discovery.)

As noted by Respondents, in order for a suitability claim to survive, there must, at a minimum, have been a recommendation of a security by the Respondents. No recommendation (or other affirmative act or representation) has been disclosed or supplied. Additionally, in order for a claim of negligence or breach of fiduciary duty to be stated, some legally cognizable duty must be asserted. As observed by Respondents, these accounts were "nondiscretionary" in nature, and there was no obligation to force a trade or to issue investment recommendations. In fact, the parties' Client Choice Agreement (dated on or about May 25, 2000), provides (in pertinent part), at paragraph 18(e), as follows:

"Client Choice is a full-service brokerage pricing alternative, not an investment advisory service, and neither Edwards nor any of its financial consultants ....intends to act or is acting in as an investment adviser or investment manager. All Services are provided only on a nondiscretionary basis. Any investment advice offered ... is solely incidental to Edwards' business as a broker-dealer ...."

It is unclear from the Claimant's pleadings (nor was it developed in their opposition to the motion) how a purported "de facto discretion" or unspecified "duty" came into existence. Nor can this Panel, simply premised upon surmise and conjecture, arrive at the conclusion that some unspecified "duty" was breached or that some "unidentified" trade or activity (or series of trades) by Respondents triggered a breach (or comprised a form of negligence or would otherwise support a damage claim).

While Claimant has repeatedly asserted (in their papers and during oral argument) that such "proof" is more appropriate for demonstration at trial, the Panel does not concur with the characterization of the burden at hand. While axiomatic, it bears repeating, that the grant of a motion to dismiss is appropriate when the proffered allegations are not sufficiently particular to afford adverse parties notice of the transactions intended to be proven and the material element of each cause of action are not supplied. Respondents' objection – as to their inability to prepare a defense premised, in large part, upon Claimant's inability (or refusal), throughout this entire process, to provide Respondents with the factual underpinnings (or other cognizable basis or support) for their various legal theories – goes to the very heart of due process considerations and fundamental public policy concerns, and must now be heeded.

Thus, in the absence of pertinent and necessary facts, and in light of the protracted history of this dispute, the Panel is constrained to grant the Respondents' Motion to Dismiss in all respects, with prejudice.

NASD fees and charges (e.g. forum fees) to be shared equally (50% Claimant, 50% Respondents). Each side to bear its own attorneys' fees.

### **AWARD**

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

1. The claims of Claimant are dismissed in their entirety.
2. Any and all relief not specifically addressed herein is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 300.00
Counterclaim filing fee	= \$1,000.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, A.G. Edwards & Sons, Inc. is a party.

Member surcharge	= \$1,700.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,750.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

February 3-6, 2004, adjournment by Claimant	= Waived
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#### **Forum Fees and Assessments**

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

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: November 21, 2003 1 session	
Four (4) Pre-hearing sessions with Panel @ \$1,125.00	= \$4,500.00
Pre-hearing conferences: August 13, 2003 1 session	

February 3, 2004	1 session
June 17, 2004	1 session
June 22, 2004	1 session

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Total Forum Fees	= \$4,950.00
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1. The Panel has assessed \$2,475.00 of the forum fees against Claimant.
2. The Panel has assessed \$2,475.00 of the forum fees jointly and severally against Respondents.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. A. G. Edwards requested photocopying = \$6.00

**Fee Summary**

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 300.00
Forum Fees	= \$2,475.00
Total Fees	= \$2,775.00
Less payments	= \$2,125.00
Balance Due NASD Dispute Resolution	= \$ 650.00

2. Respondent A.G. Edwards is solely liable for:

Member Fees	= \$5,200.00
Administrative Costs	= \$ 6.00
Total Fees	= \$5,206.00
Less payments	= \$5,481.00
Refund Due to A.G. Edwards	= \$ 275.00

3. Respondents are jointly and severally liable for:

Counterclaim Filing Fee	= \$1,000.00
Forum Fees	= \$2,475.00
Total Fees	= \$3,475.00
Less payments	= \$3,475.00
Balance Due NASD Dispute Resolution	= \$ 0.00

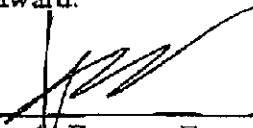
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Lucas A. Ferrara, Esq.	-	Public Arbitrator, Presiding Chairperson
Sheila D. Collins	-	Public Arbitrator
Eric J. Sussman, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

  
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Lucas A. Ferrara, Esq.  
Public Arbitrator, Presiding Chairperson

10/27/04  
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Signature Date

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Sheila D. Collins  
Public Arbitrator

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Signature Date

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Eric J. Sussman, Esq.  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

October 29, 2004

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)

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*Sheila D. Collins*  
Sheila D. Collins  
Public Arbitrator

10/27/04  
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