

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

---

In the Matter of the Arbitration Between

Name of Claimant

George S. Fowler, Jr.

91-03095

Name of Respondents

A.G. Edwards & Sons, Inc.  
John Sink  
Charles J. Galli

---

REPRESENTATION

For Claimant: George S. Fowler, Jr. was represented by Robert L. Striler, Esq. of King, Koster & Murphy located in St. Louis, Missouri.

For Respondents: A.G. Edwards & Sons, Inc. and Charles J. Galli were represented by Clay L. Grunke, Esq. of A.G. Edwards & Sons, Inc. located in St. Louis, Missouri.

John Sink appeared pro se.

CASE INFORMATION

Statement of Claim filed: October 3, 1991.

Claimant's Submission Agreement signed on: September 30, 1991.

First Amended Statement of Claim filed on: November 20, 1991

Joint Statement of Answer and Counterclaim filed by Respondents A.G. Edwards & Sons, Inc. and Charles G. Galli on: January 15, 1992.

Respondent A.G. Edwards & Sons, Inc. Submission Agreement signed on: January 15, 1991 by Steven G. Sneeringer, Vice President and Counsel, A.G. Edwards & Sons, Inc.

Respondent Charles J. Galli's Submission Agreement signed on: January 16, 1992.

Answer to Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli's Counterclaim filed by Claimant George S. Fowler, Jr. on: February 3, 1992.

Motion to Dismiss filed by Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli on: November 13, 1991.

Response to Motion to Dismiss filed by Claimant George S. Fowler, Jr. on: November 20, 1991.

Second Motion to Dismiss filed by Respondents A.G. Edwards & Sons, Inc. and Charles G. Galli on: April 8, 1992.

Claimant George S. Fowler, Jr.'s Response to Second Motion to Dismiss filed on: April 15, 1992.

Claimant George S. Fowler, Jr.'s Section 25(b)(2)(iii) Motion to Bar Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli from Presenting Any Matter, Arguments or Defenses At Hearing filed on: November 20, 1991.  
Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli's Reply to Claimant's Section 25(b)(2)(iii) Motion to Bar filed on: January 15, 1992.  
Claimant George S. Fowler, Jr.'s Reply filed on: January 29, 1992.

Claimant George S. Fowler, Jr.'s Section 25(b)(2)(iii) Motion to Bar Respondent John Sink from Presenting Any Matter, Arguments or Defenses At Hearing filed on: November 20, 1991.

Respondent John Sink did not file a properly executed submission agreement, but appeared and testified at hearing, and is required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure.

#### HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Dates/Sessions: May 21, 1992 for two (2) sessions.

May 22, 1992 for two (2) sessions.

Hearing Location: St. Louis, Missouri.

#### CASE SUMMARY

Claimant George S. Fowler, Jr. ("Fowler") alleged that Respondent John Sink ("Sink"), while employed by or acting as an agent for Respondent A.G. Edwards & Sons, Inc. ("A.G. Edwards"), engaged in acts which constituted misrepresentation, "churning" and breach of fiduciary duty. Fowler made specific allegations as follows:

1. Sink sought and did engage Fowler's trust and confidence in Sink's ability and willingness to do everything within Sink's power to properly advise Fowler with regard to Fowler's investment needs;
2. Based on Sink's representations that he was making Fowler a substantial amount of money and would continue to make Fowler a substantial amount of money, Fowler followed Sink's advice and Sink eventually took over control of the account;
3. Sink violated his fiduciary duty to Fowler by handling his account in a way that benefited him the most, i.e., for the maximization of commissions rather than acting in the best interest of Fowler, and by causing numerous unsuitable transactions in the account that were inappropriate based on Fowler's financial position and objectives;
4. Sink churned Fowler's account from June 1989 to January 1990,

partly by switching in and out of utility stocks and executing 35 trades, earning commissions of approximately \$70,902.00;

5. Sink failed to advise Fowler of the tax consequences of a withdrawal from his IRA Account that was not redeposited within 60 days, resulting in tax and penalties;

6. Sink and A.G. Edwards made misrepresentations to Fowler, by omitting or causing to be omitted certain material facts, in connection with the sale of securities;

7. Respondent Charles J. Galli ("Galli") was the branch manager in charge of supervising Sink and the accounts under Sink; and

8. A.G. Edwards and Galli were negligent in supervising Sink in that if they had adequately performed their supervisory duties the improper and excessive activity in Fowler's account would have been detected and stopped immediately.

Fowler asserted violations of the NASD Rules of Fair Practice and the Rules of the New York Stock Exchange; violations of Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934; common law fraud; breach of fiduciary duty; negligent supervision; and negligence and gross negligence. In the First Amended Statement of Claim, Fowler asserted violations of the Missouri Securities Law, V.A.M.S. 409.101, 409.102, 409.404, 409.411, et al.

Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli denied the material allegations of the Statement of Claim, alleging that:

1. During Sink's employment at A.G. Edwards, Fowler was fully aware of all transactions occurring in his account;

2. On January 26, 1990 the account value of Fowler's security account at A.G. Edwards was \$173,883.39 and on February 23, 1990 the account value was \$176,198.17; therefore, Fowler was not damaged as a result of the activity in his account;

3. When Fowler opened his accounts at A.G. Edwards, he had at least twenty years of past experience in the stock market and was a sophisticated business man and investor having amassed a total net worth excluding residence of at least one million dollars;

4. Fowler received confirmations of all transactions and monthly statements for the account reflecting every transaction;

5. Sink did not control trading in Fowler's account;

6. The trading in the account was not excessive in light of Fowler's stated investment objectives;

7. Fowler is barred from recovering from A.G. Edwards under Fowler's Customer Agreement with A.G. Edwards and under Section 8-319 of the Uniform Commercial Code as enacted in the State of Missouri because of his failure to notify A.G. Edwards of the

problems within 10 days of receipt of the written materials regarding his account;

8. Fowler is barred from recovering from A.G. Edwards under the doctrines of ratification, account stated, estoppel, waiver and laches because A.G. Edwards relied on Fowler's silence;

9. Fowler failed to act promptly and with due diligence to mitigate his damages after Fowler knew or should have known of the alleged acts and omissions of which Fowler complains;

10. Fowler caused or contributed to cause the alleged damages of which Fowler complains herein and is thus barred by his contributory negligence from recovering such damages from A.G. Edwards;

11. Fowler was aware of the risks of profit and loss associated in investing in securities and voluntarily assumed such risk;

12. The damages alleged were caused, if at all, by unforeseeable market factors and conditions for which A.G. Edwards is not liable; and

13. The complaint was barred by the Statute of Limitations set forth in Section 13 of the Securities Act of 1933.

In addition, Respondents A.G. Edwards and Galli counterclaimed, alleging that Fowler agreed in the Customer Agreement to pay any expenses including attorney's fees incurred by Edwards in defense of any action brought by Fowler should A.G. Edwards prevail.

Claimant Fowler denied the material allegations of the Counterclaim, alleging that provision of the Customer Agreement was unenforceable and unconscionable because the provision was unilateral in its application.

Respondent Sink did not file a Statement of Answer.

#### RELIEF REQUESTED

Claimant George S. Fowler, Jr. requested that the panel enter an award for:

1. Actual damages in the amount of \$124,150.00, together with pre-judgment interest at the legal rate from the date of the purchase;
2. Costs, punitive damages, and for such other relief as the panel deems necessary; and
3. The Counterclaim be dismissed and denied in its entirety.

Respondents A.G. Edwards & Sons and Charles J. Galli requested:

1. The Statement of Claim be dismissed and denied in its entirety;

2. Edwards be awarded its expenses including attorney's fees pursuant to its Customer Agreement with Fowler.

#### 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.

On May 18, 1992, the panel, after review, made a determination of Respondent A.G. Edwards and Galli's Motions to Dismiss and Claimant Fowler's Motions to Bar Pursuant to Section 25(b)(2)(iii). The panel determined that it would consider the above pleadings with the case and the hearing would proceed on May 21, 1992 and May 22, 1992.

On May 21, 1992, Claimant Fowler presented the Motion to Bar Sink from presenting any defenses pursuant to Section 25(b)(2)(iii) of the Code of Arbitration Procedure for having failed to file any pleadings in answer to the Claim. Upon review, the panel determined that the motion would be granted.

Respondents A. G. Edwards and Galli's Motions to Dismiss, upon review, are denied. Claimants Section 25(b)(2)(iii) Motion to Bar Respondents A.G. Edwards and Galli from presenting any defenses was denied.

#### AWARD

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

1. Respondents A.G. Edwards & Sons, Inc. and John Sink are jointly and severally liable for and shall pay to Claimant George S. Fowler, Jr. the sum of \$42,500.00;
2. The claim against Respondent Charles J. Galli is hereby dismissed and denied in its entirety;
3. Respondents A.G. Edwards & Sons, Inc. and Charles J. Galli's Counterclaim is hereby dismissed and denied in its entirety;
4. All claims for punitive damages are hereby denied; and
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

4 sessions X \$750.00 hearing session deposit = \$3,000.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the \$200.00 filing fee and the \$750.00 hearing session deposit previously depositing by the Claimant George S. Fowler, Jr. In addition, Fowler is liable for and shall pay to the NASD additional forum fees in the amount of \$750.00.

Respondents A.G. Edwards & Sons, Inc. and John Sink are jointly and severally liable for and shall pay to the NASD forum fees in the amount of \$1500.00.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRING ARBITRATORS' SIGNATURES

Dated:

Charles E. Jones, Esq.

August 5, 1992

Charles E. Jones, Esq.

Chairperson

Public Arbitrator

Wareen E. Van Norman, Jr.

August 11, 1992

Warren E. Van Norman, Esq.

Public Arbitrator

Thomas C. Boersig, Jr., Esq.

August 4, 1992

Thomas C. Boersig, Jr., Esq.

Industry Arbitrator

Date of Service on the Parties:

August 17, 1992