

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Virgil H. Edwards

No. 92-02641

Name of Respondents

William C. Burnside & Co., Inc.

William C. Burnside

REPRESENTATION OF PARTIES

For Claimants: Thomas M. Knepper, Esq. of Neal Gerber & Eisenberg, Chicago, Illinois.

For Respondents: Stephen H. Cohen, Esq., and Ruta K. Stropus, Esq. of Sachnoff & Weaver, Ltd., Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: August 7, 1992.

Claimants' Submission Agreement signed on: September 23, 1992.

Claimant's Supplemental Statement of Claim filed: August 24, 1992.

Joint Response to Statement of Claim and Supplemental Statement of Claim and Motion to Strike Inflammatory Statements filed by Respondents, William C. Burnside & Co., Inc. and William C. Burnside on: November 3, 1992.

Respondent William C. Burnside & Co., Inc.'s Submission Agreement signed on: October 5, 1992.

Respondent William C. Burnside's Submission Agreement signed on: October 5, 1992.

Respondents' Motion for Leave to Add an Additional Affirmative Defense filed: January 11, 1993.

HEARING INFORMATION

Hearing dates: March 11, 1993. Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimant, Virgil H. Edwards ("Claimant") alleged violation of Section 12 of the Securities Act of 1933, violation of the Illinois Securities Act of 1953, as amended, violation of the provisions of the Illinois Consumer Fraud and deceptive Business Practices Act, unsuitability of investment, and failure to conduct due diligence, as required in Article III, Section 1 of the NASD Rules of Fair Practice, by Respondents, William C. Burnside and William C. Burnside & Co., Inc. ("Respondents"). The allegations arose out of Claimant's investment in promissory notes in Aegis Capital Markets, Inc. ("Aegis"). Claimant further alleged that he had relied on the misstatements made by Respondents that the investment in Aegis was backed by the full faith and credit of the United States government, the assertion by Respondents that the investment was solid and other customers of Respondents had invested in Aegis.

In their Response, Respondents denied each and every allegation contained in the Statement of Claim. In addition, Respondents asserted the following affirmative defenses:

1. Respondents fulfilled their obligations to recommend a suitable investment for their client. It was the Claimant who had represented to Respondents that he had been looking for this type of high-yield investment, and the Claimant had asked the Respondents to custom tailor this investment to fit his own needs. Respondents, at all times prior to Claimants investing in Aegis, believed that Claimant had been an accredited investor. Claimant had confirmed his status as an accredited investor when he had signed the subscription documents.

2. Respondents engaged in extensive due diligence from the time he had been asked by his other customers to investigate Aegis. There are no set guideline for how extensive a broker's due diligence investigation must be.

3. Under no set of circumstances could Respondents' actions be construed as a guarantee of Claimant's investment.

4. The statement that the Aegis investment was sold does not rise to the level of a material misstatement. At most, Respondents' opinion would constitute an opinion as to the soundness of the investment. Mere statements of opinion do not constitute "material misstatements of fact."

5. At the time that Respondents acknowledged that the Aegis investment was "solid" it appeared to be sound. The subsequent problems at Aegis did not appear until after the sale.

Hence, Respondents could not be charged with per se fraudulent conduct.

6. The truth of the statements constitutes an absolute defense.
7. Respondents cannot be charged with responsibility for some of the allegedly false statements made in Aegis' Offering Circular and Regulation D form D filing. Respondents had no involvement in these documents and had not been in control of their filing.
8. Claimant had not spelled out the particular statements or deceptive acts which provide the groundwork for this claim. In addition, Claimant has failed to allege that Respondents' actions caused any public injury. Claimant has also failed to allege the necessary element of intent. Respondents did not intend to mislead Claimant.
9. The securities at issue were not required to be registered, pursuant to the accredited investor exception. The fact that the offering circular did not proceed or accompany the sale does not give rise to a right of rescission. Respondents only made the offer to rescind after receiving a coercive letter from Claimant's counsel in the course of pre-filing settlement discussions. Because the settlement had not been finalized, Respondents' offer was not binding and had been successfully withdrawn.
10. All elements of Rule 506 were satisfied. Burnside had a reasonable basis, under the circumstances to believe that Claimant had been accredited. The Aegis offering met Rule 502 requirements. No delivery of information to the Claimant had been required in this case.
11. This security had qualified for an exemption under the "accredited investor" exception to registration. Respondents can not be held liable under Section 12(1) as a matter of law.
12. The claim for punitive should be dismissed. Even assuming that Respondents engaged in some sort of misconduct, Respondents' actions were not so egregious as to justify punitive damages.
13. The Statement of Claim and Supplemental Statement of Claim should be dismissed against William C. Burnside ("Burnside") insofar as claimant seeks relief against Burnside in his individual capacity. Burnside, individually, is not a member of the NASD. Because the NASD Code of Arbitration Procedure does not apply to non-members of the NASD, no arbitration matter can be brought against Burnside individually.
14. At all relevant times herein, Burnside was acting as an agent for and in the employ of William C. Burnside & Co., Inc. Claimant has not alleged that Burnside acted outside his scope of employment or authority in dealing with the Claimant. Because there is no legal ground for holding Burnside individually liable in this matter, he must be dismissed as a matter of law.

RELIEF REQUESTED

Claimant requested an award of rescission (\$100,000.00), attorneys' fees, recovery of his forum and hearing costs and expenses, and punitive damages against the Respondents.

Respondents requested that the Statement of Claim be denied.

OTHER ISSUES CONSIDERED & DECIDED

In his Statement of Claim which was filed on August 7, 1992, Claimant made a request for priority docketing due to Claimant's advanced age, and the fact that his alleged losses constituted the majority of his net worth. After receiving responses from the Respondents, and Claimant's replies to the responses, the NASD set the hearing for February 25 and 26, 1993. Upon receipt of the hearing notification by the parties, the NASD had been informed that both parties would not be available to conduct a hearing on the February dates. The parties were unable to reach an agreement on reschedule dates for the hearing, and the matter had been turned over to the undersigned arbitrators for decision. After review of the pleadings, and all of the correspondence concerning the issue of priority docketing and scheduling of a hearing, the panel ordered the hearing to be set for March 11 and 12, 1993.

On January 11, 1993, Respondent William C. Burnside filed a Motion to Dismiss the Statement of Claim. On January 18, Claimant filed a response to the Motion to Dismiss which also contained a response to Respondents' Motion to Strike Inflammatory language. The Motion to Strike had been included in the Answer to the Statement of Claim. On February 1, 1993, Respondent William C. Burnside filed a reply to Claimant's January 18, 1993 letter. On February 2, Claimant filed a response to Respondents' response. After review of the Motion, and the various responses, the panel denied the Motion to Dismiss. The parties were notified of the panel's decision on February 5, 1993.

On September 23, 1993, Respondents filed their Answer to the Statement of Claim. A Motion to Strike Inflammatory Language had been included in that filing. On January 18, 1993, Claimant filed a response to the Motion to Strike. On March 9, 1993, the panel granted the Motion to Strike as to the specific language in points (a) through (e) as set forth in the Motion,

On February 3, 1993, Respondents filed a Motion for Leave to File Third-Party Discovery. Claimant filed a response to the Motion on February 3, 1993. On February 22, 1993, Respondents submitted a request for a pre-hearing conference on the Motion for Third-Party Discovery, and a request for an adjournment of the hearing dates scheduled for March 11 and 12, 1993. Claimant filed a response to the February 22, 1993 correspondence on February 23,

1993. On February 23, 1993, Respondents filed Third-Party Subpoenas for signature of the Chairman. On February 24, 1993, Respondents filed a response to Claimant's response. The original Motion to Take Third Party Discovery had been sent to the Chairman on February 4, 1993. The remainder of the responses, the Motion, the subpoenas, and the request for a pre-hearing conference were sent to the panel on February 23, 1993, and February 26, 1993. The parties received notice that the panel had denied Respondents' requests for subpoenas, for an adjournment, for a pre-hearing conference, and the Motion for Third Party Discovery on March 1, 1993.

The parties have agreed that the Award in this matter may be executed by 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.

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. Respondents, William C. Burnside and William C. Burnside & Co., Inc., are jointly and severally liable for, and shall pay to Claimant, Virgil H. Edwards, the sum of \$86,000.00 upon the concurrent assignment and transfer of all rights, title, and interest in the Aegis Promissory Note to the Respondents.
2. Claimant, Virgil H. Edwards' claims for punitive damages and interest are hereby denied and dismissed with prejudice.
3. Each party shall pay its own costs, expenses, and attorneys' fees, except as set forth more fully below.
4. Respondents, William C. Burnside and William C. Burnside & Co., Inc., are jointly and severally liable for, and shall pay to Claimant, Virgil H. Edwards, the sum of \$9,245.00 as an award of attorneys' fees, costs and expenses. The authority for the award of attorneys' fees is found in Ill.Rev.Stat. Ch. 121 1/2 Section 137.13A.

FORUM FEES

Pursuant to Section 43 (c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

2 hearing sessions X \$500.00 = \$1,000.00

Pursuant to Section 43(c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$150.00, and shall retain the hearing session deposit in the amount of \$500.00 previously paid to the NASD by the Claimant.

Additional forum fees in the amount of \$500.00 are assessed jointly and severally against the Respondents.

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

CONCURRING ARBITRATORS

Dated:

March 16, 1993

/s/Francis C. Farwell
Francis C. Farwell
Presiding Chair
Industry Arbitrator

March 15, 1993

/s/Edward V. Quinn
Edward V. Quinn
Industry Arbitrator

March 16, 1993

/s/Cris M. Selfridge
Cris M. Selfridge
Industry Arbitrator

Date of Service by the NASD:

March 17, 1993