

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Alan Torabi

vs.

NASD #93-01646  
AWARD

Name of Respondents

A.G. Edwards & Sons, Inc.  
James W. Turner

---

REPRESENTATION

For Claimant: Paul N. Young, Securities Arbitration Group, Inc.

For Respondents: Clay M. Grumke, Esq., A.G. Edwards & Sons,  
Inc., St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: April 26, 1993

Claimant's Submission Agreement signed: April 12, 1993

Joint Statement of Answer filed by Respondents: June 25, 1993

Submission Agreements submitted by Respondent, A.G. Edwards &  
Sons, Inc. on June 9, 1993.

Submission Agreements signed by Respondent, James W. Turner on  
June 24, 1993.

HEARING INFORMATION

Prehearing Conference Date/Session:  
December 14, 1993 (one session)

Hearing Date/(Sessions): December 14, 1993 (two sessions)  
December 15, 1993 (two sessions)  
January 7, 1994 (one session)

Hearing Location: Los Angeles, California

### CASE SUMMARY

Claimant alleges that Respondents, in purchasing for his account 92,000 shares of Newport Pharmaceutical, Inc. (name subsequently changed to Systemed, Inc.) from November 16, 1990 through September 10, 1991, when his account was transferred to Olde Discount Corp., recommended unsuitable securities, breached the contract between them, made misrepresentations and engaged in fraudulent practices, violated NASD Rules of Fair Practice, made unauthorized transactions, breached fiduciary duties, engaged in excessive trading, charged excessive commissions, charged excessive margin interest, and violated SEC Rule 15(c) 1-2, and New York Stock Exchange Rule 405.

Respondents denied all such allegations, alleging that Claimant authorized all transactions in his account, failed to notify Respondents of any objections to such transactions, failed to mitigate any damages, was contributorily negligent, and brought this action after the one year statute of limitations had expired.

### RELIEF REQUESTED

Claimant requested in the body of his Statement of Claim return of his alleged initial net equity position of \$278,000 plus \$9,241 in margin interest; the value of such \$278,000 had it been invested in a mutual fund (such value alleged to be \$350,000); punitive damages; and disciplinary referral to the NASD. Claimant requested in his prayer to the Statement of Claim compensatory damages of \$736,000, return of commissions and margin interest of \$23,141, repayment of credit card and mortgage interest paid to fund Claimant's transactions in the sum of \$15,000, repayment of psychological services of \$5,150, interest at 8% from 11/15/90 through 4/1/93, and punitive damages of \$2,000,000.

Respondents Counter-Claimed for Edwards' expenses, including attorneys' fees.

### Other Issues Considered:

The parties have agreed that the Award may be issued in counterpart conformed copies; the original to be filed with the NASD.

### Pre-Hearing Conference and Order:

The Chairperson of the panel, in declining to issue subpoenae duces tecum prepared by Respondents and directed to Claimant's psychologist and his employer, ordered that new subpoena be prepared to conform to local rules of practice, including tendering witness fees, mileage, and reproduction expenses, and directed the submission of the subpoenaed records by sealed envelope to the panel. (Respondents subsequently withdrew their request for subpoenae duces tecum.)

The Chairperson of the panel, in ruling upon Claimant's representative's objection to Respondents' inclusion of the representative's names in their list of witnesses, determined that by analogy to Rule 5-210 of the California Rules of Professional Conduct applicable to members of the California Bar, permitting counsel to testify, Claimant's representative (a non-lawyer) could be called. (However Respondents did not, after all, call Claimant's representative as a witness.)

The Chairperson of the panel, in ruling upon Respondent Edwards' failure to produce its compliance manual and other documents to Claimant, ordered that such be produced forthwith and took under submission Claimant's request for further documentation which Edwards had failed to produce.

#### **Discussion:**

At the hearing Claimant digressed from the compensatory damages sought as stated in his claim to a claim for \$283,424, computed as being the alleged net gain Claimant would have experienced, had 80,000 shares of Newport Pharmaceutical been held in his account until January 28, 1992, and sold on such date at the then market price of \$8; on the assumption that such shares had not previously been sold at lower prices in margin calls by other broker-dealer firms to whom the account had been transferred, and had Edwards not refused to reinstate the account following the transfer.

#### **Findings and Conclusions:**

1. The panel finds that at the time of the events complained of Claimant, a 32 year old U.S. College educated mechanical engineer, who had immigrated from Iran to the U.S. in 1979, was also a part-time registered representative of another broker-dealer, having passed the NASD General Securities Representative Examination (Series 7) on 8/29/90, and the Uniform Securities Agent State Law Examination (Series 63) on 12/14/90.

2. Claimant's purchases of Newport Pharmaceutical in three successive accounts at Edwards, consisting of a net investment of approximately \$105,000, resulted in a profit to Claimant of almost \$24,000, despite the forced sales following margin calls.

3. Claimant is not an unsophisticated or inexperienced investor.

4. The evidence was insufficient to sustain Claimant's burden of proof that the securities were unsuitable, that the contract of fair dealing was breached, that misrepresentations were made, that trading was excessive; that breaches of regulatory rules occurred.

5. There is no evidence that Claimant made any effort to mitigate what he contends are his damages.

6. Regardless of the panel's finding that Claimant suffered no compensable loss, the panel notes the following conflicting testimony, which neither side fully explored: Following commencement of the transactions complained of, Respondent Turner opened a second account for Claimant at Edwards bearing the name of a shortened version of Claimant's mother's name, and caused the transfer of Claimant's first account's assets to such second account. The second account card bears an incorrect address, an incorrect social security number, and incorrect data as the mother's investment experience. Documentation for such account bears a handwritten signature of such shortened version of the mother's name, which name was signed by Claimant. Conflicting testimony relating to the reasons for opening such account varied from Claimant's statement that Turner required same to postpone inquiry by Edwards into Claimant's first account; to Turner's testimony that Claimant, who was involved in a domestic dispute, was trying to hide assets from his then wife. Claimant's mother, who speaks no English, testified (Claimant's ex-wife acting as interpreter) that she had never met Turner and had never authorized opening of the account; Turner testified that Claimant had brought another person whom Claimant had identified as his mother to Edward's office who (with Claimant interpreting) had authorized opening of the account. Neither Claimant's representative nor Respondent's counsel offered any further or corroborating evidence on the matter, although either could have recalled as a witness Claimant's mother, or called as witness Claimant's ex-wife, both of whom were available outside the hearing room during the entire four sessions. Neither party called any Edwards employee (other than Turner) to explore Edwards' supervision of the account. The panel as a result is unable to find that Edwards failed to supervise the account or that any such failure to supervise by Edwards (if same occurred) caused any monetary loss or other damages to Claimant.

7. Respondents' less than forthright response to Claimant's requests for documents production, until ordered to comply by the panel, contributed to the length and complexity of this proceeding.

8. Other matters alleged in the Statement of Claim and in the Statement of Answer were either not argued or were unsupported by credible evidence.

#### 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 the 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:

- A. Claimant is entitled to no compensatory or other damages.
- B. Respondent's cross-claim for its expenses and attorneys fees is denied.
- C. Each party will bear his or its own costs, including attorneys' fees.

### FORUM FEES

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

Claimant is assessed and shall pay to the NASD the sum of \$2,650.00 representing one-half of the total assessment of \$5,300.00.

Respondents are jointly and severally assessed the sum of \$2,650.00 representing one-half of the total assessment of \$5,300.00.

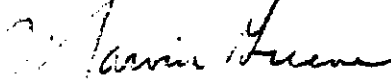
Fees are based on one pre-hearing session at \$300.00 and five hearing sessions at \$1,000.00 each.

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

### ARBITRATION PANEL

<u>Name</u>	<u>Public/Industry</u>
Marvin Greene, Esq.	Public Arbitrator
Harry Miller	Public Arbitrator
Donald Lisle	Industry Arbitrator

Concurring Arbitrators' Signatures



Marvin Greene, Esq.

Harry Miller

Date Served: 04/11/94

Donald Lisle  
Page 5 of 5

Date of decision: \_\_\_\_\_

93-001646