

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Richard D. McCutcheon,
Claimant,

v.

No. 93-02113

A.G. Edwards & Sons, Inc.
Richard Bundrick,
Respondents.

REPRESENTATION OF PARTIES

For Claimant: Gary P. Barkett, Esq., of the Davidson Law Firm, Ltd., Little Rock, Arkansas.

For Respondents: Phyllis A. Radovich, Esq., Litigation Counsel, A.G. Edwards & Sons, Inc., St. Louis, Missouri.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about May 25, 1993.

Claimant's Submission Agreement was signed on May 24, 1993.

Respondents' Joint Statement of Answer was filed on or about .

Respondent A.G. Edwards & Sons, Inc.'s Submission Agreement was signed on September 1, 1993.

Respondent Richard Bundrick's Submission Agreement was signed on July 22, 1993.

HEARING INFORMATION

Hearing date: March 7, 1994. Three (3) sessions.

Hearing Location: Little Rock, Arkansas.

CASE SUMMARY

Claimant, Richard D. McCutcheon ("Claimant") alleged that Respondents, A.G. Edwards & Sons, Inc. and Richard Bundrick ("Respondents"): made unauthorized and "de facto" discretionary trades; breached their fiduciary duty; made unsuitable investments and recommendations; failed to supervise; engaged in negligent acts and practices violating Rules of Fair Practice of the NASD; breached their contract with the Claimant; made misrepresentations and omissions; and violated applicable federal and state Securities law. The allegations arose out of the losses sustained, by the Claimant, in Fifty Off stock along with other facts and circumstances covered more fully at the hearing of this matter.

In their Joint Statement of Answer, Respondents, unless otherwise admitted therein, denied each and every allegation contained in the Statement of Claim. Respondents also asserted the following affirmative defenses:

1. To the extent that Claimant's Statement of Claim attempts to allege a violation of federal securities laws and regulations, Claimant's Statement of Claim fails to allege sufficient facts upon which relief can be granted.
2. As a result of Claimant's failure to object or notify Respondents of the acts and omissions that Claimant complains within ten (10) days of the receipt of written confirmations, account statements and other documents evidencing or setting forth transactions in Claimant's account, Claimant is barred from recovering from Respondents under Claimant's Customer Agreement with Respondents.
3. As the result of Claimant's failure to notify Respondents of the alleged acts and omissions of which Claimant now complains, or of the allegedly unauthorized transactions promptly after their entry, or promptly after receipt of written confirmations, monthly statements and other documents evidencing or setting forth transactions in Claimant's account, and in any event, promptly after Claimant discovered the alleged acts or omissions, Claimant is barred from recovering from Respondents under the doctrines of ratification, account stated, estoppel, waiver, and laches because Respondents relied upon the aforesaid silence of Claimant.
4. Claimant caused or contributed to cause the alleged damages of which he now complains by failing to exercise that degree of care over his affairs and investments which an ordinary prudent investor would exercise; as such, Claimant is barred by his contributory negligence from recovering any alleged damages from Respondents.

5. Claimant was aware from the outset of the risks of profits and losses associated with investing and voluntarily assumed such risks. Claimant's knowing and voluntary assumption of these risks was a proximate cause of his alleged damages.

6. The damages allegedly suffered by Claimant were proximately caused by unforeseen market factors and conditions affecting the value of securities in Claimant's account, for which Respondents are not liable or responsible.

7. Respondents specifically deny that material misrepresentations were made to the Claimant, either negligently or intentionally.

8. Claimant failed to act promptly and with due diligence to mitigate his damages after Claimant knew or should have known of the alleged acts and omissions of which Claimant complains. To the extent Claimant alleges damages which were sustained after such time, Claimant is therefore barred from recovering such damages. In no event is Claimant entitled to recover damages sustained after Claimant's account with Respondents was closed.

9. The Statement of Claim fails to state a basis upon which punitive damages can be awarded.

In addition, Respondents asserted a counterclaim for costs and attorneys' fees, asserting that pursuant to Claimant's Customer Agreement, Claimant had agreed to pay all of Respondents' costs if Claimant brought an action against Respondents and was unsuccessful.

RELIEF REQUESTED

Claimant requested an award against the Respondents, jointly and severally, as follows:

- (1) For compensatory damages in excess of \$50,000.00;
- (2) Pre and post award interest;
- (3) Punitive damages in such amount as the arbitrators deem appropriate to deter Respondents from future acts of misconduct such as those giving rise to this claim; and
- (4) For all of Claimant's costs, expenses and disbursements including reasonable attorney's fees in pursuing this claim.

Respondents requested that all claims be dismissed and that Respondents be awarded any and all costs and expenses incurred in connection with the defense of this proceeding, including reasonable attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

On September 17, 1993, Claimant filed a Motion to Strike Respondent's Joint Answer. After considering the motion and the response, and deliberation, the undersigned arbitrators denied the Motion to Strike.

On February 15, 1994, Respondents filed a Third Party Complaint and Motion to Join, seeking to add Delores McCutcheon joined as a Third-Party Respondent. On February 23, 1994, Claimant filed a Motion to Dismiss Third Party Complaint and Motion to Join. On February 28, 1994, Delores J. McCutcheon, by special appearance, filed a Motion to Dismiss Respondents' Third Party Complaint and Motion to Join. After review of the motions, the panel denied the Motion to Join and Third Party Complaint filed by the Respondents.

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, A.G. Edwards, Inc. and Richard Bundrick are jointly and severally liable for, and shall pay to Claimant, Richard D. McCutcheon the sum of \$24,278.00, plus interest from February 27, 1992 through January 13, 1993 in the amount of \$2,564.55 as satisfaction for his claims herein.
2. Claimant's claim for punitive damages is denied and dismissed with prejudice.

OTHER COSTS

Respondents, A.G. Edwards & Sons, Inc. and Richard Bundrick are jointly and severally liable for, and shall pay to Claimant, Richard D. McCutcheon the sum of \$2,000.00 as satisfaction of Claimant's request for attorney's fees herein.

FORUM FEES

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

3 hearing sessions x \$400.00 = \$1,200.00

Pursuant to Section 43(c) of the Code, the NASD shall **retain** the nonrefundable filing fee in the amount of \$120.00, and shall **REFUND** the hearing session deposit in the amount of \$400.00, respectively, previously paid to the NASD by the Claimant.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable Counterclaim filing fee in the amount of \$500.00, and shall **RETAIN** the Counterclaim hearing session deposit in the amount of \$600.00 previously paid to the NASD by A.G. Edwards & Sons, Inc.

Additional Forum Fees in the amount of \$700.00 are assessed jointly and severally against the Respondents.

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

CONCURRING ARBITRATORS

Dated:

Name:

March 30, 1994

Tom F. Digby /s/
Hon. Tom F. Digby
Presiding Chair
Public Arbitrator

March 29, 1994

Patrick E. Hollingsworth/s/
Patrick E. Hollingsworth
Public Arbitrator

March 29, 1994

Richard D. Bingham/s/
Richard D. Bingham
Industry Arbitrator

Date of Service by the NASD: April 4, 1994