

## NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION

Hearing Dates/Sessions: June 25, 1996 - 2 sessions  
June 26, 1996 - 2 sessions  
December 3, 1996 - 2 sessions  
December 4, 1996 - 2 sessions  
February 11, 1997 - 2 sessions  
February 12, 1997 - 1 session

Hearing Location: DoubleTree Hotel, Baltimore, Maryland - June 25 and 26, 1996  
Tremont Plaza, Baltimore, Maryland - December 3 and 4, 1996 and  
February 11 and 12, 1997

### CASE SUMMARY

Claimant opened a retirement account with Dietrich, an Edwards' broker in 1989. Claimant alleged that prior to opening the account, Claimant's retirement portfolio held securities issued by the United States Treasury and in Certificates of Deposit. Claimant alleged that at the time she began her relationship with Dietrich, she did not possess even the most rudimentary understanding of trading in securities.

Claimant alleged that for the first two years of their account relationship, Dietrich communicated almost exclusively and directly with Claimant's husband regarding transactions in her retirement account. In late 1991, Claimant informed Dietrich that her marital and financial situation had changed, that her current financial condition was tenuous, and that the outlook for further contributions towards her retirement was bleak. She also informed Dietrich that she was attending an intensive and costly training program, in addition to maintaining her therapy practice and raising two children, and did not have the financial wherewithal to withstand any loss to her retirement funds. And, finally, Claimant alleged that she emphasized that she was not conversant in the vagaries of the market and would look to Dietrich for advice. Claimant alleged that in response, Dietrich assured her that he was most sensitive to her concerns, and would assist her in managing all of her financial affairs.

Claimant alleged that by early 1992 and continuing through mid 1994, Dietrich did not respond to her concerns. Claimant alleged that she never provided Dietrich with written discretionary authorization to trade her account. Claimant alleged that Dietrich directed ninety transactions in her account in the two year period yet he spoke with Claimant on no more than fifteen occasions. Claimant alleged that during those conversations, Dietrich proposed groups and types of stocks from which he unilaterally selected the quantity to be purchased, sometimes "rounding" up or down, and the price to be paid. Sometimes he made the purchases two months after he spoke with Claimant.

Claimant alleged that she relied entirely on the information and advice provided by Dietrich because she did not have the background to evaluate the quality of stocks or the most appropriate strategy for her retirement account. Claimant asserted that Dietrich exercised de facto control over Claimant's account. Claimant alleged that Dietrich did not explain to her the high risk course of trading he was undertaking in her account, and although Edwards transmitted information regarding some of the securities purchased, the documents contained no disclosure of the speculative nature of those stocks. Claimant further alleged that her account documentation indicated that her objective was long term growth, between January 1992 and mid-1994 more than 80% of her account was in speculative securities. Claimant alleged that in 1992 and 1993, more

than 50% of the stocks purchased were held for less than one year, and over 40% were held for less than six months.

Claimant alleged that Dietrich exercised discretion without her authorization, that trading in her account was unsuitable and excessive, and that her account was churned and mishandled. She alleged that the foregoing acts demonstrate that the Respondents violated the federal and state securities laws and the common law, including fraud and negligence, and breached their fiduciary duty to Claimant. She also alleged that Edwards failed to properly supervise Dietrich and is liable as the control person and under the theory of respondeat superior. In addition, Claimant alleged that Dietrich did not comply with NYSE Rule 408D.

Respondents denied all allegations of wrongdoing asserted by Claimant. Respondents maintained the following: Claimant is a highly educated, self-employed psychologist who has made various investments, including real estate, over the years, and was thereby capable of handling and understanding all transactions in her account. All decisions and orders with respect to Claimant's account were approved and ratified by Claimant as they were in accordance with her account objectives of obtaining growth. Claimant also executed an IRA/SEP Adoption Agreement with Edwards and Custodial Account Agreement which she required that she notify Edwards in writing within ten days after receipt of statements, confirmations, reports or notices of transactions in her account, and that if Claimant failed to do so, agreed that the transaction were accepted by Claimant as correct and conclusive. Claimant failed to so notify Edwards or object to the transactions. Respondents also contended that Claimant's account was profitable and, therefore, she sustained no damages. Respondents maintained the following affirmative defenses: 1) Claimant's assertion that Edwards is responsible as a "controlling person" does not rise to the level of stating a cause of action against Edwards; 2) Claimant is barred from recovering under her Custodial Account Agreement and under the Uniform Commercial Code as enacted in the State of Maryland; 3) Claimant's failure to timely object to the transactions is deemed to be a ratification, waiver and estoppel of Claimant's right to recovery; 4) All of the transactions in Claimant's account were executed with Claimant's express authorization and initiation; 5) Claimant agreed in her IRA/SEP Adoption Agreement that any losses regarding the transactions in her account were to be borne by her and to bear Edwards' expenses in any dispute should Edwards win; 6) The Statement of Claim fails to state a claim upon which relief may be granted; 7) Claimant's claim for relief are barred in whole or part due to her contributory negligence; 8) Claimant's claim for relief are barred due to Claimant's failure to mitigate; 9) Claimant knowingly and voluntarily assumed the associated risks of her investments, which was the sole and approximate cause of her alleged damages; 10) Claimant's alleged damages were caused, if at all, by unforeseeable market factors and conditions affecting the value of securities in Claimant's account for which Respondents are not responsible; 11) Claimant's claims are barred by all applicable federal and state statutes of limitation; 12) Claimant may not recover punitive damages pursuant to the Fourteenth Amendment of the United States Constitution; 13) Claimant authorized the alleged conduct about which she now complains.

### RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$110,053. She also requested disgorgement on commissions in the amount of \$30,951. Claimant also requested attorney's fees pursuant to Section 11-107 of the Maryland Securities Act, expert witness fees, costs and hearing session fees. Additionally she requests that the Panel refer Dietrich's violation of Rule 408D to the appropriate regulatory authorities.

Respondents requested that judgment be entered on behalf of Respondents and against Claimant and that Respondents be awarded all costs as legally permitted.

### OTHER ISSUES CONSIDERED & DECIDED

On June 21, 1996, Claimant filed a Motion to Amend her Statement of Claim to amend paragraph 55(A) to allege Claimant's loss of income, earning, and profits in the approximate amount of \$109,000.00. On June 25, 1996, prior to the initiation of testimony, the Motion to Amend the Statement of Claim was sustained by the Panel.

At the close of Claimant's case and again following the close of all testimony, Respondents moved that the Panel dismiss Claimant's claims on their merits and pursuant to the applicable statutes of limitation.

At the conclusion of the testimony on February 12, 1997, Claimant requested that testimony adduced at the arbitration proceeding be kept confidential, subject only to being produced pursuant to an appropriate subpoena which she would then have an opportunity to protest. The basis for this request is that Claimant believes releasing such information would damage her reputation as a psychologist. Respondents objected to such finding by the Panel.

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 original(s) remain on file with the NASD.

### AWARD

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

1. Respondents A.G. Edwards & Sons, Inc. and Harry H. Dietrich are jointly and severally liable to Claimant Sylvia M. Bell and shall pay to Claimant the sum of \$56,450.00; inclusive of pre-judgment interest.

2. Respondents' motion to dismiss Claimant's claims on the merits and pursuant to the applicable statutes of limitations is denied in its entirety.
3. The parties shall bear their respective costs, including attorneys' fees, except as forum fees are specifically addressed below.
4. As to Claimant's request for confidentiality, the parties are to adhere to the confidentiality order drafted in this matter. The Panel denies Claimant's request to draft a further confidentiality order.
5. Any and all relief not specifically addressed herein is denied, except that if the Panel decides to write a referral in this matter any referral would be addressed after this Award is served.

#### **FORUM FEES**

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the following Forum Fees are assessed.

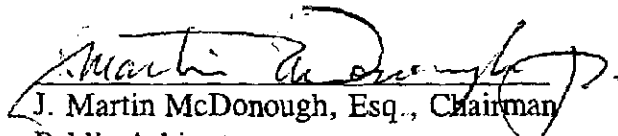
11 hearing sessions x \$750 = \$8,250 minus hearing session deposit of 500 = net \$7,750 due.

Forum Fees Assessed Against: Respondents Edwards and Dietrich are jointly and severally assessed forum fees in the amount of \$7,750.

Fees are payable to the NASD Regulation, Inc.

Concurring Arbitrators' Signatures

Date Award Signed

  
J. Martin McDonough, Esq., Chairman  
Public Arbitrator

4/25/97

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Maureen Power Wilkerson, Esq., Panelist  
Public Arbitrator

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Gordon F. Linke, Panelist  
Industry Arbitrator

Date Award Served by NASD Regulation, Inc.

April 24, 1997

Concurring Arbitrators' Signatures

Date Award Signed

J. Martin McDonough, Esq., Chairman  
Public Arbitrator

Maureen P. Wilkerson  
Maureen Power Wilkerson, Esq., Panelist  
Public Arbitrator

4.7.97

Gordon F. Linke, Panelist  
Industry Arbitrator

Date Award Served by NASD Regulation, Inc.

April 24, 1997

Bell Award

Case No. 95-03011

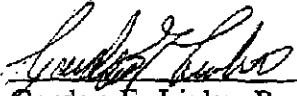
Page 6

Concurring Arbitrators' Signatures

Date Award Signed

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J. Martin McDonough, Esq., Chairman  
Public Arbitrator

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Maureen Power Wilkerson, Esq., Panelist  
Public Arbitrator

  
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Gordon F. Linke, Panelist  
Industry Arbitrator

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4/7/97

Date Award Served by NASD Regulation, Inc.

April 24, 1997