

## **AWARD**

National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A," and  
Trustee of the C.A. O'Keefe, II, Trust "B,"

Claimants,

v.

No. 95-04140

Smith Barney, Inc., and  
David J. Abrahams,

Respondent.

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### **REPRESENTATION OF PARTIES**

Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" were represented by Frank V. Ghiselli, Esq., Sole Practitioner, and Winston Cochran, Esq., Sole Practitioner, both of Houston, TX.

Respondents Smith Barney, Inc. and David J. Abrahams were represented by Paul Barenholtz, Esq. of Smith Barney, Inc. located in New York, NY.

### **CASE INFORMATION**

The Statement of Claim of Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" was filed on or about August 29, 1995.

The Uniform Submission Agreement of Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" was signed on August 24, 1995, by Owens Edge, Trustee of C.A. O'Keefe, II, Trust "A" and C.A. O'Keefe, II, Trust "B."

Respondents Smith Barney, Inc. and David J. Abrahams' joint Statement of Answer was filed on or about November 2, 1995.

Respondent Smith Barney, Inc.'s Uniform Submission Agreement was signed on October 27, 1995 by Larry H. Irom, Managing Director of Smith Barney, Inc.

### HEARING INFORMATION

There were no pre-hearing conferences.

The hearing was held on:      October 22, 1996, for two (2) sessions;  
   October 23, 1996, for three (3) sessions;  
   October 24, 1996, for three (3) sessions; and  
   October 25, 1996, for one (1) session.

The hearing was held in Houston, TX.

### CASE SUMMARY

Claimants Owens Edge ("Edge"), Trustee of the C.A. O'Keefe, II, Trust "A" ("Trust A") and Trustee of the C.A. O'Keefe, II, Trust "B" ("Trust B") (hereinafter collectively referred to as "Claimants" or the "Trusts") alleged that Respondent David J. Abrahams, with his employer, Respondent Smith Barney, Inc. (hereinafter collectively referred to as "Respondents"), engaged in unsuitable trading and churning, and made misrepresentations and omissions of material facts. According to Claimants, Edge informed Respondents that he needed someone he could trust to make decisions because he lacked stock market experience and the Trusts' beneficiary relied on the Trusts as a primary means of support, and that due to his occupation he would not be reachable much of the time in order to make decisions on behalf of the Trusts. Respondents allegedly represented that they could obtain a rate of return on the Trusts ranging from 8% to 11%, so that monthly withdrawals of approximately \$2,500.00 could be made without reducing principal, and that in the event of a downturn, the Trusts could be taken out of the market relatively quick. Based upon these representations and understandings, Edge had the Trusts transferred to Respondents in December of 1993. Upon the transfer, Trust A allegedly consisted of \$115,000.00 cash and a variety of large capitalization domestic stocks worth \$131,766.75, and Trust B consisted of \$45,000.00 cash. From March of 1994 through February of 1995, an additional \$39,669.87 cash was deposited into Trust A.

Claimants then made the following assertions: Immediately following the transfers, the entire \$115,000.00 cash in Trust A and \$45,000.00 cash in Trust B were invested in Alliance North American Government Income Trust (the "Alliance Fund"). All stocks in Trust A were allegedly arbitrarily liquidated, without regard to profit or loss. At least 70% of Trust A's assets and 100% of Trust B's assets comprised of shares of the Alliance Fund at all times. As alleged, the Alliance Fund was unsuitable because of the risk of a substantial loss of principal due to its speculative investments, which Edge never intended nor desired. Edge never intended nor desired the risks associated with margin trading either, but Respondents margined Trust A and Trust B at the highest permissible levels in order to purchase more shares of the Alliance Fund. Adding to the claim of unsuitability was Respondents' purchase for Trust A of 3,900 shares of NeoRx Corp. in October and

November of 1994 and their subsequent sale in December of 1994 for a loss of \$14,752.96. Claimants contended that NeoRx Corp. was unsuitable because of its substantial risk for the loss of principal and because NeoRx Corp. had never paid dividends on its common stock and did not anticipate doing so in the future. In addition, Respondents allegedly failed to disclose material facts regarding NeoRx Corp.'s revenue sources, its operating losses, its lack of assets and its common stock volatility. Furthermore, Respondents allegedly recommended and executed trades in options, which Edge did not intend or desire and would have rejected had he understood the risks involved in options trading. The Claimants asserted that the Respondents also engaged in churning by selling the stocks that were in the Trusts when the Trusts were transferred to Respondents, repurchasing them, and then selling them again within a period of a few months, as well as purchasing other stocks and selling them within a period of a few months, all in order to raise commissions. Moreover, no discretionary power was ever transferred to Respondents. The Claimants further asserted that the Respondents never advised Edge about fees and commissions, trading on margin, options trading, and associated risks.

Claimants made the following legal claims: (1) violations of the Deceptive Trade Practices Act; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; (5) violations of Section 33 of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann. Art. 581-33); (6) violations of Section 27.01 of the Texas Business & Commerce Code; and (7) breach of contract.

Respondents denied the allegations set forth in the Statement of Claim. Respondents made the following contentions: Edge was actively involved with every aspect of the Trusts and informed Respondents that the Trusts' investment objectives were to primarily generate monthly income and generate growth. According to the Respondents, Edge decided, on the basis of four proposals, to invest in the Alliance Fund, for which he was given a prospectus. Upon transfer of the Trusts to Respondents, all stocks were liquidated and trading on margin was initiated under Edge's direction. Certain shares of the fund were sold in order to cover checks written on the Trusts. In addition, Edge ordered the sale of some shares of the Alliance Fund and the purchase of other stocks and options in order to increase the principal. Disclosure documents explaining options were allegedly given to Edge, following which he informed Respondents that he had prior experience in options. Respondents also allegedly informed Edge that in order to improve the performance and productivity of the Trusts, the beneficiary needed to reduce his spending habits, but the spending habits did not lessen. As alleged, Edge assumed the role of fiduciary and made the investment decisions for the Trusts.

In addition, Respondents made the following affirmative defenses: (1) Claimants failed to state a claim upon which relief could be granted; (2) Claimants' own acts or omissions were the cause of the alleged harm; (3) any alleged acts of Respondents were not the direct or proximate cause of the alleged damages; (4) Claimants failed to mitigate damages; (5) Claimants' claims were barred by the doctrines of waiver and estoppel; (6) Claimant ratified each and every transaction; (7) Claimants' claims were barred by assumption of the risks; (8) there was no private right of action for alleged

violations of NYSE or NASD rules; (9) the acts complained of were not encompassed in the Deceptive Trade Practices Act; and (10) Respondents were not fiduciaries of the Trusts.

### **RELIEF REQUESTED**

Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" requested: an award in the amount of \$267,884.74 in compensatory damages for the C.A. O'Keefe, II, Trust "A"; an award in the amount of \$34,370.13 in compensatory damages for the C.A. O'Keefe, II, Trust "B"; an award in the amount of \$900,000.00 for exemplary damages, or two times the portion of actual damages that do not exceed \$1,000.00 and three times the portion of actual damages in excess of \$1,000.00, or punitive damages as authorized under Section 27.01(c) of the Business & Commerce Code; an award of attorney's fees pursuant to Section 33D(7) of the Texas Securities Act, Section 27.01(e) of the Business & Commerce Code, Tex. Civ. Prac. & Rem. Code Ann. Section 38.001, DPTA Section 17.50(d), and the NASD Code of Arbitration; and an award for pre-award and post-award interest.

Respondents Smith Barney, Inc. and David J. Abrahams requested that the Statement of Claim asserted against them be dismissed and that all costs be assessed against Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B."

### **OTHER ISSUES CONSIDERED & DECIDED**

Respondent David J. Abrahams did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Section 10301 of the Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

The Arbitration Panel reviewed the Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B"s request dated November 5, 1996 to supplement the record and the Respondents Smith Barney, Inc. and David J. Abrahams' response dated November 14, 1996. After careful consideration, the Arbitration Panel decided to grant the request and the arbitrators did contemplate all related submissions when making a final determination in this matter.

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 NASD Regulation, Inc. Office of Dispute Resolution.

### **AWARD**

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

1. That Respondents Smith Barney, Inc. and David J. Abrahams are hereby, jointly and severally, liable for and shall pay to Claimant Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" the sum of \$81,765.14 in compensatory damages;
2. That Respondents Smith Barney, Inc. and David J. Abrahams are hereby, jointly and severally, liable for and shall pay Claimant Owens Edge, Trustee of C.A. O'Keefe, II, Trust "B" the sum of \$18,234.86 in compensatory damages;
3. That Respondents Smith Barney, Inc. and David J. Abrahams are hereby, jointly and severally, liable for and shall pay to Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" \$13,200.00 for attorneys' fees pursuant to Section 33D(7) of the Texas Securities Act, Section 27.01(e) of the Business & Commerce Code, Tex. Civ. Prac. & Rem. Code Ann. § 38.001, DPTA §17.50(d), and the Code of Arbitration which was the legal authority provided by the Claimants;
4. That payment of the amounts awarded herein shall be made within thirty (30) days from the date of this Award; and
5. That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000.00 per hearing session. There were nine (9) hearing sessions x \$1,000.00 = \$9,000.00 in forum fees. Pursuant to Section 10332(b) of the Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Section 10332(c) of the Code, National Association of Securities Dealers Regulation, Inc. ("NASD Regulation, Inc.") Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$250.00 and shall retain as forum fees the hearing session deposit in the amount of \$1,000.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B."

NASD Regulation, Inc. Office of Dispute Resolution shall also retain the member surcharge in the amount of \$500.00 pursuant to Section 10333 of the Code of Arbitration Procedure which was previously paid by Respondent Smith Barney, Inc..

Respondents Smith Barney, Inc. and David J. Abrahams are hereby, jointly and severally, liable for and shall pay forum fees in the amount of \$8,000.00 to the NASD Regulation, Inc. Office of Dispute Resolution in accordance with Section 10332(c) of the Code.

Respondents Smith Barney, Inc. and David J. Abrahams are hereby, jointly and severally, liable for and shall pay to Claimants Owens Edge, Trustee of the C.A. O'Keefe, II, Trust "A" and Trustee of the C.A. O'Keefe, II, Trust "B" the amount of \$1,000.00 as reimbursement for the hearing session deposit.

**Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.**

Signed:

Dated:

Richard P. Flake, Esq.

November 27, 1996

Richard P. Flake, Esq.  
Public Arbitrator, Presiding Chair

Jerry C. Prestridge

November 29, 1996

Jerry C. Prestridge  
Public Arbitrator

Arnold J. Weinberg, Esq.

November 29, 1996

Arnold J. Weinberg, Esq.  
Industry Arbitrator

Date served by the NASD Regulation, Inc.: December 4, 1996