

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Curtis Smay and Joyce Smay,

Claimants,

v.

No. 95-05119

A.G. Edwards & Sons, Inc.,  
Advest, Inc., and  
William E. Cromwell,

Respondents.

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### **REPRESENTATION OF PARTIES**

Claimants Curtis Smay and Joyce Smay were represented by Bruce D. Aukerman, Esquire, of Mann Chaney Johnson Goodwin & Williams, located in Terre Haute, Indiana.

Respondents A.G. Edwards & Sons, Inc. and William E. Cromwell were represented by M. Jane Matoesian, Esquire, of A.G. Edwards & Sons, Inc., located in St. Louis, Missouri.

Respondent Advest, Inc. was represented by Barry Kroemer, Esquire, of Advest, Inc., located in Hartford, Connecticut.

### **CASE INFORMATION**

Claimants Curtis Smay and Joyce Smay's joint Statement of Claim was filed on or about October 30, 1995. Claimants Curtis Smay and Joyce Smay's joint Submission Agreement was signed on October 19, 1995.

Respondents A.G. Edwards & Sons, Inc. and William E. Cromwell's joint Statement of Answer was filed on or about December 20, 1995. Respondent A.G. Edwards & Sons, Inc.'s Submission Agreement was signed on November 14, 1995, by Stephen G. Sneeringer, Vice President & Counsel of A.G. Edwards & Sons, Inc. Respondent William E. Cromwell's Submission Agreement was signed on January 24, 1996.

Respondent Advest, Inc.'s Statement of Answer was filed on or about December 18, 1995. Respondent Advest, Inc.'s Submission Agreement was signed on December 18, 1995, by Lee G. Kuckro, General Counsel of Advest, Inc.

### **HEARING INFORMATION**

A pre-hearing conference was held on July 10, 1996 for one (1) session.

The hearing was held on September 9, 10, 1996 for two (2) sessions each day and September 11, 1996 for three (3) sessions, and December 17 and 18, 1996 for two (2) sessions each day for a total of 11 sessions. The hearing was held in St. Louis, Missouri.

### **CASE SUMMARY**

Claimants Curtis Smay and Joyce Smay ("Claimants") alleged that respondent William E. Cromwell ("Mr. Cromwell"), through his employers, first respondent A.G. Edwards & Sons, Inc. ("Edwards") and second Advest, Inc. ("Advest") (hereinafter collectively referred to as "Respondents"), made misrepresentations and omissions of material facts, disregarded investment objectives, conducted unauthorized trading, made unsuitable investments, and churned their account. Claimants asserted that they informed Respondents that they, Claimants, lacked investment knowledge, and that their investment objective was preservation of principal. Nonetheless, Claimants reported that Respondents exercised complete control over the nature, type and frequency of trading in Claimants' account. Consequently, according to Claimants, they had to rely on Respondents to select suitable trades, but instead Respondents invested their retirement funds in speculative and risky penny stocks and options, and put their account on margin, without informing Claimants about the associated risks. In addition, Claimants asserted that respondents Edwards and Advest failed to maintain a reasonable and proper system of internal supervision and control over their employees, agents, and associated persons. Claimants made the legal claims of breach of fiduciary duty, violations of state and federal statutory and common law as well as NASD and NYSE rules of fair practice.

Respondents Edwards and Mr. Cromwell denied the allegations set forth in the Statement of Claim and stated that the Statement of Claim is so vague and ambiguous that it fails to allege sufficient facts to state a claim for which relief may be granted for any of the legal theories asserted. Respondents Edwards and Mr. Cromwell's statements can be summed as follows: Claimants were clearly satisfied with Mr. Cromwell's handling of their account since they transferred it from Advest to Edwards when Mr. Cromwell joined Edwards. Claimants executed a Customer Agreement acknowledging all the terms and conditions with respect to their margin account. All decisions and orders with respect to Claimants' account were made by claimant Curtis Smay. Claimants opened an option account by completing an Option New Account Card, which reflected the account investment objectives for Claimants' account as growth, speculation, safety of principal, and income; and no corrections or comments regarding the information on the Option New Account Card were made by Claimants when they were given the opportunity. In addition, Claimants signed an Option Account Agreement. Claimants had substantial experience investing in equities prior to joining Edwards, and all transactions in their Edwards account were conducted with Claimants' express authorization. Respondents Edwards and Mr. Cromwell made the following affirmative defenses: (1) Claimants' assertion that Edwards is responsible as a "controlling person" does not rise to the

level of stating a cause of action against Edwards; (2) Claimants are barred from recovering from Edwards under their Customer's Agreement and under the Uniform Commercial Code as enacted in the States of Illinois and Missouri; (3) Claimants' failure to timely object to the transactions is deemed to be a ratification, waiver and estoppel of Claimants' right to recovery; (4) all of the transactions in Claimants' Edwards account were executed with Claimants' express authorization and initiation; (5) Claimants agreed, in their Customer's Agreements, to bare Edwards expenses in any dispute should Edwards win; (6) the Statement of Claim fails to state a claim upon which relief can be granted; (7) Claimants' claims for relief are barred due to their failure to mitigate damages; (8) Claimants' claims for relief are barred in whole or in part due to their contributory negligence or comparative fault; (9) Claimants knowingly and voluntarily assumed the associated risk of their investments, which was the sole and proximate cause of their alleged damages; (10) Claimants' alleged damages were caused, if at all, by unforeseeable market factors and conditions affecting the value of securities in Claimants' account after which Respondents are not liable or responsible; (11) Claimants' claims are barred by all applicable federal and state statutes of limitation; (12) Claimants may not recover punitive damages pursuant to the Fourteenth Amendment to the United States Constitution and the Illinois Constitution and are restricted by the Illinois Civil Justice Reform Act of 1995; (13) Claimants' claims for damages are prohibited by the terms of their Customer's Agreement; and (14) Claimants authorized the alleged conduct about which they complain.

Respondents Advest and Mr. Cromwell denied the allegations set forth in the Statement of Claim. Respondents Advest and Mr. Cromwell stated that they had no discretion over the Claimants' account, that all trades were approved by Curtis Smay beforehand, and that Claimants had no option agreement and conducted no option trades at Advest. According to respondents Advest and Mr. Cromwell, Claimants have never complained about the types and kinds of trading that occurred in their Advest account while the account was open, Claimants' account was profitable, and their is no valid claim relating to Claimants' Advest account. Claimants Advest and Mr. Cromwell made the following affirmative defenses: (1) Claimants failed to mitigate their damages; (2) Claimants' Statement of Claim fails to state a claim for which relief can be granted; (3) Claimants have never, previous to filing the Statement of Claim, complained of their trading, or profitability of their Advest account, and have therefore ratified all such trading; (4) Claimants' claims do not give rise to private causes of action; and (5) all valid causes of actions, if any, are barred by the applicable statutes of limitation.

### **RELIEF REQUESTED**

Claimants Curtis Smay and Joyce Smay requested: an award in an amount not less than \$150,000, plus interest; an award for attorney fees; and an award for punitive damages.

Respondents A.G. Edwards & Sons, Inc. and William E. Cromwell requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and attorneys' fees.

Respondents Advest, Inc. and William E. Cromwell requested that the claims asserted against them be dismissed in their entirety and that they be awarded their costs and fees.

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

During the course of the hearing, Advest raised a motion to dismiss. After hearing argument from the parties, and deliberation, the undersigned arbitrators denied the motion.

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, 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. Respondent A. G. Edwards & Sons, Inc. is liable for, and shall pay to the Claimants the sum of \$45,000 as satisfaction for their claim for compensatory damages.
2. Respondent Advest, Inc. is liable for, and shall pay to the Claimants the sum of \$25,000 as satisfaction for their claim for compensatory damages.
3. Respondent William E. Cromwell is liable for, and shall pay to the Claimants the sum of \$20,000 as satisfaction for their claim for compensatory damages.
4. 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, denied with prejudice.

### **FORUM FEES**

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were 11 sessions x \$750 and one (1) pre-hearing session x \$300 = \$8,550 in forum fees. Pursuant to §10332(b) 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 §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **refund** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimants.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously paid by Edwards and retain the non-refundable member surcharge in the amount of \$350 previously paid by Advest.

Additional forum fees in the amount of \$4,275 are assessed by the arbitrators against Edwards.

Additional forum fees in the amount of \$4,275 are assessed by the arbitrators against Advest.

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

<u>Keith E. Mattern</u> Keith E. Mattern Public Arbitrator, Presiding Chair	/s/	Dated: <u>December 19, 1996</u>
<u>Richard L. Puhl</u> Richard L. Puhl Public Arbitrator	/s/	<u>December 20, 1996</u>
<u>Rochelle S. Hall</u> Rochelle S. Hall Industry Arbitrator	/s/	<u>December 20, 1996</u>