

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

- Daniel R. Friedrichsen,

Claimant,

and

No. 96-00233

A.G. Edwards & Sons, Inc.,

Respondent,

REPRESENTATION OF PARTIES

Claimant Daniel R. Friedrichsen was represented by Matthew J. Forristal, Esquire of Forristal & Goettsh Law Firm, located in Holstein, Iowa.

Respondent A.G. Edwards & Sons, Inc. was represented by Clay L. Grumke, Esquire of A.G. Edwards & Sons, Inc., located in St. Louis, Missouri.

CASE INFORMATION

Claimant Daniel R. Friedrichsen's Statement of Claim was filed on or about January 17, 1996. Claimant Daniel R. Friedrichsen's Submission Agreement was signed on January 9, 1996.

Respondent A.G. Edwards & Sons, Inc.'s Statement of Answer was filed on or about March 15, 1996. The NASD Regulation, Inc. Office of Dispute Resolution has no record of a signed submission to arbitration from respondent A.G. Edwards & Sons, Inc.

HEARING INFORMATION

A pre-hearing conference was held on: October 16, 1996 for one (1) session.

The hearing was held on: January 7, 1997 for two (2) sessions; and
January 8, 1997 for two (2) sessions.

The hearing was held in Omaha, Nebraska.

CASE SUMMARY

Claimant Daniel R. Friedrichsen ("Claimant") brought this action to recover sums lost through transactions conducted by Daniel Roepke ("Mr. Roepke"), a registered representative of respondent A.G. Edwards & Sons, Inc. ("Respondent").

According to Claimant, in November 1988 he opened a commodity account with Respondent based on Mr. Roepke's representations that he was an expert in commodity investments and that he had adequate means to facilitate commodity trading, such as a communications network and essential information and research capabilities. Claimant asserted that Mr. Roepke and Respondent knew or should have known that his (Claimant's) investment needs and objectives were limited to stable or income producing securities and conservation of principal, and that he had little or no knowledge concerning commodity markets and trading on such markets. Claimant stated that in March 1990 Mr. Roepke contacted him concerning commodity hedging trades that did not require any cash input. Claimant asserted that at various times from March 1990 through November 1991, Mr. Roepke engaged in unauthorized trading of commodity futures in Claimant's account, which resulted in a substantial amount of losses to Claimant's account, including margin debt, in the amount of approximately \$170,000.00. Claimant further asserted that Mr. Roepke represented that it was necessary to conduct numerous trades on the account to make a profit or to get out of the loss position. Claimant alleged that Mr. Roepke urged him to continue to contribute to the account, while offering to contribute his own funds, so that there would be no further losses, and that Mr. Roepke and Respondent transferred funds from other accounts Claimant had with Respondent to fund the commodity account. Nevertheless, according to Claimant, Mr. Roepke and Respondent effected transactions that were of a high frequency and poor quality, were inappropriately stretched over an excessive number of commodities, and took delivery of contracts without stop loss orders, which resulted in commissions and fees from Claimant in excess of \$98,000.00. Claimant also alleged that from approximately April 1990 through some time in 1991, Respondent had information indicating that Mr. Roepke was not a competent commodities broker, but failed to take steps to restrict his access and authority to trade commodity futures in Claimant's account.

Claimant alleged that on July 15, 1991 Mr. Roepke converted for his own use an annuity contract Claimant had with Xerox Life Insurance Company ("Xerox") purchased through Xerox's agent, Mr. Roepke. According to Claimant, Mr. Roepke forged Claimant's name on a letter requesting the liquidation of the annuity and changing the address for all subsequent correspondence to the branch office of Respondent where Mr. Roepke was located. Claimant asserted that this letter also requested that Xerox forward the proceeds to a bank account that was Mr. Roepke's personal account. Claimant further asserted that the conversion of the annuity, which at the time of the conversion had a value of \$34,217.40 and was worth \$36,032.51, resulted in additional losses from federal and state income taxes, early withdrawal penalties, and lost interest.

Claimant stated that he owned a money market account with Respondent worth \$15,561.51, which was frozen in November 1991. Claimant asserted that on or about December 15, 1992 Respondent

manufactured artificial paper losses against Claimant's account and unilaterally, without consent, notice or authorization, took possession of the balance of this money market account and has since denied Claimant access to these funds.

Claimant further alleged that during 1990 and 1991 Mr. Roepke induced him to liquidate his Individual Retirement Account ("IRA") held by Respondent, which was deposited in Claimant's commodity account. According to Claimant, Mr. Roepke represented that the liquidated sum of \$10,192.83 could be used for 60 days without giving rise to penalties or a taxable event. Claimant asserted that this liquidation resulted in additional losses from federal and state income taxes, early withdrawal penalties, and lost interest on the IRA.

Lastly, Claimant alleged that on or about March 16, 1991 Mr. Roepke liquidated three cattle puts totaling \$1,118.59, the loss of which cost Claimant over \$5,000, and that on or about March 18, 1991 Mr. Roepke converted to his personal account a check drawn by Claimant in the amount of \$10,000.

Claimant made the following legal claims: (1) fraud and misrepresentation; (2) negligent misrepresentation; (3) negligence; (4) conversion of Claimants money market account with Respondent; (5) breach of contract and conversion of an annuity policy with Xerox; (6) breach of fiduciary duty; (7) violation of RICO, 18 U.S.C. § 1962; (8) conversion of Claimant's check drawn on his personal account.

Respondents denied the allegations set forth in the Statement of Claim. Respondent stated that Mr. Roepke entered into a conspiracy with Claimant and was thereby not acting within the scope of his employment and did not have actual or apparent authority to act in such manner with Claimant in the trading of commodities in Claimant's account. Respondent also made the following defenses: (1) Claimant has stated no causes of action against Respondent under the Securities Act of 1933, the Securities Exchange Act of 1934, the Commodity Exchange Act, as amended, the Iowa Securities Act or any other federal or state statutes dealing with securities and/or commodity futures contracts; (2) Claimant is barred from recovering from Respondent under his Customer's Agreement with Respondent and under § 8-319 of the Uniform Commercial Code as enacted in the State of Iowa; (3) Claimant is barred from recovering from Respondent under the doctrines of ratification, account stated, estoppel, waiver and laches; (4) Claimant failed to mitigate his damages after Claimant knew or should have known of the alleged acts and omissions of which Respondent complains, and is therefore barred from recovering such damages; (5) Claimant's comparative negligence exceeded fifty percent (50%) of the fault thereby barring him from recovering damages from Respondent, or, in any event, diminishes any damages he may recover pursuant to the Iowa Comparative Fault Act; (6) the Statement of Claim fails to state a claim upon which relief can be granted; (7) Claimant has waived and/or is estopped to assert his claims against Respondent by virtue of his conduct and dealings with Respondent; (8) Claimant's claims are barred by the doctrine of unclean hands and/or *in pari delicto* by virtue of Claimant's conduct and dealings with Respondent; (9) Claimant has ratified any alleged conduct about which Claimant now complains; (10) Claimant authorized the alleged conduct of Respondent about which Claimant complains; (11) Claimant and Mr. Roepke failed to disclose their

illegal and fraudulent acts to the detriment of Respondent, thereby barring Claimant's claims under the doctrine of fraud; (12) Claimant's claims are barred for the reason that he failed to exercise due diligence in ascertaining the legality of consequences of the conduct of which he now complains; (13) Claimant was aware at all times of the potential benefits and risk involved with commodities trading in his account, but continued to deposit money in the account thereby rendering Claimant's actions the sole proximate cause of Claimant's damages; (14) Claimant made misrepresentations to Respondent concerning his agreement with the trading which was occurring in his account thereby barring his claims under the doctrine of fraud; (15) Claimant continuously ignored the controls put in place by Respondent, actively engaged in efforts to thwart those controls and failed to notify anyone with Respondent of irregularities in his account, thereby rendering Claimant's actions fraudulent and the sole proximate cause of Respondent's damages, which bars Claimant from any recovery from Respondent; (16) Respondent did not breach any fiduciary duty, if such existed, because Claimant failed to notify Respondent of irregularities in his account; (17) Claimant has failed to appropriately plead any enterprise as that term is defined in 18 U.S.C. § 1961, and Respondent has not engaged in any predicate acts or devised any scheme or artifice to deprive Claimant of his property or to perpetrate a fraud upon him in violation of the RICO statute; and (18) Respondent did not convert a \$10,000 check made payable to Respondent and had it been informed that Mr. Roepke deposited said check in his personal account, it would have been able to prevent improper activity.

Respondent brought a counterclaim against Claimant alleging that Claimant made misrepresentations and omissions of material facts. Respondent asserted that Claimant's misrepresentations included the following: (1) that Claimant would specifically authorize and approve each security and/or commodity futures transaction in his accounts prior to said transactions occurring; and (2) that he intended and would fully pay or properly margin each securities and/or commodity futures transaction in his account as such may be required by his agreement with Respondent and all applicable federal and state laws and rules and regulations promulgated thereunder, the constitution, rules, customs and usages of the exchange, association, market or clearinghouse on which such transaction occurred. Respondent further asserted that Claimant's omissions included the following: (1) that Claimant had agreements with Mr. Roepke whereby transactions would be undertaken in securities and/or commodity futures contracts in his accounts with Respondent without his specific prior authorization; (2) he did not intend to pay for or properly margin security and/or commodity futures transactions in his accounts; (3) he would allow Mr. Roepke to deposit checks payable to Claimant into Mr. Roepke's personal account; (4) he would ratify Mr. Roepke's diversion of a check from Claimant to Respondent to Mr. Roepke personally; (5) security and/or commodity futures transactions were to be undertaken in his accounts for his benefit, even when he did not intend to be financially responsible for said transactions; (6) payments for said transactions would be undertaken by persons other than himself; (7) he would deny financial responsibility for any or all of said transactions; and (8) Mr. Roepke had authority to sign Claimant's name on checks for the purpose of depositing them into Mr. Roepke's bank account. Respondent made the following legal claims: (1) aiding and abetting; (2) common law concert of action to defraud; (3) violation of Iowa Securities Act; (4) violations of the Commodity Exchange Act, as amended; (5) common law fraud; (6) negligent misrepresentation; and (7) breach of contract.

RELIEF REQUESTED

Claimant Daniel R. Friedrichsen requested an award for compensatory damages resulting from: conversion of the Xerox Life Annuity in the amount of \$38,772.51; conversion of the Money Market Account in the amount of \$15,561.51; conversion of the Individual Retirement Account in the amount of \$15,268.83; losses from the cattle puts in the amount of \$1,118.59; conversion of the check in the amount of \$10,000.00; losses from commissions and fees from churning in the amount of \$98,000.00; and losses in commodity account in the amount of \$170,000.00. Claimant Daniel R. Friedrichsen also requested an award for interest, punitive damages and attorney fees.

Respondent A.G. Edwards & Sons, Inc. requested an award against claimant Daniel R. Friedrichsen in such amount that will fairly, justly, and adequately compensate it for all damages sustained by it as a proximate result of the wrongful conduct of Daniel R. Friedrichsen, for interest on such amount as allowed by law, for punitive damages, for its attorneys' fees incurred in connection with this matter, and that all claims asserted by Daniel R. Friedrichsen be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

Respondent A.G. Edwards & Sons, Inc. 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 §10301 of the NASD 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.

On or about March 14, 1996, respondent A.G. Edwards & Sons, Inc. moved to decline jurisdiction of the NASD Regulation, Inc. After careful consideration of councils' arguments the undersigned panel of arbitrators denied this motion.

On or about October 16, 1996, respondent A.G. Edwards & Sons, Inc. moved to bar defenses of claimant Daniel R. Friedrichsen. After careful consideration of councils' arguments the undersigned panel of arbitrators denied this 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 Claimant Daniel R. Friedrichsen compensatory damages in the amount of \$89,041.34;
2. 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 \$750 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference x \$300 = \$300, and there were four (4) hearing sessions x \$750 = \$3,000. Thus total forum fees are \$300 + \$3,000 = \$3,300. Pursuant to §10332(b) of the NASD 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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$200 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Daniel R. Friedrichsen.

NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant Daniel R. Friedrichsen.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent A.G. Edwards & Sons, Inc.

Respondent A.G. Edwards & Sons, Inc. is liable for and shall pay forum fees in the amount of \$2,550 (= \$3,300 total forum fees - \$750 hearing session deposit by Claimant Daniel R. Friedrichsen).

Respondent A.G. Edwards & Sons, Inc. is liable for and shall reimburse Claimant Daniel R. Friedrichsen for his hearing session deposit in the amount of \$750 and his filing fee in the amount of \$200.

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

Dated:

Frank A. Molenda, Esquire
Frank A. Molenda, Esquire
Public Arbitrator, Presiding Chair

March 25, 1997

Larry R. Trussell
Larry R. Trussell
Public Arbitrator

March 26, 1997

Bruce C. Young
Bruce C. Young
Industry Arbitrator

March 24, 1997

Date served by NASD Regulation, Inc.: April 7, 1997