

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Spencer Edwards, Inc.

NASD CASE NO. 96-00252

Name of Respondents

Jeffrey Marc Applebaum and
S & D Partnership

REPRESENTATION

For Claimant: Kristin K. Rasciner, Esq., in-house counsel for Spencer Edwards, Inc., Englewood, Colorado.

For Respondents Jeffrey Marc Applebaum ("Applebaum") and S & D Partnership ("S & D"): Howard N. Kahn, Esq. of Kramer, Green, Zuckerman & Kahn, P.A., Hollywood, Florida.

CASE INFORMATION

Statement of Claim filed on January 16, 1996.

Claimant's Submission Agreement signed on May 29, 1996 by Edward H. Price, President of Spencer Edwards, Inc.

Answer to Statement of Claim filed by Respondents on August 10, 1996.

Respondent Applebaum's Submission Agreement signed on August 4, 1997. Respondent S & D's Submission Agreement signed on August 4, 1997 by Joseph Maenza, Partner of S & D Partnership.

Counterclaim filed by Respondent S & D on June 2, 1997.

Claimant's Response to S & D's Counterclaim filed on June 20, 1997.

HEARING INFORMATION

On November 7, 1996, a telephonic pre-hearing conference lasting one (1) session was conducted with the arbitrator. On August 4, 1997, in Fort Lauderdale, Florida, hearings lasting two (2) sessions were conducted.

CASE SUMMARY

Claimant alleged that on or about December 8, 1995, Respondent Applebaum requested that Claimant's employee, James Mitchell, open an individual account for him so that he could purchase 20 OEX Jan 580 puts before the market closed that day. Claimant alleged that Applebaum is the authorized agent for Respondent S&D Partnership, for which Mr. Mitchell had been the account executive for some time. Claimant asserted that Mitchell agreed to expedite the account opening/approval process upon Applebaum's promise that assets then in the partnership account could be transferred into the individual account if necessary to pay for the trade in a timely manner and that Mitchell did expedite the process, purchased the puts on Applebaum's behalf and confirmed the purchase with Applebaum as requested. Claimant further alleged that Applebaum had no intention of paying for the trade himself or with the assets of the partnership if the trade proved unprofitable. Claimant asserted that the trade did result in a loss when the puts decreased in value and Respondents refused to pay for the transaction upon settlement, resulting in a loss to Claimant of more than \$5,000.00.

Respondents denied the material allegations of the Statement of Claim and alleged that the trade was unauthorized by Applebaum, that Claimant failed to provide the standardized options disclosure mandated by Rule 9B-1 of the Securities Exchange Act of 1934 and that Claimant falsified other documentation in connection with the establishment of the individual account. Respondents alternatively asserted, assuming arguendo that the arbitrator finds that the trade was authorized, that Claimant failed to properly mitigate its damages by not selling the option on December 11, 1995. Respondents further maintained that the Statement of Claim is deficient and barred by the Statute of Frauds in that no writing exists under which Applebaum pledged the assets of the Partnership to secure trading in his individual account and asserted that the Partnership Agreement, which was in the possession of Claimant, specifically prohibited Applebaum from pledging any Partnership assets as well.

Respondent S & D subsequently asserted a counterclaim against Spencer Edwards for improperly and without operation of law freezing the assets in its account pending the outcome of the arbitration proceeding. In response, Claimant admitted that certain disputed funds are being held in the account of S & D until such time as the dispute is resolved but denied that it has converted funds rightfully belonging to S & D for its own use and benefit.

RELIEF REQUESTED

Claimant requested that the arbitrator find both Respondents jointly and severally liable for actual/compensatory damages in the amount of \$5,135.15. Claimant further requested an award of punitive damages, in the amount of three times the actual damages, as a consequence of Respondents' knowing, deliberate and malicious misstatements regarding its intention to honor the contract made for the purchase of securities; attorneys' fees as outlined in the Customer Agreement signed between Claimant and Respondent S&D; pre-judgment and post-judgment interest; the costs incurred in prosecution of this action and such other and further relief as the arbitrator deemed appropriate. Claimant additionally requested that S & D's counterclaim be dismissed.

Respondents requested dismissal of all claims against them together with the awarding of attorneys' fees, interest, costs and punitive damages in an amount deemed appropriate by the arbitrator. Respondent S & D further requested an award on its counterclaim in the amount of the monies improperly frozen by Claimant.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed to receive a conformed copy of the Award while the original remains on file with NASD Regulation, Inc.

Pursuant to the arbitrator's request at the conclusion of the hearing, the parties filed post-hearing memoranda addressing the issues of the applicability of the Statute of Frauds, the effect of Claimant's alleged failure to provide the requisite options disclosure document and Claimant's duty, if any, to mitigate damages. Respondents subsequently filed a motion to strike Claimant's post-hearing memorandum, which was opposed by Claimant. On September 25, 1997, the arbitrator issued his ruling denying the Respondents' motion.

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 are found liable, jointly and severally, and shall pay to Claimant the amount of \$5,135.15, pre-judgment interest specifically excluded. The Respondents may offset said sum by the amount of funds, including any accrued interest, that Claimant certifies is being held in the account of Respondent S & D Partnership as of the date of this award. If the total amount of funds presently held by Claimant in the S & D account should exceed the sum of \$5,135.15, Claimant shall release any such excess amount to Respondent S & D.
2. All other claims for relief, including Respondent S & D's counterclaim and the parties' requests for punitive damages and attorneys' fees, are denied.

OTHER COSTS

Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure, the arbitrator has assessed forum fees in the amount of \$900.00 (2 sessions X \$300.00 per session, plus one pre-hearing conference with the arbitrator X \$300.00) as follows:

1. Claimant is assessed the sum of \$450.00. Additionally, Claimant is liable for the sum of \$200.00 representing the member surcharge due pursuant to Rule 10333 of the Code of Arbitration Procedure.
2. Respondents are assessed, jointly and severally, the sum of \$450.00 for which NASD Regulation, Inc. shall retain the \$100.00 counterclaim hearing session deposit previously paid by Respondents in partial satisfaction thereof, leaving a balance due in the amount of \$350.00.
3. NASD Regulation, Inc. shall retain the \$500.00 claim filing fee paid by Claimant and the \$50.00 counterclaim filing fee paid by Respondents.

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

Arbitrator's Signature

Public/Industry

/s/
Richard S. Zaifert, Esq.

Public

Date of Decision: October 31, 1997