

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Charles J. Nowotny, and
Charles J. Nowotny IRA &
Revocable Living Trust,

and

96-05729

Name of Respondent

A. G. Edwards & Sons, Inc.

REPRESENTATION OF PARTIES

Charles J. Nowotny, and Charles J. Nowotny IRA & Revocable Living Trust ("**Claimant**") was represented by Donald J. Mehan, Jr., Esq., of Moline & Shostak, L.L.C., St. Louis, Missouri.

A. G. Edwards & Sons, Inc. ("**AGE**") was represented by Jeff Jamieson, Esq., of A. G. Edwards & Sons, Inc., St. Louis, Missouri.

CASE INFORMATION

Claimant filed the Statement of Claim on or about December 26, 1996, and signed Submission Agreements on December 18, 1996 and January 28, 1997.

AGE filed its Statement of Answer on or about April 3, 1997, and signed the Submission Agreement on April 1, 1997.

HEARING INFORMATION

The Arbitration Panel held a hearing on October 21, 1997 for one (1) session and on December 10, 1997 for two (2) sessions in St. Louis, Missouri for a total of three (3) sessions.

CASE SUMMARY

Claimant alleged that: the Conduct in the account by William Ferry ("Ferry"), a registered representative employed by age, and the transactions in the account were not contemplated in, and deviated from, the Investment Plan prepared for Claimant by ferry; short selling and option trading recommended and undertaken by Ferry in Claimant's trust account was inappropriate for the account; Ferry failed to adequately disclose the risk involved in such a strategy; the sell off in Claimant's IRA Account on December 18, 1995 of approximately 50% of the equity securities in the account also deviated from the long term Plan; on numerous occasions, Ferry indicated on the confirmations for transactions that the transactions were "unsolicited" when Ferry had solicited and initiated the transactions; Respondent breached their fiduciary duties to claimant by deviating from the written Plan and representing transactions in Claimant's accounts that were not appropriate and suitable for the accounts; AGE is vicariously liable for the actions and inactions of its registered representative while he was in its employ; and Respondent is primarily and directly liable for failing to supervise its registered representatives. The allegations arose out of transactions in securities presented during the hearing in this matter.

Unless otherwise admitted in its Answer, Respondent denied the allegations set forth in the Statement of Claim. Respondents asserted the following defenses: As a result of Claimant's failure to object or notify Respondent of the acts and omissions of which Claimant complains within 10 days of receipt of written confirmations, account statements and other documents evidencing or setting forth transactions in Claimant's account, Claimant is barred from recovering from Respondent under Claimant's Client Agreement with AGE and under Section 8-319 of the Uniform Commercial code as enacted in the State of Missouri; Claimant is barred from recovering from Respondent under the doctrines of ratification, account stated, estoppel, waiver and laches because Respondents relied on Claimant's silence; Claimant failed to mitigate his damages; Claimant is barred from recovery through his own contributory negligence from recovering damages from AGE; Claimant's knowing and voluntary assumption of risk was the sole and proximate cause of his alleged damages; the damages alleged suffered by Claimants were caused, if at all, by unforeseen market factors and conditions affecting the value of securities in Claimant's account, for which AGE is not liable or responsible; the Complaint and each count thereof, failed to state a claim against AGE upon which relief can be granted; claimant has ratified the alleged conduct about which Claimant complains; Claimant authorized the alleged conduct of Respondent which Claimant complains; Claimant is barred from recovery for any of the alleged conduct of AGE in Claimant's Complaint by the doctrine of laches; and the Complaint, and each count thereof relating to the trust Account is barred as Claimant has agreed to indemnify AGE and hold AGE and hold AGE harmless pursuant to paragraph 7 of the Trustee Agreement and Certification of Trust Investment Powers.

RELIEF REQUESTED

Claimant requested an award in the amount of: \$62,191.76 against Respondent as compensatory damages; interest; and costs and attorneys fees.

AGE requested: That judgement be entered on behalf of AGE and against Claimant on the claims of Claimant in this arbitration proceeding; that all costs of this arbitration proceeding, including, but not limited to, forum fees and AGE's reasonable costs and expenses incurred in defending this matter, be taxed against Claimant; and for such other relief as the Arbitration Panel deemed appropriate.

OTHER ISSUES CONSIDERED & DECIDED

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:

Claimant's claims are, and each of them, denied with prejudice. Each party shall bear its own costs and expenses associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$500 per hearing session and \$300 for each prehearing conference, if any. There were three (3) sessions x \$500 = \$1,500 in forum fees. Pursuant to Rule 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 Rule 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$150 and shall retain as forum fees the hearing session deposit in the amount of \$500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$300 previously paid by AGE.

Additional forum fees in the amount of \$250 are assessed against the Claimant.

Additional forum fees in the amount of \$750 are assessed against AGE.

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

Dated:

Jerry M. Drewry
Jerry M. Drewry
Public Arbitrator, Presiding Chair

/s/

January 27, 1998

Joseph R. Soraghan
Joseph R. Soraghan
Public Arbitrator

/s/

January 28, 1998

William K. Love
William K. Love
Industry Arbitrator

/s/

January 26, 1998