

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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In the Matter of the Arbitration Between )  
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DONALD M. and MILDRED KUHNS, )  
 ) Claimants. )  
 ) Case #87-01568  
vs. ) Award  
 )  
BESHANY BROWN & CO., BROWN & HAWK, INC., )  
K.W. BROWN & CO. d/b/a K.W. BROWN INVESTMENTS )  
and EDWARD A. VINER & CO. n/k/a FAHNESTOCK & CO., )  
 )  
Respondents. )  
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Heard before the members of the Arbitration Panel:

Howard E. Kurzweil, Esq.  
Mr. Thomas E. Swenson  
Mr. Samson Silberman

CASE SUMMARY

This claim was filed with the NASD, Inc. on August 20, 1987. The hearing was conducted in Fort Lauderdale, Florida on December 19, 1989 with a total of two (2) sessions.

Claimants Donald and Mildred Kuhns ("the Kuhns") alleged that Respondents Beshany Brown and Company, Inc. ("Beshany Brown"), Brown and Hawk, Inc. ("B & H"), K.W. Brown and Company, Inc. d/b/a K.W. Brown Investments ("Brown & Co."), Edward A. Viner and Company n/k/a Fahnestock and Company ("Fahnestock") and Kenneth Brown, individually ("Ken Brown") were liable for losses sustained pursuant to the purchase of certain stocks. Specifically, Claimants alleged that: Respondents failed to advise or explain that Claimants' account was on margin; executed unauthorized trades in Claimants' account; placed Claimants in unsuitable investments; made material misrepresentations; violated Florida Statute Section 517; and breached their fiduciary duty.

Respondent Fahnestock answered and alleged: that it acted only as the clearing house; never had any direct dealings with the Claimants; and denied that it had any fiduciary duty to the Claimants. Fahnestock cross claimed against Respondents Beshany Brown and B & H alleging that, under the terms of the agreement it had with them, should Fahnestock be found liable, Beshany Brown and B & H should be liable to Fahnestock for indemnification.

Brown and Co. answered the Cross Claim on behalf of Beshany Brown; B & H; and itself by denying liability to the Claimants and alleged: that there can be no indemnity for a violation of securities law where a party itself is at fault; and that Brown and Co. and Ken Brown individually were not parties to the agreement with Fahnestock.

Respondents Beshany Brown, B & H, Brown and Co., and Ken Brown answered Claimants' claim and asserted the affirmative defenses of: estoppel; waiver; ratification; assumption of risk; laches; and failure to mitigate damages. Respondents also alleged that Claimants: wished to speculate; did not complain of unauthorized trades upon receiving confirmations; knew they were on margin; and were suitable for the transactions. Respondents asserted a counterclaim against Claimants for attorney's fees and costs.

#### RELIEF REQUESTED

Claimants requested damages in the amount of \$13,983.76 plus interest, punitive damages, attorney's fees and other costs. Respondent Fahnestock cross claimed against Beshany Brown and B & H for indemnification and attorney's fees and requested dismissal of the claim. The remaining Respondents requested dismissal of the claim and counterclaimed for attorney's fees.

#### AWARD

On December 19, 1989, the arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimants on August 13, 1987, and by Respondents Fahnestock on December 2, 1988, Ken Brown on November 10, 1988 and Brown & Co., Beshany Brown, and B & H on January 23, 1988. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. 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 originals remain on file with the NASD, Inc.
2. Respondents Ken Brown, Brown & Co., Beshany Brown, and B & H are hereby liable, jointly and severally, and shall pay to Claimants the amount of Six Thousand Fourteen and 00/100 (\$6,014.00) Dollars.
3. Respondent Fahnestock is not liable and, therefore, all claims against it as well as its cross claim against the remaining Respondents are hereby dismissed.
4. Respondents Ken Brown, Brown & Co., Beshany Brown, and B & H are hereby liable jointly and severally and shall pay to Claimants the further amount of Two Thousand Five Hundred and 00/100 (\$2,500.00) Dollars for attorney's fees.
5. Claimants/Counter Respondents are not liable to the Respondents/Counter Claimants and, therefore, all counter claims against them are hereby dismissed.

6. Pursuant to Section 43 of the Code of Arbitration Procedure, the arbitrators have assessed forum fees in the amount of Eight Hundred and 00/100 (\$800.00) Dollars (\$400 X 2 sessions). Claimants are hereby assessed forum fees in the amount of Four Hundred and 00/100 (\$400.00) Dollars and Respondents Ken Brown; Beshany Brown; Brown & Co.; and B & H are hereby assessed forum fees in amount of Four Hundred and 00/100 (\$400.00) Dollars for which they shall be jointly and severally liable. The NASD, Inc. shall retain the Four Hundred and 00/100 (\$400.00) Dollar filing fee previously deposited by the Claimants with the NASD, Inc. in full satisfaction of Claimants share of such forum fees.
7. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

#### OTHER ISSUES

None.

#### ARBITRATORS CONCURRING

Howard E. Kurzweil, Esq.  
Mr. Thomas E. Swenson  
Mr. Samson Silberman

Dated: January 4, 1990