

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of  
Securities Dealers, Inc.  
NASD Financial Center  
33 Whitehall Street  
New York, N.Y. 10004  
FAX (212) 858-4389

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In the Matter of the Arbitration Between

Name of Claimants

Don P. Brown, ttee/Brett L. Brown Trust  
Don P. Brown, ttee f/b/o Brett Lofton Brown  
Don P. Brown, ttee/Misty F. Brown Trust

91-00792

Name of Respondents

Fahnestock & Co., Inc.  
Carlo A. Nees

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REPRESENTATION

For Claimants Don P. Brown, ttee/Brett L. Brown Trust; Don P. Brown, ttee f/b/o Brett Lofton Brown; and Don P. Brown, ttee/Misty F. Brown Trust ("Claimants"): Don P. Brown, Esq. of Meyers, Hentemann, Schneider & Rea Co.

For Respondent Fahnestock & Co., Inc. ("Fahnestock"): Charles E. Padgett Senior Vice President and General Counsel of Fahnestock & Co., Inc.

For Respondent Carlo Nees ("Nees"): Jerome S. Berkeley, Esq. of Marshman, Snyder, Berkeley and Kapp.

CASE INFORMATION

Statement of Claim filed: March 12, 1991.

Amended Statement of Claim Filed: June 24, 1991.

Claimant's Submission Agreement signed on: April 4, 1991.

Statement of Answer filed by Fahnestock on: May 6, 1991

First Supplemental Statement of Answer filed by Fahnestock on: November 4, 1991.

Respondent Fahnestock's Submission Agreement signed on: May 3, 1991.

Statement of Answer filed by Nees on: October 28, 1991.

Nees did not file a Submission Agreement.

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HEARING INFORMATION

Hearing Dates/Sessions: September 11, 1991 - one session  
March 23, 1992 - two sessions

Hearing Location: NASD Office - Cleveland, Ohio

CASE SUMMARY

Claimants alleged that on September 20, 1988, Claimants opened up three separate accounts. Claimants alleged that on several occasions during the week prior to September 15, 1989, Nees recommended to the Trustee Don P. Brown ("Brown") that Nees purchase American Capital Corp. Stock ("American Capital") for the three accounts. Brown alleged that he told Nees not to purchase American Capital unless so instructed by George M. Brown, Jr. who is the brother of Brown and father to Bret L. Brown and Misty F. Brown. Claimants alleged that neither Don or George Brown authorized the purchase of American Capital for the accounts. Claimants alleged that Nees purchased American Capital for all three accounts without authority and contrary to the instructions of Brown. Claimants alleged that the unauthorized purchases were conducted by Nees, an agent of Fahnestock, while he was acting within the scope of his authority. Claimants alleged that Fahnestock is responsible for the acts of its agent under the doctrine of Respondeat Superior.

Respondents Fahnestock and Nees ("Respondents") maintained that George M. Brown took a pro-active posture in the management of the referenced accounts. Respondents maintained that Brown was a sophisticated investor. Fahnestock maintained that authority was given by the client to execute the American Capital purchases. Nees maintained that George M. Brown knew of the American Capital purchase and authorized the purchases. Respondents maintained that any losses incurred to the accounts were the result of Claimants action or inaction.

In response to Claimant's Amended Statement of Claim, Fahnestock maintained that if the transactions were not specifically authorized then the actions of Nees were beyond the scope of his authority and he was not acting as Fahnestock's agent. Fahnestock asserts that if Nees was informed by Brown that the transactions were unauthorized, then Nees failed to inform Fahnestock of such complaint. Fahnestock counterclaimed that the acts of Nees prevented Fahnestock from investigating the transactions in issue in a timely fashion so that any losses resulting from this matter are solely the Responsibility of Nees.

In addition, Fahnestock maintained that Brown had a fiduciary duty as Trustee to exercise control over and to properly supervise the accounts and that he failed to comply with his fiduciary duties and therefore is liable for the

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losses suffered by the accounts.

Respondent Nees denied all assertions against him alleged by Fahnstock.

Claimants denied all assertions made by Fahnstock against Brown.

RELIEF REQUESTED

Claimants requested that the purchases of American Capital be rescinded, that the Panel order Respondents to pay Claimant \$3,974.50 for each account and order Claimant to transfer the shares purchased to Respondents, that Respondents pay reasonable attorneys' fees and costs.

Respondent Fahnstock requested that the Claimants be ordered to pay all costs and attorneys' fees.

Respondent Nees requested that the Claimants be ordered to pay all costs and attorneys' fees.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. That Claimants' claim is denied in its entirety.
2. That all other claims counter claims and cross claims are denied in their entirety.
3. That all parties shall bear their respective costs, including attorneys' fees.
4. Pursuant to the by-laws of the NASD, the presiding arbitrator determined that Nees was required to submit to this arbitration, notwithstanding his failure to submit an executed Submission Agreement. Therefore, Nees is bound by this arbitrator's rulings and determinations.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed:

Forum fees in the amount of \$300 for the September 11, 1991 single hearing session is assessed against Respondent Nees.

Forum fees in the amount of \$600 for the March 23, 1992 double hearing session are equally assessed against the Claimants and Respondents.

Three hearing session were conducted in this matter at \$300 per session.

Claimants have already deposited \$300 as a hearing deposit so that no more monies are due from the Claimant.

Respondents Fahnestock and Nees are jointly and severally assessed \$300 for the hearing on March 23, 1992. Nees is also assessed \$300 for the hearing session.

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

Arbitrator's Signature

Name

Robert C. Devlin  
Robert C. Devlin, Esq.

Public/Industry

Public

Executed on:

~~Date of Decision:~~

4/30/92

Date of Decision: May 12, 1992