

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Herman and Rosalind Steinkoetter

92-01430

Name of Respondents

Advest, Inc.;
Newhard Cook & Co., Inc.;
Christian D. Tompras

REPRESENTATION

For Claimants: Herman and Rosalind Steinkoetter were represented by Peter Sadowski, Esq. of The Stolar Partnership, located in St. Louis, Missouri.

For Respondents: Advest, Inc. was represented by William C. Freitag, Esq. of Advest, Inc., Hartford, Connecticut.

Newhard Cook & Co., Inc. was represented by Michael A. Clithero, Esq. of Peper, Martin, Jensen, Maichel and Hetlage, located in St. Louis, Missouri.

Christian D. Tompras was represented by W. Woody Schlosser, Esq. of Puricelli and Schlosser, located in Clayton, Missouri.

CASE INFORMATION

Statement of Claim filed: April 27, 1992.

Claimants' Submission Agreement signed on: March 13, 1992.

Amended Statement of Claim filed on: June 19, 1992.

Statement of Answer, Motion to Dismiss and Memorandum in Support of the Motion to Dismiss filed by Respondent Advest, Inc. on: June 2, 1992.

Amended Statement of Answer filed by Respondent Advest, Inc. on: July 10, 1992.

Motion to Dismiss filed by Respondent Advest, Inc. on: September 10, 1992.

Motion to Decline Jurisdiction filed by Respondent Newhard, Cook & Co., Inc. on: July 20, 1992.

Statement of Answer filed by Respondent Newhard Cook & Co., Inc. on: December 4, 1992.
Respondent Newhard Cook & Co., Inc.'s Submission Agreement signed on: April 27, 1993 by Harry Newhard, Chairman, Newhard Cook & Co., Inc.

Statement of Answer and Motion to Dismiss filed by Respondent Christian D. Tompras on: June 19, 1992.

Respondent Christian D. Tompras' Submission Agreement signed on: June 19, 1992.

Supplement to Motion to Dismiss filed Respondent Christian D. Tompras on: September 10, 1992.

Claimants' Opposition to Respondent Advest, Inc.'s Motion to Dismiss filed on: June 18, 1993.

Respondent Advest, Inc.'s response to Claimants' Opposition to Motion to Dismiss filed on: July 10, 1992.

Claimants' Opposition to Respondent Tompras' Motion to Dismiss filed: July 21, 1992.

Claimants' response to Memorandum of August 3, 1992 regarding the Federal Class Action Settlement filed: August 31, 1992.

Respondent Advest, Inc.'s Supplement to Motion to Dismiss filed on: January 8, 1993.

Respondent Newhard Cook & Co., Inc.'s Supplemental Motion to Dismiss for Lack of Jurisdiction filed on: December 28, 1992.

Claimants' Response to Respondents Newhard Cook & Co., Inc.'s and Advest, Inc.'s Supplemental Motion to Dismiss for Lack of Jurisdiction filed on: January 13, 1993.

HEARING INFORMATION

Pre-Hearing Conference: April 22, 1993 for One (1) session before one arbitrator;
April 26, 1993 for One (1) session before one arbitrator.

Hearing Date/Sessions: May 5, 1993 for Three (3) sessions.

Hearing Location: St. Louis, Missouri.

CASE SUMMARY

Claimants Herman And Rosalind Steinkoetter ("Steinkoettters") alleged that Respondent Christian D. Tompras ("Tompras"), while employed by or acting as an agent for Respondents Newhard Cook & Co., Inc. ("Newhard") and Advest, Inc. ("Advest"), misrepresented the characteristics of VMS Mortgage Investment Fund ("VMS Fund") and induced their purchase of an investment which was unsuitable given their known investment objectives. The Steinkoettters specifically alleged that:

1. The Steinkoettters were retired individuals who were unsophisticated investors and relied on the investment experience of paid investment professionals to make investment decisions for them. The Steinkoettters had previously purchased some securities through Tompras and maintained a small investment portfolio consisting of several low risk mutual funds and some General Motors stock. In early 1988, Tompras, an account executive with Newhard, began regularly calling the Steinkoettters in order to persuade them to invest funds in what he described as a guaranteed investment opportunity;
2. The Steinkoettters met with Tompras in the spring of 1988 and explained that they were looking for a low risk stock providing a stable and regular income payout with potential for capital growth, in order to preserve investment capital while earning income. Tompras recommended that they invest all their available cash funds into the VMS Fund, which he described as a safe investment which would satisfy their investment goals of a low risk, capital growth stock with regular dividend distributions and guaranteed the return of their capital investment. Tompras provided the Steinkoettters with a 140 page VMS fund prospectus;
3. Tompras misrepresented and omitted material facts about the VMS fund, including that it was a highly-speculative, risky real estate venture involving numerous related party interests, that the Capital guarantee could not possibly insure the return of all their initial investment dollars or the payment of the 12% dividend and the extraordinarily high sales commission charges;
4. In addition, Tompras failed to perform an investor suitability analysis as to whether the VMS Fund was an appropriate investment for the Steinkoettters. Furthermore, Tompras failed to take into account the financial risks to the Steinkoettters in exclusively purchasing shares in VMS Fund versus a diversified investment strategy. Based upon the representations made by Tompras, the Steinkoettters purchased shares of the fund totaling an investment of \$35,600.00;
5. After the purchase of the VMS Fund, the Steinkoettters would periodically call

Tompras to inquire in to the performance of the Fund. Tompras responded to their concerns by continually reminding them that the Fund was a guaranteed investment, but failed to warn the Steinkoettters about the obvious financial risk the fund was exposed to because of its weak financial performance and the vague collateral descriptions given to loans it had made to VMS Realty Partner affiliates;

6. Newhard was acquired by Advest pursuant to an Asset Transfer Agreement dated September 12, 1989. Tompras became an Associate Vice President Investments with Advest and the Steinkoetter account was transferred to Advest. Tompras continued to emphasize the guaranteed status of the investment even as its financial condition deteriorated;

7. Over two and one half years after the first VMS Fund purchase, the value of the fund had fallen from \$10.00 per share to .68 cents per share.

Based upon the above allegations, the Steinkoettters asserted violations of the Federal and Missouri Securities laws and the NASD rules and regulations; breach of fiduciary duty; and common law fraud.

Respondent Advest denied the material allegations of the Steinkoettters' claim, alleging that:

1. Tompras was not an Account Executive with Advest at anytime in 1988 when the purchases were made and Advest never received any compensation, commission or fee as a result of the purchase of the VMS Fund;
2. Pursuant to the Asset Transfer Agreement between Advest and Newhard, the parties expressly agreed that Advest did not assume any of Newhard's debts or liabilities;
3. The Steinkoettters were informed both prior to the investment and in late 1988 about the investment risks and projections of the VMS shares and received an original prospectus and a supplemental prospectus before the account was received by Advest; and
4. The Steinkoettters have failed to state a claim upon which relief can be granted by alleging a cause of action for "failure to warn" and Advest cannot be held responsible simply because the value of the investment went down after the account arrived at Advest.

Respondent Newhard denied any liability based upon the allegations of the Claim, alleging that:

1. The Steinkoettters are parties to a VMS Securities class action lawsuit and that pursuant to the settlement documents entered in that action, all claims made by the Steinkoettters are barred by the release entered in conjunction with settlement of the class action;
2. Newhard ceased operating a securities business on December 7, 1989 and has not been a viable corporation since that time. The NASD does not have jurisdiction of this matter because (1) there is no contractual agreement between the parties to arbitrate this dispute before the NASD and (2) Newhard is not now a member of the NASD having withdrawn its membership from the NASD during 1990;
3. The VMS Fund was consistent with the Steinkoettters' investment objectives and was suitable for their portfolio. In fact, the investment was consistent with other investments the Steinkoettters made, including another Real Estate Investment Trust. In addition, all matters they complain of were thoroughly disclosed in the prospectus they received;
4. Newhard cannot be held responsible for any losses which occurred after the transfer of the account to Advest;
5. Recovery is barred by the doctrines of laches, waiver, ratification, estoppel and by the applicable statute of limitations;
6. Recovery is barred by their comparative fault and lack of due diligence in dealing with the investment until its value had decreased substantially; and
7. The Steinkoettters' investment decisions were not made in reliance upon the alleged conduct of Newhard and any damages suffered were caused by the Steinkoettters own actions or negligence.

Respondent Tompras denied the material allegations of the Statement of Claim, alleging that:

1. The claim is barred because of the release language of the class action suit;
2. The claim is barred by the two-year statute of limitations on complaints regarding a new issue offering;
3. The investment was suitable for the Steinkoettters because there was no suitability requirements outlined in the prospectus and Mr. Steinkoetter was a

sophisticated investor who sits on the board of directors of a multi-million dollar pension fund;

4. Tompras did due diligence on the fund, rigorously studying the material provided by the underwriter. In addition, Newhard, Cook approved the investment for offering to investors;

5. While Tompras solicited the initial purchase of 1,460 shares, the subsequent purchases of 2,100 shares were at the direction of Mr. Steinkoetter and he alone bears the responsibility and consequences for the lack of diversification of the portfolio;

6. The Steinkoettters received the prospectus on VMS which outlined its characteristics and risks. In addition, Tompras made clear that any claims and warranties were exclusively those of the fund's sponsoring partners and not those of Newhard, Cook or Tompras;

7. The Steinkoettters were kept well informed about VMS by Tompras and he even provided some of the information used in their claim;

8. The Steinkoettters have failed to establish a cause of action to warrant remedy of damages and failed to mitigate damages.

RELIEF REQUESTED

Claimants requested the entry of an award against Respondents for the losses proven at hearing, up to the actual losses of \$33,180.00 plus interest, reasonable attorneys' fees, expert witness fees, costs and for such other relief as the panel deemed necessary.

Respondent Advest requested dismissal of the claim.

Respondent Newhard requested that the claim against it be dismissed for lack of jurisdiction.

Respondent Tompras requested that the Steinkoettters' claims be dismissed and that he be found harmless in the matter.

OTHER ISSUES CONSIDERED & DECIDED

On November 6, 1992, the Director of Arbitration made the following rulings in regard to the separate Motions to Dismiss filed by the Respondents:

Respondent Tompras' Motion to Dismiss based upon the class action settlement would be handled by the panel of arbitrators because the Claimants alleged that they were not released by the VMS order;

Respondent Advest, Inc.'s Motion to Dismiss for failure to state a claim or cause of action rests within the exclusive jurisdiction of the arbitrators; and

Respondent Newhard, Cook's Motion to Dismiss for lack of jurisdiction had to be decided by the arbitrators because the final decision rested within their exclusive jurisdiction of the arbitrators. Newhard, Cook was required to file an answer by November 20, 1992 because the NASD had administratively determined that it had jurisdiction in view of the Steinkoetter's position that Respondents were not excluded by the VMS order.

On April 13, 1993, the Arbitrators determined that the Motions and Supplemental Motions to Dismiss filed on behalf of Respondents Tompras, Advest and Newhard, Cook were denied.

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.

AWARD

After considering the pleading, 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 Newhard, Cook & Co., Inc. is liable for and shall pay to Claimants Herman Steinkoetter and Rosalind Steinkoetter the sum of \$12,000.00;
2. Respondent Advest, Inc. is liable for and shall pay to Claimants Herman Steinkoetter and Rosalind Steinkoetter the sum of \$6,000.00;
3. Upon receipt of the sums enumerated in paragraphs one (1) and two (2) above, Claimants Herman Steinkoetter and Rosalind Steinkoetter shall immediately cause their rights and interest in the class action settlement known as In Re VMS Securities Litigation, Consolidated Case No. 89 C 9448, filed in the United States District Court for the Northern District Of Illinois, Eastern Division to be transferred to Respondents Advest, Inc. for a one-third (1/3) interest and Respondent Newhard, Cook & Co., Inc. for a two-thirds (2/3) interest;

4. The claims asserted against Respondent Christian D. Tompras are hereby dismissed and denied in their entirety; and
5. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) Pre-Hearing conferences before an arbitrator x \$300.00 per session = \$600.00; Three (3) Hearing sessions x \$400.00 per session = \$1,200.00; Total Forum Fees = \$1,800.00.

The national Association of Securities Dealers, Inc. shall retain the non-refundable claim filing fee of \$120.00 and the hearing session deposit of \$400.00 previously deposited by the Claimants, Herman Steinkoetter and Rosalind Steinkoetter. Respondents Advest, Inc. and Newhard, Cook & Co., Inc. are jointly and severally liable for and shall pay to the NASD forum fees in the sum of \$1,400.00.

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

Concurring Arbitrators' Signatures

Name

Date

Thomas A. Cipolla, Esq.
Thomas A. Cipolla, Esq.
Public Arbitrator
Chairperson

July 24, 1993

James L. Breckenridge
James L. Breckenridge
Public Arbitrator

July 29, 1993

Raymond Allen Moore
Raymond Allen Moore
Industry Arbitrator

July 29, 1993

For NASD Use Only-Date of Service of Award:

8-3-93