

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Karl-Heniz Kowa & Christel I. Kowa

Case No. 92-02673

Name of Respondents

Viner (Edward A.) & Co., Inc.
Fahnestock & Co., Inc.
Ruan Securities Corporation
Brian Smith

REPRESENTATION

For Claimants, Karl -Heinz Kowa and Christel I. Kowa: Russell L. Forkey, Esq. of Russell L. Forkey, P.A., Fort Lauderdale, Florida.

For Respondent, Fahnestock & Co., Inc. ("Fahnestock") and Edward A. Viner & Co., Inc. ("Viner"): Charles E. Padgett, Esq., of Fahnestock, New York, New York.

For Respondent, Ruan Securities Corp ("RSC"): Terrence D. Brown of Des Moines, Iowa.

For Respondent, Brian Smith ("Smith"): Pro se.

CASE INFORMATION

Statement of Claim filed: 8/11/92.

Claimant's Submission Agreement signed: 8/7/92.

Respondents' Fahnestock and Viner, Joint Statement of Answer filed: 8/26/92.

Respondents' Fahnestock and Viner did not file Submission Agreements as required by Sections 12 and 25 of the Code.

Respondent RSC's Statement of Answer filed: 9/22/92 and amended 8/6/93.

Respondent RSC's Submission Agreement signed: 9/21/92 by Robert M. Young, Jr., President.

Respondent, Smith's Statement of Answer filed 10/2/93.

Respondent Smith's Submission Agreement signed: 10/5/92.

HEARING INFORMATION

On August 25 and 26, 1993 and September 29 and 30, 1994, in Fort Lauderdale, Florida, hearings lasting 8 sessions were conducted.

CASE SUMMARY

Claimants alleged that Respondent, Smith, while with Viner/Fahnestock induced the Claimants to trade options in a manner which was unsuitable for the Claimants and which created high commission costs for the Claimants; that when Smith, left Viner/Fahnestock and went to RSC, he solicited the Claimants to transfer their account based upon the representation that he would be able to recover their losses for them; that this was based upon the fact that he had determined that a new method of trading would accomplish the same; that at Ruan further unsuitable trading took place which caused additional loss to the Claimants; and, that during the entire time of the Claimants' relationship with Smith, their account was churned with total commissions of approximately \$206,000.00 being generated. The Claimants alleged liability under the theories of fraud and deceit, breach of fiduciary duties, negligence, breach of contract; and, as it related to the Corporate Respondents, negligent supervision.

Respondent, RSC denied Claimant's allegations and alleged that in determining the validity of Claimant's claim, they must be applied to Florida law. Respondent RSC alleged the following affirmative defenses: (1) that the Florida Economic Loss Rule bars all claims asserted in this case except Claimants' breach of contract claim; (2) that all negligence claims in this case are barred by the terms of the Option Agreement; (3) that any reliance by Claimants on Smith's alleged statements while employed by RSC was unreasonable; (4) that RSC and Smith had no duty to prevent Claimants from making unsuitable trades; (5) that all claims are barred by the doctrines of ratification and waiver; (6) that any

damages awarded to Claimants must be reduced due to Claimants' failure to mitigate; and (8) that punitive damages are not permissible in this case.

Respondents, Fahnestock and Viner, denied all allegations of wrongdoing.

RELIEF REQUESTED

Claimants requested damages in the amount of \$267,435.00, plus interest from Smith, Viner and Fahnestock, jointly and severally; damages in the amount of \$149,617.00 plus interest against Smith and RSC, jointly and severally; plus attorney's fees and costs from all Respondents.

Respondent, RSC requested dismissal, attorney's fees and costs.

OTHER ISSUES CONSIDERED & DECIDED

1. On August 25, 1994, Respondent Smith did not appear at the hearing but had advised RSC's counsel to announce he did not object to the hearing proceeding without him and that he would appear on August 26, 1994. The Panel decided to proceed over Claimant's objection and Mr. Smith did appear on August 26, 1994 and confirmed his waiver of appearance on August 25, 1994.
2. 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 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:

1. Respondents, Smith, Fahnestock and Viner, are found liable, jointly and severally, and shall pay to Claimants the sum of \$112,000.00.
2. Respondents, Smith and RSC, are found liable, jointly and severally, and shall pay to Claimants, the sum of \$44,000.00.
3. Claimants' requests for punitive damages, attorney's fees and prejudgment interest are denied.

OTHER COSTS

None.

FORUM FEES

1. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed Forum Fees in the amount of \$6,000.00 (8 sessions x \$750.00.)
2. Claimants are hereby assessed \$3,000.00 less \$1,500.00 previously deposited, leaving a balance of \$1,500.00 payable to the National Association of Securities Dealers, Inc.
3. Respondents are assessed \$3,000.00, jointly and severally, less \$1,500.00 previously deposited, leaving a balance of \$1,500.00 payable to the National Association of Securities Dealers, Inc.

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

Concurring Arbitrators' Signatures

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Anthony J. Titone, Esq.

Public

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Louise Jeroslow

Public

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Douglas Delanoy

Industry

Date of Decision: 1/6/95