

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Isadore Fendelman and Bernice Fendelman

93-01080

Name of Respondents

Newhard, Cook & Co., Inc.;
Harry W. Newhard

REPRESENTATION

For Claimant: Isadore and Bernice Fendelman were represented by Howard S. Smotkin, Esq. of Riezman & Blitz, P.C., located in St. Louis, Missouri.

For Respondents: Newhard, Cook & Co., Inc. was represented by Joanne D. Martin, Esq. of Peper, Martin, Jensen, Maichel & Hetlage, located in St. Louis, Missouri.

Harry W. Newhard was represented by Steven W. Koslovsky, Esq. of Ziercher & Hocker, P.C., located in St. Louis, Missouri.

CASE INFORMATION

Statement of Claim filed: March 22, 1992.

Claimants' Submission Agreement signed on: March 17, 1993.

Joint Statement of Answer filed by Respondent Newhard, Cook & Co., Inc. and Harry W. Newhard on: June 18, 1993.

Respondent Newhard, Cook & Co., Inc.'s Submission Agreement signed on: July 13, 1993 by Harry W. Newhard, Sole Director, Newhard, Cook & Co., Inc.

Respondent Harry W. Newhard's Submission Agreement signed on: July 13, 1993.

HEARING INFORMATION

Pre-Hearing Conference: September 20, 1993 for One (1) session before One (1) Arbitrator.

Hearing Dates/Sessions: September 27, 1993 for Two (2) sessions;
September 28, 1993 for Two (2) sessions; and
September 29, 1993 for Two (2) sessions.

Hearing Location: St. Louis, Missouri.

CASE SUMMARY

Claimants Isadore Fendelman and Bernice Fendelman ("Fendelman") alleged that Respondents Newhard Cook & Co., Inc. ("Newhard Cook") and Harry Newhard ("Newhard") had induced them to purchase unsuitable securities and failed to adequately advise Claimants of the risks and nature of the investments made on their behalf. The Fendelmans specifically alleged that:

1. In or about October, 1986, the Fendelmans' broker of fifteen years, Jerry Stein ("Stein"), joined Newhard Cook. The Fendelmans brought their business to Newhard Cook. Stein knew the Fendelmans' economic status and investment objectives and that they were unsophisticated investors who relied on his advice. Stein influenced the Claimants' investment decisions and effectively exercised control over their investments;
2. In May of 1987, the Fendelmans' assets in the Newhard Cook account had been invested in accordance with the stated investment objectives. Thereafter, Stein induced Claimants to invest in other securities, including margin securities, representing that they were "risk-free" and consistent with their conservative investment objectives;
3. Newhard and Newhard Cook failed to advise the Fendelmans of the true risks or the nature of the investments. In addition, Newhard and Newhard Cook failed to supervise Stein's handling of the account to assure that the Fendelmans' investment objectives were followed, even after Respondents became aware of customer complaints against Stein and even after Newhard Cook settled the claims arising from the complaints;
4. During part of his employment and at the time of his departure from Newhard Cook, Stein was indebted to Newhard Cook for an amount in excess of \$600,000.00, resulting from payment of settlements for various complaints. Newhard Cook and Newhard discharged Stein because of the complaints and indebtedness. Stein became employed by Westport Financial Group, Inc. ("Westport") after his discharge. On Stein's advice, the Fendelmans opened an account at Westport and transferred their assets from Newhard Cook to Westport;

5. At Westport, Stein continued to misrepresent the investments, engaged in excessive trading and unsuitable transactions in the Fendelman account, and induced the Fendelmans to loan him money; and

6. Newhard Cook and Newhard never advised Claimants of the true reasons for or circumstances surrounding Stein's departure from Newhard Cook. Had they known, the Fendelmans would not have continued to entrust their monies and securities to Stein and would not have been exposed to his continued ill handling of their account.

Based upon the above allegations, the Fendelmans asserted claims for violation of the Federal and Missouri securities laws; violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") 18 U.S.C. Sec. 1961, et seq.; breach of fiduciary duty; fraud; negligent misrepresentation; negligence; negligent hiring; and breach of contract.

Respondents Newhard Cook and Newhard denied the material allegations of the Statement of Claim, alleging that Claimants were customers of Stein long before Newhard Cook received their account; they never complained that Stein was not following their directives while at Newhard Cook; the Claimants received monthly account statements which accurately showed the transactions and to which they did not object; and their account was handled in an appropriate manner by Newhard Cook. In addition, Respondents alleged that they could not be held liable for activities Stein conducted after he left Newhard Cook and over which they had no control. Furthermore, the Respondents asserted multiple affirmative defenses, including the following:

1. The claims are barred by the applicable statute of limitations; by the equitable doctrines of waiver, estoppel, ratification and laches; by Claimants' comparative or contributory fault; and by Claimants' failure to mitigate damages;
2. The Statement of Claim failed to state a claim upon which relief can be granted;
3. The request for punitive damages is barred by applicable law and violates the U.S. Constitution; and
4. Newhard acted in good faith at all times and did not directly or indirectly induce the acts of which claimants complain.

RELIEF REQUESTED

Claimants requested entry of an award against Respondents for actual damages of not less than \$200,000.00; punitive damages of \$1,000,000.00; for treble damages in accordance with the

RICO claim pursuant to 18 U.S.C. Sec. 1964(c); for recovery of the consideration paid for the securities purchased from Stein at Newhard Cook and at Westport, together with interest at 8% per year from the date of payment, costs, reasonable attorneys' fees and interest as provided in Sec. 409.411(a), Missouri Revised Statutes; costs of arbitration; and for such further relief as the Panel deemed proper.

Respondents requested that the Statement of Claim be denied and that Claimants not be allowed to recover on the claims asserted.

OTHER ISSUES CONSIDERED & DECIDED

The Panel specifically found that the Claimants' testimony was credible and compelling, but that the parties who were responsible for the major part of their losses were not parties to this arbitration.

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. Respondent Newhard, Cook & Co., Inc. is liable for and shall pay to Claimants Isadore Fendelman and Bernice Fendelman the sum of \$17,700.00 plus interest of \$5,800.00, for a total of \$23,500.00;
2. In addition, Respondent Newhard, Cook & Co., Inc. is liable for and shall pay to Claimants Isadore and Bernice Fendelman the sum of \$250.00 as reimbursement of the claim filing fee;
3. All claims for punitive damages and RICO violations are hereby dismissed and denied in their entirety;
4. The claims against Respondent Harry W. Newhard are hereby dismissed and denied in their entirety;
5. The parties shall bear their own costs of arbitration, including attorneys' fees,

except for those specifically enumerated herein; and

6. All relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) Pre-Hearing conference with arbitrator x \$300.00 per session = \$300.00; Six (6) hearing sessions x \$1,000.00 per session = \$6,000.00. Total forum fees = \$6,300.00.

The National Association of Securities Dealers, Inc. shall retain the \$250.00 claim filing fee and the \$1,000.00 hearing session deposit previously deposited by the Claimants, Isadore and Bernice Fendelman. Claimants Isadore and Bernice Fendelman are liable for and shall pay the NASD additional forum fees in the sum of \$2,150.00. Respondent Newhard, Cook & Co., Inc. is liable for and shall pay the NASD forum fees in the sum of \$3,150.00.

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

November 22, 1993

Keith D. Patten, Esq.
Keith D. Patten, Esq.
Public Arbitrator

November 23, 1993

Timothy M. Kelly, Esq.
Timothy M. Kelly, Esq.
Industry Arbitrator

November 22, 1993

For NASD Use Only

Date of Service: 11-26-93