

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Names of Claimants

Alice Rose Kowalson, M.D. and
Alice Rose Kowalson, M.D. Pension Plan

93-01701

Names of Respondents

Fahnestock & Co., Inc.,
John Boesel, and
Dickinson & Company

REPRESENTATION

Claimant, Alice Rose Kowalson was represented by J. Clayton Berger, Esq. of Teilborg, Sanders & Parks, Phoenix, Arizona.

Respondent, Fahnestock & Co., Inc. was represented by Charles E. Padgett, Esq. of Fahnestock & Co., Inc., New York, New York.

Respondent, John Boesel appeared pro se.

Respondent, Dickinson & Company was represented by Thomas M. Swartwood, Esq. of Dickinson & Company, New York, New York and David Jordan, Esq. of Titus, Brueckner & Berry, Scottsdale, Arizona.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on March 15, 1993.

Claimant, Alice Rose Kowalson, M.D.'s personal Submission Agreement was signed on March 8, 1993 and the Submission Agreement for the Alice Rose Kowalson, M.D. Pension Plan was signed on March 10, 1993.

A Statement of Answer was filed with the NASD by Respondent, Dickinson & Company on July 6, 1993.

Respondent, Dickinson & Company's Submission Agreement was signed on July 1, 1993 by Thomas M. Swartwood, Esq, Executive Vice President.

A Statement of Answer was filed with the NASD by Respondent, John Boesel on

Respondent, John Boesel did not file an executed Submission Agreement with the NASD.

A Statement of Answer was filed with the NASD by Respondent, Fahnestock & Co., Inc. on August 17, 1993.

Respondent, Fahnestock & Co., Inc. did not file an executed Submission Agreement with the NASD.

HEARING INFORMATION

A pre-hearing conference lasting for one (1) hearing session was held on December 13, 1993.

The hearing dates were December 15, 1993 for one (1) hearing session, December 16, 1993 for two (2) hearing sessions, and January 18, 1994 for three (3) hearing sessions.

The hearing location was Scottsdale, Arizona.

CASE SUMMARY

Claimants, Alice Rose Kowalson, M.D. and The Alice Rose Kowalson, M.D. Pension Plan ("Claimants") alleged that their accounts which were initially opened at Respondent, Dickinson & Co. ("Dickinson") were churned by Respondent, John Boesel ("Boesel") through the purchase of highly speculative over the counter stocks which were unsuitable for a pension plan trust account. Claimants alleged that the conduct continued when Boesel transferred to Respondent, Fahnestock & Co., Inc. ("Fahnestock"). Claimants alleged that Boesel was aware that safety and preservation of capital were the primary investment objectives of the trading in the accounts and that Boesel disregarded Claimants' investment objectives to generate commissions. Claimants also asserted that Fahnestock and Dickinson were guilty of negligent supervision of Boesel.

Respondent, Boesel denied the allegations of the claim and asserted affirmative defenses including that the claims were barred by applicable statutes of limitations, the claim failed to state a cause of action for recovery, the claimant failed to complain after reviewing the monthly account statements, the claimant failed to properly administer the pension plan and the claimant was an experienced investor who assumed the risks of her investments.

Respondent, Dickinson denied the allegations of the statement of claim and asserted that there was no indication from claimant that any wrongdoing was occurring in the accounts despite the fact that Claimant was receiving the monthly account statements and confirmations for the period of time the accounts were maintained at Dickinson. Dickinson asserted affirmative defenses including, but not limited to, assumption of risk, the claims were barred by applicable statutes of limitation. Claimant was negligent in the exercise of reasonable diligence with respect to her affairs and any losses in her accounts were due to market conditions and not the actions of Dickinson.

Respondent, Fahnestock also denied the allegations of the claim and requested a more definite statement of claim.

RELIEF REQUESTED

Claimants requested compensatory damages in the total sum of \$85,360.00, plus treble damages pursuant to A.R.S. § 13-2314(A) and/or an award of punitive damages against Boesel.

Respondent, Boesel requested dismissal of the claim and assessment of the costs of the proceeding against Claimants.

Respondent, Dickinson requested dismissal of the claim and an award of its costs and attorney's fees incurred in responding to the claim.

Respondent, Fahnestock requested dismissal of the claim and assessment of costs to Claimant.

OTHER ISSUES CONSIDERED & DECIDED

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.

While Respondents, Boesel and Fahnestock did not file executed submission agreements with the NASD, they are required to submit to arbitration pursuant to Section 12 of the NASD Code of Arbitration Procedure ("NASD Code"). Accordingly, Boesel and Fahnestock are bound by the panel's determination on all issues submitted for consideration.

Prior to the hearing, Claimant settled her claims against Dickinson. Accordingly, Dickinson was dismissed as a party to this proceeding and the matter went to hearing against only Boesel and Fahnestock.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and the post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Fahnestock and Boesel are jointly and severally liable for and shall pay to Claimants, the sum of Three Thousand Two Hundred Twenty Dollars and No Cents (\$3,220.00);
2. Fahnestock is individually liable and shall pay to Claimants, the sum of Two Thousand Five Hundred Fifty Eight Dollars and No Cents (\$2,558.00);
3. Boesel is individually liable and shall pay to Claimants, the sum of Three Thousand Eight Hundred Thirty Five Dollars and No Cents (\$3,835.00);
4. Interest at the rate of 10% per annum is assessed on the above stated sums from and inclusive of September 1, 1992 to and inclusive of the date the award is paid in full by the Respondents;
5. Claimants' claims for punitive and treble damages are denied and dismissed in their entirety; and,
6. The NASD shall retain the \$750.00 postponement fee paid by Fahnestock and other than Forum Fees set forth below, the parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the \$200.00 non-refundable claim filing fee and the \$750.00 hearing session deposit previously paid to the NASD by Claimant. Fahnestock is assessed additional Forum Fees in the sum of \$4050.00 and will also directly reimburse Claimant for the \$950.00 filing fees submitted to the NASD to initiate this matter. Forum Fees were calculated at the rate of \$750.00 per hearing session for six (6) hearing sessions and \$300.00 for the single hearing session pre-hearing conference.

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

Concurring Arbitrators' Signatures

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| <u>/s/ Gregory W. Dawson</u> | <u>March 25, 1994</u> |
| Gregory W. Dawson, Esq | Dated |
| Presiding Chairperson | |
| Public Arbitrator | |

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| <u>/s/ Eugene W. Bronski</u> | <u>March 25, 1994</u> |
| Eugene W. Bronski, Esq. | Dated |
| Panelist | |
| Public Arbitrator | |

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| <u>/s/ Maurice O. O'Neill</u> | <u>March 25, 1994</u> |
| Maurice O. O'Neill | Dated |
| Panelist | |
| Industry Arbitrator | |

Date award served on the parties by the NASD: March 30, 1994