

94110415

11/94

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Teal Traina

93-01748

Name of Respondents

Fahnestock & Co., Inc.
John Moore

REPRESENTATION

Claimant Teal Traina ("Claimant") was represented by John E. Lawlor, Esq., Attorney at Law, Garden City, New York.

Respondents Fahnestock & Co., Inc. ("Fahnestock") and John Moore ("Moore") were represented by Charles E. Padgett, Senior Vice President and General Counsel at Fahnestock, New York, New York.

CASE INFORMATION

Statement of Claim filed on: April 30, 1993

Claimant's Submission Agreement signed on: March 29, 1993

Joint Statement of Answer filed by Respondents Fahnestock and Moore (collectively referred to as "Respondents") on: July 2, 1993

Fahnestock's Submission Agreement signed on: August 20, 1993

Moore's Submission Agreement signed on: August 20, 1993

HEARING INFORMATION

Pre-Hearing Conference was held on May 5, 1994 with the Parties and the Chairman to resolve outstanding discovery matters.

9411045

Hearing Dates/Sessions: October 10, 1994, two sessions
 October 11, 1994, two sessions
 October 24, 1994, two sessions

Hearing Location: Offices of the National Association of Securities Dealers,
Inc., Arbitration Department and The Merchants Club, New York.

CASE SUMMARY

Claimant, among other things, alleged that he met with Moore and informed Respondents of his investment objective. Claimant, a 75 year old retiree, alleged that he told Moore that he was interested in safe, conservative income producing investments. Claimant alleged that he told Moore that he needed his investments to remain safe and liquid because he would be relying on the money from these investments for retirement and to pay medical bills. Claimant alleged that Moore, with full knowledge of Claimant's investment objectives, recommended that Claimant purchase among other things of Xytronyx ("XYX"), Aura Systems, Inc. ("AURA") and various options. Claimant alleged that Moore made material misrepresentations to induce Claimant to invest. Claimant alleged that Moore knew the representations were false or were made with reckless disregard for the truth. Claimant alleged that Moore recommended investments that were inconsistent with Claimant's stated investment objectives and were unsuitable. Claimant alleged that Respondents misstated the risks of Claimant's potential investments and omitted to inform Claimant of all the risks attendant to the investments Moore recommended to Claimant. Claimant alleged that Respondents invested his money in other speculative and unsuitable investments such as Guilford Mills, Inc., Western Stars Business Systems, Inc., Midway Airlines and Scorpion Technologies, Inc. Claimant alleged that Moore made purchases on margin without his authorization. Claimant alleged that Moore represented to Claimant that such margin purchases were prudent because Moore guaranteed that the stocks would at least double in value. Claimant alleged that the use of margin was for Respondents benefit rather than his own. Claimant alleged that Respondents failed to explain the risks of margin. Claimant alleged that Moore effected options transactions in Claimant's account without authorization. Claimant maintained that he does not know what an option is and that he has never previously engaged in option trading. Claimant alleged that Moore turned Claimant's account into a high speed, high risk, high volume speculative trading account. Claimant's alleged excessive trading in his account for the Respondents' benefit and at his expense. Claimant alleged that Moore traded his account in and out of AURA and XYX no less than 89 times. Claimant alleged that Fahnestock failed to properly supervise Claimant's account or its employee Moore. Claimant

9411045

alleged that Fahnestock aided and abetted the activities of Moore and is additionally liable under the doctrine of Respondeat Superior. Claimant alleged that Respondents violated Section 10(b) of the Securities Act of 1934 and rule 10b-5 promulgated thereunder. Claimant alleged that the activity of Respondents constituted common law fraud. Claimant alleged that Respondents breached both expressed and implied contracts and that they violated NYSE Rules 405 and 342 and Article 3, Section 1, 18, and 27 of the NASD's Rules of Fair Practice. Claimant alleged that Fahnestock violated its duty to exercise due diligence and was otherwise negligent in failing to learn the essential facts relative to Claimant; to monitor the transactions carried on in Claimant's account; to diligently supervise Claimant's account; to effectively supervise and exercise control over Respondent Moore; and, in failing to warn Claimant of the risks attendant to Respondents' intended activity.

Respondents categorically denied all allegation of wrongdoing alleged by Claimant. Respondents maintained, among other things, that far from being a retiree, with little or no sophistication, the Claimant was a sophisticated investor. Respondents maintained, that at one time, Claimant was a Trustee for a pension and trust fund. Respondents maintained that Claimant wished to purchase speculative growth stocks and that Claimant's investment objectives were followed. Respondents maintained that all investments were suitable for Claimant, that Claimant was aware of all risks attendant to his investments and that Claimant authorized all transactions in Claimant's account.

RELIEF REQUESTED

Claimant, in his pleading, requested in an amount not less than \$200,000 plus interest.

Respondents, in their pleading, requested that judgment be given in their favor and that all costs be assessed against 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.

94H1045

FINDS OF FACTS

The Panel finds that Claimant must accept primary responsibility for the risks knowingly assumed in his account and the ultimate investment results.

The Panel also finds, however, that oversight of the account by Fahnestock was less than adequate. The customer's age and investment objectives were not properly ascertained and/or considered. The account was highly concentrated in volatile stocks. It was substantially leveraged. It was heavily traded and dealt occasionally in options. Mr. Moore dealt lightly at best with these considerations. At no time, in over three years, did the account catch the attention even of Mr. Moore's branch manager, much less Fahnestock's compliance officers. The customer's age and investment objectives were not properly ascertained and/or considered.

AWARD

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

1. That Respondents Fahnestock and Moore should forfeit commissions in the amount of \$25,000 and pay that amount as damages to Claimant, with liability to be joint and several. Therefore Respondents Fahnestock and Moore are liable to the Claimant and shall pay to the Claimant the sum of \$25,000. No prejudgment interest is awarded on this amount.
2. Each party shall bear their respective costs and attorneys fees except as specified below.
3. That all other claims for relief not specifically addressed are denied in their entirety.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

Traina Decision
Case No. 93-01748
Page 5.

9411045

6 hearing sessions x \$750 = \$4500 minus Claimant's
previously filed hearing session deposit of \$750 = \$3750
plus 1 pre hearing conference x \$300 = \$4,050 net due as forum
fees

Forum Fees shall be assessed against: Respondent Fahnestock. Fahnestock shall
pay forum fees in the amount of \$4,050.

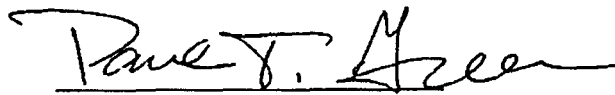
Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Joseph M. Weitzman, Esq.	-	Public Chairman
Paul T. Green	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature
Name

Public/Industry


Paul T. Green

Public

NASD Date of Decision: November 25, 1994

9411045

Traina Decision
Case No. 93-01748
Page 5.

6 hearing sessions x \$750 = \$4500 minus Claimant's
previously filed hearing session deposit of \$750 = \$3750
plus 1 pre hearing conference x \$300 = \$4,050 net due as forum
fees

Forum Fees shall be assessed against: Respondent Fahnestock. Fahnestock shall
pay forum fees in the amount of \$4,050.

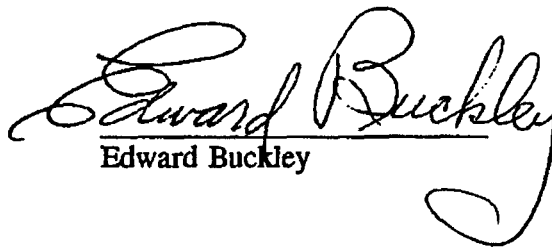
Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Joseph M. Weitzman, Esq.	-	Public Chairman
Paul T. Green	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature
Name

Public/Industry


Edward Buckley

Industry

NASD Date of Decision: November 25, 1994

Traina Decision
Case No. 93-01748
Page 5.

7411045

6 hearing sessions x \$750 = \$4500 minus Claimant's
previously filed hearing session deposit of \$750 = \$3750
plus 1 pre hearing conference x \$300 = \$4,050 net due as forum
fees

Forum Fees shall be assessed against: Respondent Fahnestock. Fahnestock shall
pay forum fees in the amount of \$4,050.

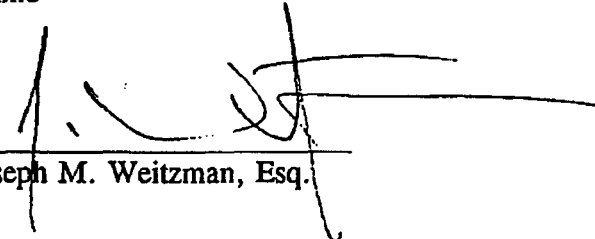
Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATION PANEL

Joseph M. Weitzman, Esq.	-	Public Chairman
Paul T. Green	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature
Name

Public/Industry



Joseph M. Weitzman, Esq.

Public

NASD Date of Decision: November 25, 1994