

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Katherine B. Wheeler,
Claimant,

v.

No. 94-00927

B.C. Christopher Securities Company,
MCW, Inc., f/k/a B.C. Christopher Securities Company ,and
Fahnestock & Company, Inc.,
Respondents.

REPRESENTATION OF PARTIES

Claimant Katherine B. Wheeler ("Claimant") was represented by John J. Miller, Esq. and Barry D. Estell, Esq., of Nygaard & Miller, Overland Park, Kansas.

Respondents B.C. Christopher Securities Company, and MCW, Inc. f/k/a B.C. Christopher Securities Company ("MCW") were represented by J. Michael Vaughan and Heidi R. Youngs of Weisenfels & Vaughan, Kansas City, Missouri.

Respondent Fahnestock & Company, Inc. ("Fahnestock") was represented by J. Bret Armatas , Esq., Overland Park, Kansas. Due to a settlement with the Claimant, Fahnestock did not participate in the hearing.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about March 8, 1994. Claimant's Submission Agreement was signed on March 8, 1994. Claimant's Amended Statement of Claim was filed on or about April 18, 1994. Letter filed on or about March 30, 1995 dismissing Fahnestock from this arbitration with prejudice.

MCW's Answer was filed on or about August 1, 1994. MCW's Submission Agreement was signed on July 6, 1994.

Fahnestock's Response to Claimant's Amended Statement of Claim was filed August 5, 1994.

HEARING INFORMATION

Hearing dates: February 28, 1995; Three (3) sessions.
March 1, 1995; Two (2) sessions.
April 6, 1995; Two (1) session.

Hearing Location: Kansas City, Missouri.

CASE SUMMARY

Claimant alleged that MCW and Fahnestock: Violated the Missouri Merchandising Practices Act; made material misrepresentations and concealed material information; committed negligence and fraud; breached their contract and fiduciary duty; and violated NASD Rules. The allegations arose out of transactions in the following securities: Jones Cable TV Fund 15-A; VMS Mortgage Investment Fund; VMS Strategic Land Trust; and VMS Strategic Land Fund II.

In its Answer, MCW denied each and every allegation made in the Amended Statement of Claim. In addition, MCW asserted the following affirmative defenses:

1. Claimant's Amended Statement of Claim fails to state a claim upon which relief can be granted.
2. Claimant's claims are barred by the applicable statutes of limitations. Specifically, those investments made more than five (5) years ago are barred under all theories of liability.
3. Claimant's claims are barred by the doctrines of waiver, estoppel and laches.
4. Claimant failed to mitigate her damages.
5. Any losses suffered were the result of market conditions for which Claimant assumed all risk of loss.
6. With respect to investments made at B. C. Christopher Securities Company n/k/a MCW, MCW cannot be liable for any depreciation in the price of the investments purchased after claimant transferred her account from MCW.
7. Claimant's Amended Statement of Claim fails to state a claim for punitive damages.
8. Claimant has failed to plead fraud with required particularity.
9. While denying any liability to the Claimant, MCW states that if there is such fault, it be compared and apportioned according to the acts of the Claimant and that of any of Claimant's alleged damages should be reduced according to her own respective negligence.
10. Respondent MCW at all times exercised good faith with respect to Claimant's account and investments.

In its Response, Fahnestock denied any allegation not specifically admitted. In addition, Fahnestock asserted the following affirmative defenses:

1. Claimant's Statement of Claim fails to state a claim upon which relief can be granted against the respondent.

2. Claimant has failed to plead fraud claims with particularity against this respondent as required.
3. Claimant's claims against this respondent are barred by the doctrines of waiver, estoppel and laches.
4. Claimant's losses resulted from market conditions for which claimant assumed all risk of loss.
5. If there is liability for any portion of the claimed damages, which is expressly denied, fault should be apportioned between claimant, respondents and other unnamed parties.
6. Claimant's claims are barred by the applicable statutes of limitations.

RELIEF REQUESTED

Claimant demanded an award as follows:

- (a) rescission of her investment in Jones Cable TV Fund 15-A in the amount of \$16,500.00;
- (b) damages of \$87,160.89 for her capital loss in VMS programs;
- (c) damages in the amount that Claimant's invested assets would now be worth had they been suitably managed in accordance with the Claimant's investment objectives;
- (d) punitive damages to punish Respondents and to deter others from similar misconduct;
- (e) Claimant's costs and expenses, including attorneys' fees; and
- (f) Such other relief as the arbitration panel deemed just and proper.

MCW requested an award in its favor and against Claimant on all claims, for its costs incurred and for such other and further relief as the panel deemed just and proper.

Fahnestock requested that the Statement of Claim be denied.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed by 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 original(s) 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 B. C. Christopher Securities Company and MCW, Inc. are jointly and severally liable for, and shall pay to Katherine B. Wheeler the sum of \$36,750.00 as satisfaction of her claim for compensatory damages.

2. All other claims not specifically covered in this Award are hereby, and each of them, denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs associated with this arbitration, including attorneys' fees, except as set forth more fully below.

Respondents B. C. Christopher Securities Company and MCW, Inc. are jointly and severally liable for, and shall pay to Katherine B. Wheeler the sum of \$950.00 as satisfaction of her claim for costs herein.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

6 hearing sessions @ \$750.00 per session = \$4,500.00

Pursuant to Section 43(c) of the Code, the NASD shall **retain** the nonrefundable filing fee in the amount of \$200.00, and shall **retain** the hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Claimant.

Pursuant to Section 45 of the Code, MCW, Inc., f/k/a B.C. Christopher Securities Company, shall pay to the NASD the sum of \$350.00 for its nonrefundable member surcharge assessment.

Additional Forum Fees in the amount of \$3,750.00 are assessed against MCW, Inc..

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

CONCURRING ARBITRATORS

Dated:

Name:

May 8, 1995

Charles E. Jones /s/
Charles E. Jones
Presiding Chair
Public Arbitrator

May 5, 1995

William T. Smith, III /s/
William T. Smith, III
Public Arbitrator

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Clarence Albert Getchell, III
Industry Arbitrator