

971 27

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

In the Matter of the Arbitration Between

Names of Claimants

Lawrence Fagelbaum Individually and as
Custodian for Harry Fagelbaum and Gary Fagelbaum;
Harry, Lawrence, Gary and Martin Fagelbaum, ITWROS;
and Harry Fagelbaum

95-04858

Names of Respondents

Fahnestock & Co., Inc. and
Anthony V. Boniello

REPRESENTATION

For Claimants: Russell L. Forkey, Esq., Fort Lauderdale, Florida.

For Respondents Fahnestock & Co., Inc. ("Fahnestock") and Anthony V. Boniello ("Boniello") ~~Re Eric~~ Eric Fahnestock
J. Shames, Esq., of Fahnestock & Co., Inc., New York, New York. ~~Shames, Esq. of Fahnestock~~

CASE INFORMATION

Statement of Claim filed: August 17, 1995.

Claimants' Submission Agreements signed as follows:

Lawrence Fagelbaum: August 19, 1995;
Harry Fagelbaum: August 21, 1995;
Gary Fagelbaum: August 17, 1995; and,
Martin Fagelbaum: August 19, 1995.

Joint Statement of Answer filed by Respondents Fahnestock and Boniello: January 17, 1996.

Respondent Fahnestock's Submission Agreement/Corporate Acknowledgment signed: December 12, 1995
by Eric J. Shames on behalf of the firm.

Respondent Boniello's Submission Agreement signed: December 29, 1995.

HEARING INFORMATION

The Chairperson conducted a telephonic pre-hearing conference which lasted one (1) session on
September 13, 1996.

On October 9, 10 and 11, 1996 and, October 20 and 21, 1997 hearings lasting eleven (11) sessions were
conducted in Fort Lauderdale, Florida.

CASE SUMMARY

Claimants alleged that they filed this claim against the Respondents for fraud and deceit, breach of fiduciary duty, breach of contract, negligence, market manipulation, and, as it relates to Fahnestock, negligent supervision and/or fraudulent marketing with respect to the Claimants' investment in the stock of one company, Sidari Corporation (ZITT) ("Sidari"), in which Claimants alleged the Respondents were market makers. Claimants further alleged that relying on the expert advice of Respondent Boniello, (which was confirmed by various corporate officers and insiders of Sidari Corporation, up to and including the President and Chief Executive Officer, Joseph A. Sidari), they were persuaded to accumulate 539,600 shares of Sidari for a total accumulated cost of \$207,096.00. Claimants maintained that this extremely over-concentrated position in a single security should have been known and prevented by management of Fahnestock, particularly as they were a market maker for the Sidari Corporation; and, that Respondents continuously supplied Claimants with false representations and misleading information allegedly disseminated by the Corporation's officers and advisors in order to influence the Claimants to maintain their position in the stock.

Respondents denied each and every allegation of wrongdoing contained in the Statement of Claim and denied any liability to the Claimants. Respondents alleged that Claimants were riding the market; that the allegations were concocted solely to create a claim against Respondents for Claimants' losses; and, that Claimants had ratified all transactions by waiting more than four years from the time they began purchasing Sidari to file their claim. Respondents further alleged that the principal Claimant, Lawrence Fagelbaum, who made the investment decisions was an experienced investor with assets reaching almost one million dollars; that Claimants consistently invested in small capitalization companies, investing in 50,000 shares or more of at least three other highly speculative stocks; that Claimants had information on a Sidari private placement prior to making the initial purchase and made all purchases of Sidari on an unsolicited basis; and, that the chief Claimant was in contact with the Chairman of Sidari on numerous occasions, and received more than forty (40) trade confirmations for his Sidari purchases. Respondents maintained that Respondent Boniello repeatedly advised and cautioned Claimants of the risky nature of their investment choices.

RELIEF REQUESTED

Claimants requested rescission and/or damages in the amount of \$292,895.00 inclusive of legal interest, costs, attorney's fees and such other relief as the panel deemed appropriate.

Respondents requested a dismissal of the claim.

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 NASD Regulation, Inc.

AWARD

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

1. Respondents Fahnestock and Boniello are found not liable and, therefore, all claims against them are hereby dismissed.

2. Claimants' claims for rescission, attorneys' fees and costs are hereby denied.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure ("Code") the arbitration panel has assessed forum fees in the amount of \$8,550.00 (eleven (11) hearing sessions x \$750.00 + one (1) pre-hearing telephonic conference x \$300.00).

1. Respondent Fahnestock is hereby assessed forum fees in the amount of \$4,275.00 payable to NASD Regulation, Inc.
2. Claimants are hereby assessed forum fees, jointly and severally, in the amount of \$4,275.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited by Claimants in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. of \$3,525.00.
3. NASD Regulation, Inc. shall retain the claim filing fee of \$200.00 paid by the Claimants.
4. NASD Regulation, Inc. shall retain the member surcharge of \$350.00 paid by Respondent Fahnestock pursuant to Rule 10333 of the Code.

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

ARBITRATION PANEL

Concurring Arbitrators' Signatures

/s/
Randy R. Freedman, Esq.

Public/Chairperson

/s/
Lawrence J. Gale

Public/Panelist

/s/
David L. Yerkes

Industry/Panelist

Date of Decision: November 26, 1997