

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Patrick Mahaney, Claimant v. Fahnestock & Co., Inc., Morton Gerald Gropper and Bruce Adam Gropper, Respondents

Case Number: 03-07651

Hearing Site: San Francisco, California

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Nature of the Dispute: Customer vs. Member and Associated Persons

**REPRESENTATION OF PARTIES**

For Claimant:

Jeffrey A. Feldman, Esq.  
Law Offices of Jeffrey A. Feldman  
San Francisco, California

For Respondents:

Cory M. Sobel, Esq.  
Fahnestock & Co. Inc.  
New York, New York

**CASE INFORMATION**

Statement of Claim filed: October 21, 2003

Claimant's Opposition to Respondents' Motion to Dismiss filed: February 19, 2004

Claimant's Arbitration Brief filed: August 20, 2004

Claimant's Uniform Submission Agreement signed: October 17, 2003

Joint Statement of Answer and Motion to Dismiss filed by Respondents Fahnestock & Co., Inc., now known as Oppenheimer & Co., Inc., hereinafter both shall be known as "Fahnestock" and Morton Gerald Gropper: December 17, 2003

Respondent Bruce Adam Gropper's letter of December 22, 2003 adopting the Joint Statement of Answer filed by Respondents Fahnestock and Morton Gerald Gropper filed: December 26, 2003

Respondents Fahnestock, Morton Gerald Gropper and Bruce Adam Gropper's Corrections to Respondents' Statement of Answer and Motion to Dismiss filed: March 9, 2004

NASD Dispute Resolution  
Arbitration No. 03-07651  
Award Page 2 of 5

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### **CASE SUMMARY**

Claimant alleged the following claims with respect to investments in various securities, including but not limited to investments in QQQ and Adobe Systems Inc.: 1) Breach of Fiduciary Duty as to all Respondents; 2) Negligent Hiring and Supervision as to Fahnestock; 3) Negligence as to all Respondents; 4) Fraud as to all Respondents; and 5) Churning as to all Respondents.

Respondents denied Claimant's allegations of wrongdoing and denied any liability to Claimant. Respondents also asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested:

1. Out-of-pocket damages and lost return on principal damages in the amount which will be proven at the arbitration hearing;
2. Punitive and exemplary damages according to proof at the time of the hearing;
3. Rescission of all investments in the account and interest on the principal which was invested from the dates of loss;
4. Costs;
5. Restitution/disgorgement of the transaction costs paid by Claimant; and
6. Such other and further relief as the Panel may deem just and proper.

Respondents requested that the Statement of Claim of Claimant in all respects be dismissed with prejudice, and attorneys' fees and disbursements be assessed against Claimant.

### **OTHER ISSUES CONSIDERED AND DECIDED**

On October 17, 2003, Claimant and Claimant's counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators. Pursuant to the Code of Arbitration Procedure IM-10100 the waiver of the Claimant shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

Respondents did not file with NASD Dispute Resolution ("NASD-DR") properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the NASD-DR Code of Arbitration Procedure ("the Code") and, having answered the Claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

On or about March 25, 2004, the Panel reviewed and considered the positions of the parties relative to Respondents' Motion to Dismiss. The Panel denied the Motion.

NASD Dispute Resolution  
 Arbitration No. 03-07651  
 Award Page 3 of 5

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The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### AWARD

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

1. Respondents "Fahnestock", Morton Gerald Gropper and Bruce Adam Gropper are jointly and severally liable for and shall pay to Claimant, the sum of \$101,683.27.
2. Respondents "Fahnestock", Morton Gerald Gropper and Bruce Adam Gropper are jointly and severally liable for and shall pay to Claimant, the sum of \$250.00 as reimbursement for Claimant's filing fee.
3. Claimant's claims for punitive and exemplary damages are denied.
4. Except as mentioned in paragraph 2 above, each party shall bear all other respective costs and attorney's fees.
5. All other relief not expressly granted is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$250.00
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#### Member Fees

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, Fahnestock is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,200.00</u>
Total Member Fees	= \$4,450.00

NASD Dispute Resolution  
 Arbitration No. 03-07651  
 Award Page 4 of 5

### Forum Fees and Assessments

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(1) Pre-hearing conference session with a single arbitrator @ \$450.00/session =	\$450.00
Pre-hearing conference: July 16, 2004	1 session
(2) Pre-hearing conference sessions with the Panel @ \$1,000.00/session =	\$2,000.00
Pre-hearing conferences: March 18, 2004	1 session
March 25, 2004	1 session
(6) Hearing sessions @ \$1,000.00/session =	\$6,000.00
Hearing: August 31, 2004	2 sessions
September 1, 2004	2 sessions
September 2, 2004	2 sessions
<b>Total Forum Fees</b>	<b>= \$8,450.00</b>

The Panel assessed the \$8,450.00 in forum fees jointly and severally to Respondents, Fahnestock, Morton Gerald Gropper and Bruce Adam Gropper.

### Fee Summary

1. Claimant is charged with the following fees and costs:	
Initial Filing Fee	= \$ 250.00
<u>Less Payments</u>	= \$(1,425.00)
Refund Due Claimant	= \$(1,175.00)
2. Respondent "Fahnestock" is charged with the following fees and costs:	
Member Fees	= \$ 4,450.00
<u>Less Payments</u>	= \$(4,450.00)
Balance Due NASD-DR	= \$ 0.00
3. Respondents "Fahnestock", Morton Gerald Gropper and Bruce Adam Gropper are charged jointly and severally with the following fees and costs:	
Forum Fees	= \$ 8,450.00
<u>Less Payments</u>	= \$( 0.00)
Balance Due NASD-DR	= \$ 8,450.00

All balances are payable to NASD Dispute Resolution and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

NASD Dispute Resolution  
Arbitration No. 03-07651  
Award Page 5 of 5

**ARBITRATION PANEL**

Carl B. Noelke, Esq.	-	Public Arbitrator, Presiding Chair
Joseph Berzok, Esq.	-	Public Arbitrator
Ralph S. Blascovich, Esq.	-	Non-Public Arbitrator

**Consenting Arbitrators' Signatures**

  
 Carl B. Noelke, Esq.  
 Chair, Public Arbitrator

9/10/04  
 Signature Date

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 Joseph Berzok, Esq.  
 Public Arbitrator

\_\_\_\_\_  
 Signature Date

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 Ralph S. Blascovich, Esq.  
 Non-Public Arbitrator

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 Signature Date

9/13/04  
 Date of Service

NASD Dispute Resolution  
Arbitration No. 03-07651  
Award Page 5 of 5

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Carl B. Noelke, Esq.	-	Public Arbitrator, Presiding Chair
Joseph Berzok, Esq.	.	Public Arbitrator
Ralph S. Blascovich, Esq.	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Carl B. Noelke, Esq.  
Chair, Public Arbitrator

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Signature Date

  
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Joseph Berzok, Esq.  
Public Arbitrator

9/9/04  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Ralph S. Blascovich, Esq.  
Non-Public Arbitrator

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Arbitration No. 03-07651  
Award Page 5 of 5

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Joseph Barzok, Esq.	-	Public Arbitrator
Ralph S. Blascovich, Esq.	-	Non-Public Arbitrator


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Non-Public Arbitrator

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Signature Date

9/13/04  
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Date of Service