

7/95

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimants

Eric Chwatt  
Mitchell Chwatt

93-03388

Name of Respondents

S.D. Cohn and Co., Inc.  
John J. Baratta

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REPRESENTATION

For Claimants: Daniel A. Eigerman, Esq. of Horner & P.C. located in New York, New York.

For Respondent S.D. Cohn & Co., Inc.: Charles M. O'Rourke, Esq., Hempstead, New York.

For Respondent John J. Baratta: Alan M. Friedman, Esq. located in New York, New York.

CASE INFORMATION

Statement of Claim filed: August 30, 1993.

Claimant Eric Chwatt's Submission Agreement signed on: July 21, 1993.

Claimant Mitchell Chwatt's Submission Agreement signed on: July 21, 1993.

Statement of Answer filed by Respondent S.D. Cohn and Co., Inc. ("Cohn") on: January 17, 1994.

Respondent Cohn's Submission Agreement signed on: January 11, 1994.

Statement of Answer filed by Respondent John J. Baratta ("Baratta") on: December 15, 1993.

Respondent Baratta's Submission Agreement signed on: December 15, 1993.

**HEARING INFORMATION**

Hearing Dates / Sessions:            March 1, 1995 / Two Sessions.  
   March 23, 1995 / One Session.

Hearing Location:                    The offices of the National Association of Securities Dealers, Inc.  
   located in New York, New York.

**CASE SUMMARY**

Claimants alleged that in or about early 1992 Claimants opened accounts with Respondent Cohn and that from that time until approximately February 1993 Respondent Baratta, an employee of Cohn, acted as Claimants' account executive. Claimants further alleged that in or about March, 1992 Respondent Baratta made unauthorized purchases of the securities of Drivefone, Inc. ("Drivefone") for Claimants' accounts. Claimants then alleged that when they asked that the Drivefone positions be removed from their accounts Baratta made repeated representations and promises to Claimants that he would guarantee Claimants' investment in Drivefone and make good any losses they might incur as a result of the investment and that Baratta's representations were made to induce Claimants to hold the Drivefone securities. Claimants alleged that, in reliance upon Baratta's representations, Eric Chwatt purchased Drivefone securities, at a price between \$5.375 and \$8.00 per share for a total amount of \$45,097.50, and Mitchell Chwatt purchased Drivefone securities between \$5.375 and \$8.00 per share for a total amount of \$41,707.50. Claimants then alleged that in November and December 1992 Eric Chwatt sold his Drivefone securities at a loss of \$22,627.50 and Mitchell Chwatt sold his Drivefone securities and incurred a loss of \$23,852.50. Claimants alleged that they requested that Respondent Baratta honor his promises, Baratta instead offered Claimants opportunities to purchase new issues in the future to recoup their losses and that Respondent Baratta failed to make good the Claimants' losses. Claimants further alleged that Respondent Cohn was contractually bound to the Claimants on the representations and promises made by Baratta to Claimants because Cohn granted actual authority to make such representations and promises or clothed Baratta with apparent authority to do so. Claimants alleged that Respondents breached their fiduciary duty owed to Claimants. Claimants alleged that Baratta had no intention of honoring representations and promises when made and were known by Baratta to be false and untrue and made solely to induce Claimants to purchase Drivefone. Claimants further alleged that they did not know and had no way of knowing that Baratta's representations and promises were false and untrue and that they relied thereon to their detriment.

Respondent Cohn maintained that Claimant Eric Chwatt was a registered representative of Cohn's and that as a registered representative, knew that the alleged guarantees made by Baratta were prohibited activities. Respondent Cohn further maintained that neither Claimant complained or made any effort to notify Respondent Cohn of Baratta's activities at a time when corrective action could and should have taken place. Respondent Cohn maintained that Eric Chwatt, as a registered representative and NASD associated person, and his brother Mitchell

Chwatt were prohibited from purchasing new issues by the NASD's rules against withholding allocations of new issues. Respondent Cohn maintained that Eric Chwatt knew these rules but failed to notify his firm as he was required.

Respondent Cohn denied knowledge of or participation in the acts of omissions alleged by Claimants and further denied liability for alleged private arrangements negotiated by Respondent Baratta and Claimants.

Respondent Cohn maintained the following affirmative defenses: (1) Claimants are barred from any recovery as a result of their own unclean hands; (2) Claimants were estopped from asserting claims arising out of their participation in activities they knew or should have known were in violation of the law; (3) Claimants failed to mitigate their losses; (4) Any alleged misrepresentations by Baratta were not relied upon by Claimants; and (5) Claimant Eric Chwatt violated Respondent Cohn's rules and policies.

Respondent Cohn further maintained that, with respect to Respondent Baratta, if Claimants' allegations were true that Baratta would have acted beyond the proper scope of his relationship with Cohn and that if Respondent Cohn were to be held liable with respect to any such claim, that Cohn would be entitled to indemnification and to be held harmless by Respondent.

Respondent Cohn also maintained, with respect to Claimant Eric Chwatt, that he would have acted beyond the proper scope of his relationship with Respondent Cohn and, if Respondent Cohn were to be held liable with respect to any such claim, Respondent Cohn would be entitled to indemnification and to be held harmless by Claimant Eric Chwatt.

Respondent Baratta denied that Claimant Eric Chwatt was an individual public customer in that Eric Chwatt was a registered representative for the purpose of trading in securities. Respondent Baratta also denied that he had made unauthorized purchases of Drivefone for Claimants' accounts. Respondent Baratta denied that he represented and promised that he would guarantee Claimants' investments in Drivefone. Respondent Baratta maintained that he did tell Claimants that he would bring future potentially profitable new issues to Claimants' attention but denied making any other representation, promise or guarantee to Claimants. Respondent Baratta denied making representations, promises or guarantees to Claimants that were knowingly false and untrue and Baratta further denied making any promises or guarantees in order to induce Claimants to purchase and hold Drivefone securities.

#### **RELIEF REQUESTED**

Claimants requested:

1. an award in favor of Eric Chwatt for \$22,627.50 with interest from December 14, 1992;
2. an award in favor of Mitchell Chwatt for \$23,852.50 with interest from December 3,

1992:

3. costs of the arbitration; and
4. any such other and further relief as the arbitrators deem just.

Respondent Cohn requested:

1. Claimants' claims as against Cohn be dismissed and alternatively;
2. That Respondent Cohn be indemnified and held harmless by Respondent Baratta and Claimant Eric Chwatt for and including reasonable legal fees and costs associated with this arbitration.

Respondent Baratta requested:

1. No arbitration award be made against the Respondents.
2. Respondent Baratta be awarded costs of the arbitration plus such other and further relief as the arbitrators deem necessary and proper.

#### **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.

#### **AWARD**

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

1. Claimants' claims against S.D. Cohn are dismissed in their entirety.
2. Respondent Baratta is liable and shall pay to Claimant Mitchell Chwatt the sum of \$16,415.00.
3. Respondent Baratta is liable and shall pay to Claimant Eric Chwatt the sum of \$15,645.00.

**FORUM FEES**

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

3 sessions X \$400 = \$1,200 minus hearing session deposit of \$400 = net \$800 due.

Forum fees Assessed Against:

1. Respondent Baratta is assessed the sum of \$800.00 which represents the total forum fees due. Respondent Baratta is liable and shall pay to the NASD the sum of \$800.00.

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

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Concurring Arbitrators' Signatures

Name

Public Chairperson

Charles Kleinbaum, Esq.

Name

Public Panelist

Howard M. Sommers, Esq.

Name

Industry Panelist

Stephen H. Lewis, Esq.

Date of Decision: July 6, 1995

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Date of Decision: July 6, 1995