

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Richard F. Schwartz

Case No.

vs.

94-01705

Name of Respondent

Oppenheimer & Co., Inc.
Randy Driver

REPRESENTATION

For Claimant, Richard Schwartz ("Schwartz"), appeared Thomas P. Marotta, Esq., of Hermann Cahn & Schneider located in Cleveland, Ohio.

For Respondent, Oppenheimer & Co., Inc., ("Oppenheimer") and Randy Driver ("Driver"), appeared Eugene S. Small, Esq., In-house counsel for Oppenheimer located in New York, New York.

CASE INFORMATION

Statement of Claim filed on: May 6, 1994.

Claimant's Submission Agreement signed on: April 26, 1994.

Joint Statement of Answer filed by Respondents on: July 8, 1994.

Respondent Oppenheimer's Submission Agreement signed on: July 8, 1994.

Respondent Driver did not file a Submission Agreement.

HEARING INFORMATION

Hearing Date/Sessions: October 24, 1995 - 3 sessions

The hearings took place in the National Association of Securities Dealers Inc.'s offices located in Cleveland, Ohio.

CASE SUMMARY

Claimant alleged breach of fiduciary duties, breach of contract, violation of NASD Rules, and fraud. Mr. Schwartz stated he was an unsophisticated investor with limited, conservative investment experience. Initially, Schwartz stated he began investing through Driver at Oppenheimer while his financial situation was relatively secure, and he purchased RJR Nabisco and Duracell. In the Fall of 1991, Schwartz

claimed he informed Driver that he was closing his businesses, spending time at a yoga center, and that his income would be drastically reduced. Schwartz explained that he had no telephone and mail was often delayed. Claimant maintained that despite the reduction in income, Driver called to suggest he sell RJR and Duracell and purchase Centocor, a pharmaceutical company which manufactured a "hot" new drug awaiting FDA approval. Schwartz claimed that Driver knew or should have known that Centocor was involved in a patent infringement lawsuit but failed to inform Schwartz. Additionally, Schwartz maintained Driver had Schwartz trading on margin and discouraged his purchasing Glaxo stock. However, Schwartz claimed later that he authorized Driver to sell some Centocor holdings to purchase 2,000 shares of Glaxo but that Driver, without authorization, purchased 3,000 shares which resulted in insufficient equity in Centocor to meet a subsequent margin call. After that, Schwartz claimed shares in Centocor were bought and sold without his authorization.

Respondents alleged that the Claimant was a savvy and sophisticated investor of considerable wealth with substantial investment and business experience. Additionally, the Respondents alleged that the Claimant was intimately familiar with the basis of Oppenheimer's recommendation to purchase Centocor and made the investment with full knowledge of the risk involved. Moreover, the Respondents contended that the Claimant understood the risks involved in every transaction and was willing to assume those risks in the hope of achieving far above average returns on his investments.

By way of Defenses, the Respondents averred that the Claimant failed to state a claim upon which relief could be granted; is equitably estopped from bringing this action; that the Claimant by his own actions has waived any and all claims alleged in the Statement of Claim; that Claimant has ratified each and every transaction and is barred from recovery herein; that the Claimant voluntarily assumed the risk inherent in the trading strategy utilized; that the Claimant is barred from recovering under the doctrines of ratification, estoppel, waiver, and laches; that the Claimant is barred by the doctrines of unclean hands and *in pari delicto*; that the Claimant failed to act with due diligence to mitigate his damages; that the Claimant's own negligence was the proximate cause of his losses; that the Claimant failed to timely notify the Respondent Oppenheimer of any complaints; that the Claimant's statutory securities fraud claims are barred because his broker did not act with the requisite scienter; that the Claimant's claims are barred by the applicable statutes of limitations; that an award of punitive damages violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and that this Panel is without jurisdiction to award attorney's fees.

RELIEF REQUESTED

Claimant requested compensatory damages in the sum of \$76,000 for his losses in the purchase of Centocor shares, plus reasonable interest from November 1991 to the date of judgment, together with reimbursement of all costs and fees to be assessed by the NASD. Claimant further requested \$100,000 in punitive damages.

Respondents requested that the Claimant's Statement of Claim be dismissed in its entirety and that the costs of this proceeding be assessed fully against Schwartz.

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 original remain on file with the NASD.

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. All claims are dismissed in their entirety.
2. Each party pays its own costs.
3. Forum fees are to be split evenly between the parties.

FORUM FEES

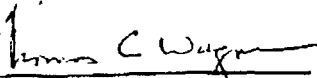
Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee are assessed.

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|--|-------------------|
| Non-refundable filing fee: | \$ 200.00 |
| Hearing Session (3 @ \$750 per session): | <u>\$2,250.00</u> |
| Total Fees: | \$2,450.00 |

1. The Claimant Schwartz paid \$950.00 and owes \$375.00 to the NASD.
2. Respondents have paid nothing and owe \$1,125.00 to the NASD.

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

Concurring Arbitrator's Signatures



Thomas C. Wagner, Esq.
Chairperson

Public

Mara K. Cole

Public

Sherry L. Bruce

Industry

Date of Decision: December 7, 1995

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