

**Award**  
NASD Regulation, **Inc.**

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**In the Matter of the Arbitration Between**

**Names of Claimants**

Charles W. Dunn  
Charles W. **Dunn** Revocable Trust  
Charles Dunn & Associates

Case No. 98-04494

**Names of Respondents**

LNA Capital Corp.  
Barington Capital Group, L.P.  
John Leonard Donahue  
James Anthony Mitarotonda  
Marc Seth Cooper  
John Michael Rizzo  
Edwin Kantor  
Jerome Snyder

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**REPRESENTATION OF PARTIES**

**For** Charles W. DUM ("Dunn"), Charles W. **Dunn** Revocable Trust ("DUM Revocable Trust"), and Charles **Dunn** & Associates ("Dunn & Associates"), hereinafter collectively referred to as "Claimants": Nicholas D. Thomas, Esq. **of** the Law Office **of** Nicholas **D.** Thomas, Raleigh, North Carolina.

**For** Respondents LNA Capital Corp. ("LNA"), Barington Capital Group, L.P. ("Barington"), James Anthony Mitarotonda ("Mitarotonda"), Marc Seth Cooper ("Cooper"), John Michael Rizzo ("**Rizzo**"), Edwin Kantor ("Kantor"), and Jerome Snyder ("Snyder"): **Stuart** A. Jackson, Esq. of the law firm **of** Re, Parser & Partners, New York, New York and Andrew L. Weinberg, Esq. **of** the law firm **of** Squadron, Ellenoff, Plesent & Sheinfeld LLP. New York, New York.

For Respondent John **Leonard** Donahue ("Donahue"): Robert L. Herskovits, Esq. of the Law Offices **of** Michael F. Bachner, New York, New York.

**CASE INFORMATION**

Statement **of** Claim filed by Claimants on **or** about: November **30**, 1998.

Claimant Dunn signed the Uniform Submission Agreement: November **17**, 1998 and March 19, 1999.

Claimant Dunn, as Trustee for the Dunn Revocable Trust, signed the Uniform Submission Agreement: December 21, 1998 and March 19, 1999.

Claimant **Dunn & Associates** did not file an executed Uniform Submission Agreement. Amended Statement of Claim filed by Claimants on or about: March 15, 1999.  
Respondent Cooper signed the Uniform Submission Agreement: May 11, 1999.  
Respondent Kantor signed the Uniform Submission Agreement: May 12, 1999.  
Respondent Snyder signed the Uniform Submission Agreement: May 12, 1999.  
Respondent LNA signed the Uniform Submission Agreement: May 13, 1999.  
Respondent Barington signed the Uniform Submission Agreement: May 13, 1999.  
Respondent Mitarotonda signed the Uniform Submission Agreement: May 13, 1999.  
Respondent Rizzo signed the Uniform Submission Agreement: May 13, 1999.  
Statement of Answer filed by Respondents LNA, Barington, Mitarotonda, Cooper, Rizzo, Kantor and Snyder on or about: May 14, 1999.  
Statement of Answer filed by Respondent Donahue on or about: June 2, 1999.  
Respondent Donahue did not file an executed Uniform Submission Agreement.

Claimants asserted the following causes of action: Violation of North Carolina General Statute 78A-8; violation of Florida Statute Section 517.301; common law fraud; breach of fiduciary duty; negligence; gross negligence; and violation of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The causes of action relate to damages arising from Respondent Donahue's solicitation to sell stocks and Claimants purchase of stocks in which Respondent Barington acted as underwriter and/or market maker. Claimants allege that Respondents LNA, Mitarotonda, Cooper, Rizzo, Kantor and Snyder are control persons of Respondent Barington.

Unless specifically admitted in its Answer, Respondents LNA, Barington, Mitarotonda, Cooper, **Rizzo**, Kantor and Snyder denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted the following defenses: Claimants failed to state claims upon which relief may be granted; Claimants were fully advised of and understood the high risk nature of the investments; Claimants knowingly assumed and accepted the risks in making their investments; Claimants' loss, if any, was caused in whole or in part by conditions and events outside the control of Respondents LNA, Barington, Mitarotonda, Cooper, Rizzo, Kantor and Snyder; Claimants failed to act promptly to mitigate damages; Claimants are estopped from recovery under the doctrines of waiver, estoppel and ratification; Respondents LNA, Barington, Mitarotonda, Cooper, **Rizzo**, Kantor and Snyder acted *in* good faith and maintained a reasonable system of supervision and control; and Respondents LNA, Barington, Mitarotonda, Cooper, **Rizzo**, Kantor and Snyder did not owe a fiduciary duty to Claimants.

Unless specifically admitted in its Answer, Respondent Donahue denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted the following defenses: Claimants own negligence, fault or lack of diligence caused the damages that Claimants complain of; Claimants acted in reckless disregard of facts which they knew or should have been aware and failed to exercise due care and diligence; Claimants knew or should have known all material facts concerning their investments and are thereby estopped

from recovery; Claimants authorized and directed the execution of all transactions in their securities accounts; Claimants authorized and ratified all transactions in their securities accounts; Claimants failed to act promptly to mitigate damages; Claimants are barred by the statute of limitations; and Respondent Donahue acted in good faith and exercised reasonable care in connection with Claimants' investments.

### **RELIEF REQUESTED**

Claimants requested compensatory damages in excess of \$500,000.00 and **less** than \$5,000,000.00, interest, attorney's fees, costs, punitive damages and all other relief deemed appropriate by the Panel.

Respondents LNA, Barington, Mitarotonda, Cooper, Rizzo, Kantor and Snyder requested dismissal of the claims, an award of all costs and attorney's fees incurred in defending the claims and such other relief as the Panel deemed just and proper.

Respondent Donahue requested dismissal of the claims and an assessment of all costs against the Claimants.

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

Respondent Donahue did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code. Respondent Donahue, having answered the claim and having appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

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.

### **AWARD**

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

1. Claimants' claims are denied in their entirety.
2. Claimants' request for punitive damages is denied.
3. **In** the event there is a notation on the NASD CRD with respect to Respondent Donahue, the Panel recommends the expungement of all references to the above captioned arbitration from Respondent Donahue's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Donahue must obtain confirmation from a court of competent jurisdiction before the CRD **will** execute the

expungement directive.

4. All other requests for relief not specifically addressed herein are denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:  
initial claim filing fee = \$ 250.00

#### Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm, Respondent Barington, is a party.

Member surcharge = \$2,500.00  
Pre-hearing process fee = \$ 600.00  
Hearing process fee = \$4,500.00

#### Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$300.00 = \$ 300.00  
Pre-hearing conference: December 8, 1999 1 session

One (1) Pre-hearing session with Panel x \$1,000.00 = \$1,000.00  
Re-hearing conference: January 6, 2000 1 session

Four (4) Hearing sessions x \$1,000.00 = \$4,000.00  
Hearing Dates: March 28, 2000 2 sessions  
March 29, 2000 2 sessions

Total Forum Fees = \$5,300.00

The Panel has assessed the total forum fees of \$5,300.00 jointly and severally to the Claimants.

**Fee Summary**

Claimants be and hereby **are** jointly and severally liable for:

|                                   |                            |
|-----------------------------------|----------------------------|
| Initial Filing Fee                | = \$ 250.00                |
| Forum Fees                        | = \$5,300.00               |
| Total Fees                        | = \$5,550.00               |
| <b><u>Less payments</u></b>       | <b><u>= \$1,250.00</u></b> |
| Balance Due NASD Regulation, Inc. | = \$4,300.00               |

Respondent Barington be and hereby is solely liable for:

|                                   |                            |
|-----------------------------------|----------------------------|
| Member Fees                       | = \$7,600.00               |
| Total Fees                        | = \$7,600.00               |
| <b><u>Less payments</u></b>       | <b><u>= \$7,600.00</u></b> |
| Balance Due NASD Regulation, Inc. | = \$0.00                   |

All balances are due and payable to NASD Regulation, Inc.

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s\_\_\_\_\_  
Leonard Landsman  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator

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

\_\_\_\_\_  
James W. A. Black  
Industry Arbitrator

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

May 9, 2000  
Date of Service (For NASD office use only)

**Fee Summary**

Claimants be and hereby are jointly and severally liable for:

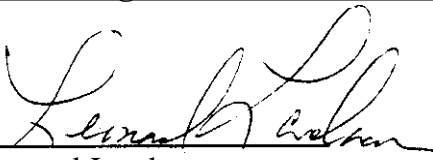
|                                   |                     |
|-----------------------------------|---------------------|
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| Balance Due NASD Regulation, Inc. | = \$0.00            |

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**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Leonard Landsman  
Public Arbitrator, Presiding **Chair**

5/4/00  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator

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

\_\_\_\_\_  
James W. A. Black  
Industry Arbitrator

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

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Leonard Landsman  
Public Arbitrator, Presiding Chair

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

  
\_\_\_\_\_  
Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator

05/03/00  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
James W. A. Black  
Industry Arbitrator

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

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Leonard Landsman  
Public Arbitrator, Presiding Chair

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Signature Date

\_\_\_\_\_  
Zeb E. Barnhardt, Jr., Esq.  
Public Arbitrator

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

  
James W. A. Black  
Industry Arbitrator

5/3/00  
Signature Date