

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Erwin A. Weiss

vs.

Case no.
92-02893

Name of Respondents

Gary Goldberg & Co., Inc
Gary Goldberg

REPRESENTATION

For Claimant, Erwin A. Weiss ("Claimant"), Joseph F. Keenan, Esq., from the law firm of Bochat & Keenan, Inc., P.C.

For Respondents, Gary Goldberg & Company, Inc. ("GGCI") and Gary Goldberg (Goldberg) (collectively "Respondents"), Stephen G. Rinehart Esq. from the law firm of Parker, Chapin, Flattau and Klimpl.

CASE INFORMATION

Statement of Claim was filed on August 26, 1992.

Claimant's Submission Agreement was signed on July 30, 1992

Joint Statement of Answer was filed by Respondents on December 14, 1992.

GGCI's Submission Agreement was signed on September 21, 1992.

Goldberg's Submission Agreement was signed on September 21, 1992.

HEARING INFORMATION

Hearing Dates/Sessions: April 29, 1993 - 2 sessions
 June 16, 1993 - 2 sessions
 July 19, 1993 - 2 sessions
 September 20, 1993 - 2 sessions
 September 21, 1993 - 2 sessions
 September 27, 1993 - 2 sessions

Hearing Location: New York, New York.

CASE SUMMARY

Claimant alleges that he is a 59 year old orthodontist with three children, who in 1985 opened a securities account with GGCI. Claimant alleges that the account was opened and maintained as a pension account and he explained to Respondents that the funds were to be conservatively invested. Claimant also alleges that Respondents ignored his investment objectives and placed a series of unsuitable investment vehicles into his retirement account: \$50,000 in Landsing Pacific Fund (Real Estate Investment Trust); \$93,000 in Balcor Equity Pension Investors III (Real Estate Limited Partnerships); \$25,000 in Phoenix Leasing Cash Distribution Fund (Limited Partnership); \$25,000 in Wildwood Dale Mabry Limited (Limited Partnership); \$34,927 in VMS Mortgage Investment Fund; and \$41,000 in Montebello Park Investors. Claimant contends that these investments were speculative and illiquid and represented approximately eighty percent (80%) of his portfolio. Claimant also alleges that Respondents misrepresented the risks involved in these investments.

Claimant contends that Goldberg has disregarded his clients' investment objectives as evidenced by his checkered career as a broker in which he has settled several claims involving limited partnerships and was censured by the NASD and assessed \$2,000 fine in connection with the Montebello Park Investors Fund.

Claimant asserts six causes of action including violation of the Securities Act of 1933 and the Securities Act of 1934, as amended, and Rule 10-b5 (5) of the rules and regulations promulgated thereunder, violation of the Rules of the New York Stock Exchange, common law fraud, breach of fiduciary duty and breach of contract which resulted in damages in excess of \$200,000.

Respondents deny liability and deny the allegations of wrongdoing. Respondents state that GGCI's correct name is Goldberg & Co.

Respondents maintain that they did not have discretion over Claimant's account and that Claimant at his own discretion with all relevant facts including the risk factors made the investments for the account. Respondents state that Claimant deliberately omitted material facts concerning the following liquid securities in the account: \$85,000 in American Capital Government Securities (Mutual Fund); \$50,000 in Lord Abott Bond Debinture Fund (Mutual Fund); (\$49,000 in MFS Intermediate Income Trust (closed-end bond fund); \$61,008 in Zero Coupon Bond; and, \$95,000 in Oppenheimer Multi-Sector Income Trust. Respondents contend that Claimant failed to disclose that Montbello and Balcor were profitable and grossly overstated his investment in Balcor as being \$93,000 when it was \$43,000.

Respondents interpose eight affirmative defenses, including the fact that the Statement of Claim failed to state any claim upon which relief may be granted, the claims are time barred by applicable statute of limitations and that the securities recommended to Claimant were suitable based upon the financial situation and needs disclosed by Claimant. Specifically, Respondents contend that the claims are ineligible for arbitration pursuant to the six year period as stated in Section 15 of the Code of Arbitration Procedure and pursuant to the settlement terms of In Re VMS Securities Litigation, consolidated case No. 89C 9448, United States District CT, Northern District of Illinois.

RELIEF REQUESTED

Claimant requests an award of:

1. Recession of all unsuitable and illiquid limited partnerships in his account.
2. Recovery of out-of-pocket or trading losses from the time Goldberg began to handle his account;
3. Recovery of the loss of value of the account in accordance with Mitey v. Oppenheimer & Company, 637 F. 2d 2818 (5th Circuit 1981);
4. Positive damages, reasonable attorneys fees, interest and costs of this proceeding.

Respondents request that the panel render an award dismissing the claim, awarding Respondents the costs of this proceeding and any such other and further relief as the panel may deem just and appropriate.

OTHER ISSUES CONSIDERED & DECIDED

Claimant in his Arbitration Brief argues that Respondents violated their fiduciary duty under the Employee Retirement Income Securities Act of 1974 by failing to diversify Claimant's account. Claimant further argues that Goldberg violated his fiduciary duty as an investment advisor and certified financial planner under the Investment Advisors Act by failing to disclose to Claimant conflict or potential conflict of interest as well as material facts concerning compensation and Goldberg's own interest in these private placements as well as his extensive disciplinary history. Claimant also argues that Respondents fraudulently concealed information concerning the limited partnership and should not be able to invoke the statute of limitations. Claimant also argues that the six-year period does not begin from the date of purchase, but from the "occurrence or event giving rise to the act or dispute, claim or controversy."

Respondents submitted a Memorandum of Law and argued that four of the alleged unsuitable investments were made more than six years prior to the commencement of this proceeding, August 26, 1992: Phoenix Leasing, Landsing, Wildwood and Balcor. Respondents contend that the claims relating to these securities are ineligible for arbitration pursuant to Section 15 of the NASD Code. Respondents state that Claimant's unsupported allegations of "fraud" cannot be used to avoid the expiration of the six-year claim period. Respondents further argue that their conduct is not covered by the Investment Advisers Act of 1940.

The panel's decision on this motion is contained in the award in this matter.

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) Respondents' motion to dismiss is denied.
- 2) Respondents are jointly and severally liable to Claimant and shall pay Claimant **ONE HUNDRED AND THIRTY THREE THOUSAND FOUR HUNDRED AND NINETY SEVEN DOLLAR** and zero cents (\$133,497.00) which includes interest:
- 3) Claimant shall return to GGCI the following securities: Landsing Pacific Fund, Balcor Equity Pension II, Montebello Park Investors and V.M.S. Banyon Mortgage;
- 4) The claim for damages as to Wildwood Dale Mabry and Oppenheimer Multi-

Sector Income Trust is denied.

5) The claim for punitive damages is denied.

6) The claim for attorney's fees is denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and shall be borne equally by the parties.

Non-refundable Filing Fee: \$200.00

Hearing Session Fees: \$750.00 x 10 sessions = \$7,500.00

1) Claimant is assessed \$3,850 in forum fees. Claimant deposited \$950.00 and owes a balance of \$2,900.00.

2) Respondents are jointly and severally assessed \$3,850.00.

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

ARBITRATION PANEL

James M. Bauman, Esq.	-	Public Chairperson
Henry H. Barter	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature

Henry H. Balter

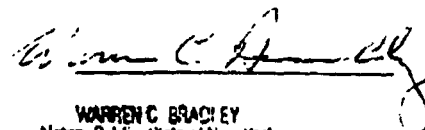
Henry H. Balter
Public Panelist

Date of Decision: October 13, 1993

**STATE OF NEW YORK
COUNTY OF**

S.S.:

On this 7th day of October 1993, before me personally appeared *Henry Balter* who executed the foregoing instrument and duly acknowledged to me that he executed the same.


WARREN C. BRACHLEY
Notary Public, State of New York
No. 60-4972467
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires October 2, 1994

Sector Income Trust is denied.

5) The claim for punitive damages is denied.

6) The claim for attorney's fees is denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and shall be borne equally by the parties.

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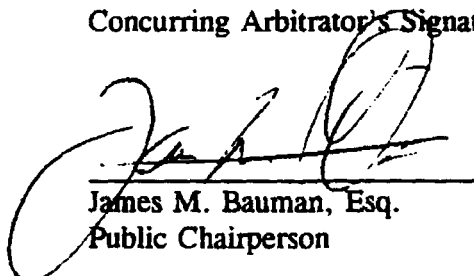
2) Respondents are jointly and severally assessed \$3,850.00.

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

ARBITRATION PANEL

James M. Bauman, Esq.	-	Public Chairperson
Henry H. Barter	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature



James M. Bauman, Esq.
Public Chairperson

Date of Decision: October 13, 1993

90-2873

STATE OF NEW YORK
COUNTY OF *BRONX*

S.S.:

On this *5th* day of October 1993, before me personally appeared *James M. Bauman, Esq.* who executed the foregoing instrument and duly acknowledged to me that he executed the same.

Mark Ehrlich

MARK EHRLICH
NOTARY PUBLIC, State of New York
No. 41-4909340
Qualified in *Westchester* County, *1993*
Commission Expires Oct. 28,

Sector Income Trust is denied.

5) The claim for punitive damages is denied.

6) The claim for attorney's fees is denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed and shall be borne equally by the parties.

Non-refundable Filing Fee: \$200.00

Hearing Session Fees: \$750.00 x 10 sessions = \$7,500.00

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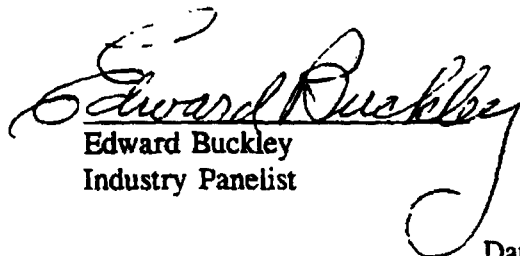
2) Respondents are jointly and severally assessed \$3,850.00.

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

ARBITRATION PANEL

James M. Bauman, Esq.	-	Public Chairperson
Henry H. Barter	-	Public Panelist
Edward Buckley	-	Industry Panelist

Concurring Arbitrator's Signature

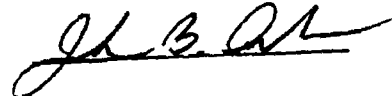

Edward Buckley
Industry Panelist

Date of Decision: October 13, 1993

**STATE OF NEW YORK
COUNTY OF *NASSAU***

S.S.:

On this *4th* day of October 1993, before me personally appeared Edward Buckley who executed the foregoing instrument and duly acknowledged to me that he executed the same.



**JOHN B. AMBRUSO
Notary Public, State of New York
No. 01AM5055205
Qualified in Suffolk County
Term Expires *4-30-94***