

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

99 Commercial Street Inc.
Martin Kennedy
Clark McLain

93-00970

Name of Respondents

Gary M. Goldberg
Gary Goldberg & Co., Inc.

REPRESENTATION

For Claimants 99 Commercial Street, Inc., Martin Kennedy, and Clark McLain (hereinafter collectively referred to as "Claimants") appeared Joseph F. Keenan, Esq. of the law firm of Bochat & Keenan, P.C., Garden City, NY.

For Respondents Gary M. Goldberg and Gary Goldberg & Co., Inc. (hereinafter collectively referred to as "Respondents") appeared Stephen G. Rinehart, Esq. of the law firm of Parker, Chapin, Flattau & Klimpl, New York City, NY.

CASE INFORMATION

The Statement of Claim was filed on March 15, 1993. Claimant 99 Commercial Street, Inc.'s Submission Agreement was executed on March 9, 1993. Martin Kennedy and Clark McLain executed a Submission Agreement on March 9, 1993.

The Joint Statement of Answer of Respondent's was filed on June 15, 1993. Each Respondent executed a Submission Agreement on April 30, 1993.

HEARING INFORMATION

A telephonic pre-hearing conference was held on June 7, 1994 with the Chairman to resolve outstanding discovery issues. Thereafter, the hearings were conducted at the NASD offices located in New York City, New York on November 14, 1994; November 15, 1994; and November 16, 1994. Each hearing dated last two sessions for a total of six hearing sessions.

CASE SUMMARY

Claimants 99 Commercial Street, Inc., Martin Kennedy, and Clark McLain alleged that Claimants made Respondents aware that Claimants were novice investors who were interested in a safe, conservative and liquid short-term investments because they were going to be using all of claimants assets as collateral to mortgage 99 Commercial Street, Inc.'s property to raise funds for a real-estate acquisition. Claimants further alleged that Respondents represented that they understood Claimants' objectives and that the recommended investments would provide complete safety of principal and a reasonable rate of return. Claimants further alleged that Respondents misled Claimants by misrepresentations and omissions and if Claimants were aware of the true facts they would not have purchased the recommended securities. Claimants alleged that all of Respondents' activities in MFS and VMS were in furtherance of Respondents' RICO enterprises and continuing scheme to defraud Claimants. Further, Claimants alleged that Respondents used the mail to facilitate and execute the fraud.

Claimants alleged that Respondents fraudulently misrepresented that MFS funds were highly liquid and the principal would be unharmed causing Claimants to invest the majority of the mortgage proceeds into two MFS funds (MGF and MIN). Claimants specifically alleged that Respondents failed to disclose that the principal was always at risk of capital depreciation because MGF and MIN market prices fluctuated, MGF and MIN were intended to be long-term investments, and that MGF and MIN were a "non-diversified" investment fund which is susceptible to any single economic, political or regulatory occurrence. Further, Claimants alleged self-dealing by Respondents because MGF and MIN securities were sold to Claimants from Respondents' or their agents' accounts in order to generate commissions and minimize any losses Respondents would suffer from holding the high risk VMS and MFS in their own portfolios. Claimants alleged that on two occasions they bought each MGF and MIN shares at 1/8 higher than the high price for the day, and on one occasion sold each MGF and MIN share at 1/8 lower than the low price for the day in violation of the NASD Rules of Fair Practice. Claimants further alleged that Respondent Gary Goldberg failed to disclose to Claimants material facts disclosed in the MIN prospectus or any other financial information concerning the MIN securities.

Moreover, Claimants alleged that their return of MIN securities was less than 1 % return on their initial investment which was significantly lower than the 10-11 % return Respondents had promised Claimants. Further, Claimants alleged that MSF funds were unsuitable because Claimants would have received more if they had invested in United States Treasury Bills, a savings account, or a money market account.

Claimants further alleged that Respondents made fraudulent statements and

material misrepresentations in relation to VMS's ownership interest in underlying properties and liquidity. Further, Claimants alleged that Respondents failed to disclose material facts about VMS that appeared in published reports at least 60 days before Respondents made the first investment on behalf of claimants, and that on February 1, 1990, the date of the first investment, the Wall Street Journal reported VMS was on the verge of collapse. In addition, Claimants alleged that on February 1, 1990, Respondents continually assured Claimants that their principal was safe despite the VMS price decline. Further, Claimants alleged that Respondents represented that the price of VMS would rise thereby inducing Claimants to invest \$20,000.00 in VMS to allow Claimants to "average down", a concept Respondents never explained to Claimants. Claimants alleged that on February 15, 1990 they once again inquired about VMS' decline to which Respondents responded that VMS would rise. Claimants also alleged that throughout the month of March, 1990 Respondents purchased additional shares of VMS securities and Respondents made a final purchase in August of 1990.

Respondents maintained that Claimants are experienced businessmen who at all times controlled their own accounts and were aware of the risks involved. Further, Respondents maintained that the investments were fully liquid and traded on the NYSE. Respondents also maintained that Claimants advised Respondents that they wanted to generate significant income and that they were prepared to tolerate risk. Additionally, Respondents maintained that Claimants were aware that the Respondents were acting as principals and because these were principal trades, a markup of 1/8 was charged and was disclosed on the confirmations. Respondents maintained that the 1/8 markup was less than 2% of the principal which is within the NASD guidelines permitting markups as high as 5%.

Respondents maintained that they did not make any misrepresentations with respect to the securities; that Claimants were fully aware of VMS' troubled position and dividends; and that Respondents maintained that Claimants made their own decisions based on a fully informed basis.

Respondents set forth several affirmative defenses. Among these defenses Respondents maintained that Claimants failed to state a claim upon which relief may be granted; that the claims are barred by the applicable Statute of Limitations; that reasonable grounds exist for Respondents believing that the recommendations were suitable for Claimant; that the arbitrators are barred by law from awarding punitive damages; that Claimants failed to mitigate their damages; and that the damages, if any, resulted from Claimants own negligence or assumption of the risk, and acts or omissions of the issuers of the securities.

RELIEF REQUESTED

Claimants requested a judgment against the Respondents jointly and severally for alleged damages in the amount of \$210,000.00; treble damages in such amount as may be established and determined by a trier of the facts; damages in such

amount as may be established and determined by a trier of fact: punitive damages; and pre-judgment and post-judgment interest on all damages awarded; attorneys fees and expert witness fees; costs and disbursements; and such other and further relief as the court deems just and proper.

Respondents requested that the arbitration panel render an award dismissing the claims; awarding Respondents the cost of this proceedings; and awarding such other and further relief as the panel may deem just and appropriate.

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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All claims against Respondents Gary Goldberg & Co., Inc. and Gary Goldberg be and hereby are dismissed;
2. All claims for treble damages be and hereby are dismissed;
3. All claims for punitive damages be and hereby are dismissed;
4. All claims for attorneys fees be and hereby are dismissed;
5. All claims for expert witness fees, costs and disbursements be and hereby are dismissed; and
6. All other claims be and hereby are dismissed.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

1 pre-hearing session X \$300.00	= \$ 300.00
6 sessions X \$750	= \$4,500.00
TOTAL	= \$4,800.00

Forum fees Assessed Against:

1. Claimants be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees minus the \$600.00 hearing session deposit previously deposited by Claimants with the NASD. Therefore the amount due and owing is \$1,800.00.
2. Respondents be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees.

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

Concurring Arbitrators' Signatures

George R. Freund
Public Arbitrator - Chairperson

William Binckes

William Binckes
Public Arbitrator

Karen Cullen
Industry Arbitrator

STATE OF
COUNTY OF

On the 20 day of DECEMBER, 1994, before me personally appeared WILLIAM BINCKES to me known to me to be the person who executed the foregoing instrument, and s/he acknowledged to me that s/he execute the same.

Maureen S. Frankel

Notary Public

Date of Decision: December 30, 1994

Forum fees Assessed Against:

1. Claimants be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees minus the \$600.00 hearing session deposit previously deposited by Claimants with the NASD. Therefore the amount due and owing is \$1,800.00.
2. Respondents be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees.

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

Concurring Arbitrators' Signatures

George R. Freund
Public Arbitrator - Chairperson

William Binckes
Public Arbitrator

Karen Cullen
Industry Arbitrator

STATE OF NY
COUNTY OF NY

On the 20 day of December, 1994, before me personally appeared _____ to me known to me to be the person who executed the foregoing instrument, and s/he acknowledged to me that s/he execute the same.

Notary Public

Date of Decision: 12/20/94
XXXXXXXXXXXXXXXXXXXX

ADALE COHEN
Notary Public, State of New York
No. 24-4813887
Qualified in Kings County
Certificate Filed in New York County
Commission Expires December 31, 1995

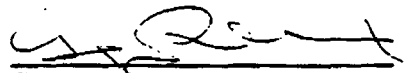
Date of Decision: December 20, 1994.

Forum fees Assessed Against:

1. Claimants be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees minus the \$600.00 hearing session deposit previously deposited by Claimants with the NASD. Therefore the amount due and owing is \$1,800.00.
2. Respondents be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$2,400.00 representing one-half of all outstanding forum fees.

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

Concurring Arbitrators' Signatures


George R. Freund
Public Arbitrator - Chairperson

William Binckes
Public Arbitrator

Karen Cullen
Industry Arbitrator

STATE OF
COUNTY OF

On the 29TH day of December, 1994, before me personally appeared George R. Freund to me known to me to be the person who executed the foregoing instrument, and s/he acknowledged to me that s/he execute the same.

DIANA M. DE LAUNTE
NOTARY PUBLIC
My Commission Expires 12/31/94

Notary Public Diana M. De Launte

Date of Decision: December 30, 1994