

**N.A.S.D. AWARD**

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

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In the Matter of the Arbitration Between

**Names of Claimants**

Robert M. Brittingham  
and John G. Brittingham

93-01956

**Names of Respondents**

Goldman, Sachs and Company  
and Steven Adams

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**REPRESENTATION**

Claimant, Robert M. Brittingham was represented by J. Dennis Weitzel, Esq. of and Timothy A. Duffy, Esq. of Burleson, Pate & Gibson, Dallas, Texas and Morgan W. Bentley, Esq. of Newark, New Jersey.

Claimant, John G. Brittingham was represented by Michael G. O'Neill, Esq. and Patricia A. O'Meara, Esq. of O'Neill & Dyer, Dallas, Texas.

Respondents, Goldman, Sachs and Company and Steven Adams were represented by Samuel W. Seymour, Esq., John Hardiman, Esq. and Michael E. Swartz, Esq. of Sullivan & Cromwell, New York, New York and Bruce W. Collins, Esq. of Carrington, Coleman, Sloman & Blumenthal, Dallas, Texas.

**CASE INFORMATION**

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on May 11, 1993.

Claimants, John G. Brittingham's and Robert M. Brittingham's Submission Agreement were signed on May 11, 1993.

A Joint Statement of Answer was filed with the NASD by Respondents, Goldman, Sachs

and Company and Steven Adams on August 10, 1993.

Respondent, Goldman, Sachs and Company's Submission Agreement was signed on August 10, 1993 by Sheldon I. Goldfarb, Esq., Deputy General Counsel.

Respondent, Steven Adams' Submission Agreement was signed on August 10, 1993.

An Amended Statement of Answer was filed with the NASD by Respondents, Goldman, Sachs and Company and Steven Adams on March 15, 1994.

A Supplemental Statement of Claim was filed with the NASD on April 26, 1995.

### **HEARING INFORMATION**

Pre-hearing conferences were held in this matter as follows:

January 20, 1994 for One (1) session;  
January 24, 1994 for One (1) session;  
October 31, 1994 for One (1) session;  
May 5, 1995 for One (1) session;  
May 26, 1995 for One (1) session; and,  
May 30, 1995 for One (1) session.

The hearing Dates and number of sessions for each date were as follows:

January 25, 1995 for Two (2) sessions;  
June 5, 1995 for Three (3) sessions;  
June 6, 1995 for Three (3) sessions;  
June 7, 1995 for Three (3) sessions;  
June 8, 1995 for Three (3) sessions;  
June 9, 1995 for Three (3) sessions;  
June 10, 1995 for Three (3) sessions;  
June 12, 1995 for Three (3) sessions;  
June 13, 1995 for Three (3) sessions;  
June 14, 1995 for Three (3) sessions;  
June 15, 1995 for Two (2) sessions;  
June 16, 1995 for Two (2) sessions.

The hearing location was Dallas, Texas.

### CASE SUMMARY

Claimants, John G. Brittingham and Robert M. Brittingham collectively referred to as "(the Brittinghams)", alleged that Respondents, Goldman, Sachs and Company ("Goldman, Sachs") and Steven Adams ("Adams") made misrepresentations and induced the Brittinghams to purchase Variable Term Preferred Depository Shares of Ratners Group ("Ratners") which were unsuitable given the Brittinghams' investment objectives. The Claimants specifically alleged that:

1. In 1990, Goldman, Sachs and Adams stated to Greg Moseman, an accountant and financial officer for the Brittinghams, that if the Brittinghams' opened an account at Goldman, the Brittinghams would benefit from the current analysis of the experts on Goldman, Sachs' staff. This induced the Brittinghams to open their accounts with Goldman, Sachs and Adams;

2. Upon opening their accounts, the Brittinghams instructed Adams to follow a conservative investment strategy with a prerequisite of short term liquidity. Ratners was a risky and illiquid investment;

3. Adams and Goldman, Sachs recommended the purchase of American Depository Shares, stating that the shares were a sound, safe, and conservative investment. Further, Adams and Goldman, Sachs specifically recommended Ratners, stating that Ratners was of equal quality and character to the others; but that special attention to Ratners would be appreciated because Ratners was initially underwritten by Goldman, Sachs, and Goldman, Sachs was compensated in the reoccurring auctions of the shares;

4. Prior to Adams and Goldman, Sachs' recommendation of the initial purchase, the experts at Goldman, Sachs had circulated information regarding the growing instability of Ratners. Goldman, Sachs and Adams were grossly negligent in their failure to inform the Brittinghams of this information;

5. Although the Goldman, Sachs analysts published reports recommending that shares of Ratners not be purchased and that holders should consider selling their position, Goldman, Sachs and Adams did not disclose this information to the Brittinghams. In addition, on October 8, 1991, when the auction failed and Goldman, Sachs could not find purchasers to buy the Ratners shares that owners wanted to sell, Goldman continually encouraged the Brittinghams to purchase more of the shares; and

6. As a result of Adams and Goldman, Sachs' wilful and malicious conduct the Brittinghams incurred a loss in the amount of \$19,450,000.00.

Based upon the above allegations, the Brittinghams' asserted the following claims: negligence and gross negligence; violation of the NASD Rules of Fair Practice; violation of the New York Stock Exchange Rules; wilful and malicious conduct; breach of fiduciary duties;

breach of warranty; violation of consumer-protection laws; common-law fraud; and breach of contract.

Respondents, Goldman, Sachs and Adams denied the material allegations contained in the Statement of Claim and asserted the following:

1. The Brittinghams and Greg Moseman were sophisticated and knowledgeable investors. The Brittinghams had experience in the purchase of auctioned preferred stocks prior to their opening of their accounts with Adams and Goldman. Further, the Brittinghams and Greg Moseman advised Adams and Goldman that they intended to increase their existing investments in auction preferred stocks;

2. The Brittinghams and Greg Moseman had received and reviewed copies of the prospectuses for various auctioned preferred stocks, including Ratners. In addition, Greg Moseman had received Goldman, Sachs' research reports concerning Ratners. Therefore, the Brittinghams knew of and assumed the risks involved;

3. Throughout the time period in which the Brittinghams invested in Ratners, the Goldman, Sachs' research analysts recommended investment in Ratners. Moreover, these recommendations of Ratners were consistent with the Brittinghams' investment objectives; and

4. At the Brittingham's direction, all decisions concerning the Brittinghams' accounts were made by or through Greg Moseman. Greg Moseman alone ordered all purchases and sales in the Brittinghams' account. Goldman, Sachs had no discretion over the accounts.

In addition, Respondents asserted several affirmative defenses, including the following:

1. Any losses sustained in the account is attributable to the Brittinghams' own conduct and economic conditions;

2. The claims based on an oral contract are barred by the Statute of Frauds;

3. The claims are barred, in whole or in part, by the principles of waiver, ratification and estoppel;

4. Claimants failed to mitigate damages;

5. Claimants failed to state a cause of action upon which relief can be granted;

6. Respondents complied with the rules of the National Association of Securities Dealers, Inc. and the New York Stock Exchange; and

7. The claims, are barred, in whole or in part, by the doctrines of contributory and

comparative negligence.

### **RELIEF REQUESTED**

The Brittinghams requested entry of an award against Goldman, Sachs and Adams for \$19,450,000.00 representing actual damages; \$30,000,000.00 representing punitive damages; plus interest; costs; and other monetary relief the Panel deems fair and equitable.

Goldman, Sachs and Adams requested that the Statement of Claim be denied in its entirety, and an award for the incurred costs and attorneys' fees be assessed against the Brittinghams.

### **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. The Arbitration Panel specifically finds that Respondent, Goldman, Sachs and Company is liable to Claimant, Robert M. Brittingham in connection with the so-called "wash or cross" trade that occurred in the account of Robert M. Brittingham on October 22, 1991, for having failed to obtain the consent of the customer to make this trade once the original order that was submitted by the customer to purchase \$1,000,000 of Ratners at the auction on that date failed.
2. Accordingly, Respondent, Goldman, Sachs and Company is liable for and shall pay to the Claimant, Robert M. Brittingham, the sum of \$560,000.00 as actual damages;
3. Respondent, Goldman, Sachs and Company is liable for and shall pay to the Claimant, Robert M. Brittingham the sum of \$89,712.00 as interest;
4. Respondent, Goldman, Sachs and Company is liable for and shall pay to the Claimant, Robert M. Brittingham the sum of \$498,348.45 as attorneys' fees; and
5. Claimant, Robert M. Brittingham's claim for punitive damages is denied and

dismissed in its entirety;

6. Claimant, Robert M. Brittingham's claims asserted against Respondent, Steven Adams are denied and dismissed in their entirety;

7. Claimant, John G. Brittingham's claims asserted against Respondents, Goldman, Sachs and Company and Steven Adams are denied and dismissed in their entirety;

8. Any other claim for relief not specifically enumerated herein is denied and dismissed in its entirety; and,

9. Other than the award of attorney's fees set forth above and forum fees which are set forth below, the parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter.

#### **FORUM FEES**

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

Six (6) pre-hearing conferences at the rate of \$300.00 per hearing session for a total of \$1,800.00 and Thirty-three (33) hearing sessions at the rate of \$1500.00 per hearing session for a total of \$49,500. The total Forum Fees assessed in this matter are \$51,300.00

The NASD shall retain the \$300.00 non-refundable claim filing fee and the \$1,500.00 hearing session deposit previously paid to the NASD by Claimants and the NASD shall also retain the \$500.00 member surcharge assessed to Goldman, Sachs and Company.

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Goldman, Sachs and Company is assessed and shall pay to the NASD Forum Fees in the amount of \$25,650.00. Claimant, John G. Brittingham is assessed and shall pay to the NASD, Forum Fees in the amount of \$24,150.00.

Concurring Arbitrators' Signatures

/s/ Marc A. Myrin  
Marc A. Myrin, Esq.  
Presiding Chairperson  
Public Arbitrator

August 4, 1995  
Dated

/s/ Harold L. Sutherland  
Harold L. Sutherland  
Panelist  
Public Arbitrator

August 4, 1995  
Dated

/s/ Lee R. Brooks  
Lee R. Brooks  
Panelist  
Industry Arbitrator

August 4, 1995  
Dated

For NASD Use Only  
Date Award Served on the Parties: August 4, 1995