

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

B. W. Fowler

93-04600

Name of Respondents

A.S. Goldmen & Co., Inc.;
John Catalano

REPRESENTATION

For Claimant: B.W. Fowler ("Fowler") was represented by J. Keith Friley, Esq. of Baton Rouge, Louisiana

For Respondent: A.S. Goldmen & Co., Inc. ("Goldmen") and John Catalano ("Catalano") were represented by Carole R. Bernstein, Esq. of Bachner, Tally, Polevoy & Misher, located in New York, New York.

CASE INFORMATION

Statement of Claim filed: September 28, 1993

Amended Statement of Claim filed: March 1, 1994

Claimant's Submission Agreement signed on: September 28, 1993.

Statement of Answer filed by Respondents on: January 10, 1994.

Respondent Goldmen's Submission Agreement signed on: January 10, 1994 by Stuart Winkler, Vice President, A.S. Goldmen & Co., Inc.

Respondent Catalano's Submission Agreement signed on: February 23, 1994.

HEARING INFORMATION

Pre-Hearing Conference: July 19, 1994 for One (1) session by telephone before Arbitrator Roy V. Ladner, Esq.;
May 22, 1995 for One (1) session by telephone before Arbitrator Edward J. Gay III, Esq.

Hearing Dates/Sessions: August 1, 1995 for Two (2) sessions;
August 2, 1995 for Two (2) sessions.

Hearing Location: New Orleans, Louisiana.

CASE SUMMARY

Claimant Fowler sought damages allegedly arising out of a series of investments commencing in September of 1990 which are alleged to have been based upon recommendations of the Respondents, which were unsuitable in light of the sophistication, means, objectives and needs of the Claimant.

Respondents Goldmen and Catalano denied that the recommendations made to the Claimant were unsuitable and affirmatively avered that the Claimant had waived his purported claims; that the Claimant failed to mitigate his damages; that the claims were barred by the applicable statute of limitations; and that respondents acted in conformity with all applicable rules and regulations and fulfilled their duties and responsibilities properly and in good faith.

RELIEF REQUESTED

Claimant Fowler seeks the recovery of \$71,652.34, together with interest, costs and attorneys fees.

Respondents Goldmen and Catalano requested that all claims be denied and that an award be entered in favor of respondents for costs and attorneys fees.

OTHER ISSUES CONSIDERED & DECIDED

Upon review of all the evidence, testimony and pleadings, the Panel makes the following findings of fact:

1. In June of 1990 Respondent John Catalano was employed by Respondent A.S. Goldmen & Co. in New York. Among other things, he was employed to solicit prospective investors across the country by telephone. Mr. Catalano was expected

to develop and record appropriate information about the investor's sophistication, objectives, needs and means in order to formulate suitable investment recommendations;

2. In June of 1990 Respondent Catalano identified Claimant, B.W. Fowler, a Mississippi resident from a "lead card" and contacted him by telephone. Claimant, a retired railroad machinist, was clearly an unsophisticated investor who had virtually no experience trading in highly speculative securities and had very limited ability to formulate investment strategies and comprehend the risks of speculative investments. Mr. Catalano's investigation and documentation of the sophistication, objectives, means and needs of the Claimant was superficial and inadequate and not reasonably calculated to ensure the suitability of investment vehicles recommended to the claimant;

3. Following his initial telephone conversation with Respondent Catalano, on June 22, 1990, Claimant liquidated certain investments and wired the sum of \$85,590.93 to A.S. Goldmen in order to establish an account and to acquire shares of Nestle SA ADR based upon the recommendation of Respondent Catalano;

4. Respondent Catalano sought to establish, and promptly following his initial contact with the Claimant did establish, a relationship of trust and confidence with the Claimant as a result of which Mr. Catalano effectively controlled the assets in the account;

5. On July 2, 1990 2700 shares of Nestle SA ADR were purchase for a total of \$85,273.00. The panel concludes that the recommended investment in Nestle SA ADR was not unsuitable in light of the evidence developed at the hearing;

6. On August 21, 1990, pursuant to the recommendation Respondent Catalano, 5000 shares of Direct Connect International were purchased in Claimant' account for \$11,250.00. Funds for the transaction were provided through the sale of 400 shares of Nestle (at a loss of over \$3.25 per share), which was also recommended by Mr. Catalano. The panel concludes that Mr. Catalano had no reasonable grounds for the belief that recommendation of this highly speculative investment was suitable for the Claimant and that the security was, in fact, not suitable. The panel further concludes that the sale of Nestle was inappropriate for Claimant and that in recommending and executing the transactions of August 21, 1990 respondents breached their obligations to Claimant;

7. On October 18, 1990, pursuant to the recommendation of Respondent Catalano, 18,500 additional shares of Direct Connect International for \$37,000 were

purchased in Claimant's account. The transaction was funded with the sale of 1200 shares of Nestle (at a loss of over \$3.75 per share). The panel further concludes that the sale of Nestle was inappropriate for Claimant and that in recommending and executing the transactions of October 18, 1990 respondents breached their obligations to Claimant;

8. On January 2, 1991, pursuant to the recommendation of Respondent Catalano, 500 units of Pamet Systems, Inc. were purchases in the Claimant's account for \$4,000 and funded with available account cash and an additional investment of \$1,000 by Claimant. The panel concludes that Mr. Catalano had no reasonable grounds for the belief that recommendations of this highly speculative investment was suitable for the Claimant and that the security was, in fact, not suitable; and

9. By June 30, 1991, the value of the claimant's account, into which he had invested \$86,590.83, had declined to \$43,500 and had exhibited a high degree of volatility. The panel concludes that by September 30, 1991 the Claimant should reasonably have recognized the highly speculative nature of the investments in question and taken measures to mitigate his damages by liquidating his positions in Direct Connect and Pamet and ceasing reliance upon the recommendation of the respondents. The Panel concludes that the Claimant has failed to mitigate his damages and continued in his relationship with A.S. Goldmen long after it was reasonably prudent for him to have done so and, as a result, lost substantially all of his investment.

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. Respondents A.S. Goldmen & Co., Inc. and John Catalano are jointly and severally liable for and shall pay to the Claimant, B.W. Fowler, actual damages in the amount of \$27,028.33 together with interest at the rate of 8.75 % from the date of this award until paid;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and

3. Any relief not specifically awarded is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) prehearing conferences before One (1) arbitrator x \$300.00 per session = \$600.00; Four (4) hearing sessions x \$500.00 per session = \$2,000.00; Total Forum Fees = \$2,600.00.

The National Association of Securities Dealers, Inc. shall retain the non-refundable claim filing of \$150.00 and refund the \$500.00 hearing session deposit previously deposited by the Claimant, B.W. Fowler. In addition, the NASD shall refund the \$450.00 overpayment previously deposited by the Claimant, B.W. Fowler. Respondents A.S. Goldmen & Co., Inc. and John Catalano are jointly and severally liable for and shall pay to the NASD the sum of \$2,600.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

Edward J. Gay, III /s/
Edward J. Gay, III, Esq.
Public Arbitrator
Chairperson

August 30, 1995

Clayton J. Borne, III /s/
Clayton J. Borne, III, Esq.
Public Arbitrator

August 29, 1995

Charles E. Melancon, Jr. /s/
Charles E. Melancon, Jr.
Industry Arbitrator

August 30, 1995