

**NATIONAL ASSOCIATION OF SECURITIES DEALERS**

Name of Claimants

94-00152

**Name of Respondents**

## REPRESENTATION

**For Respondents: Eugene B. Harper, Esq. of Invest Financial Corp., Tampa, Florida.**

### CASE INFORMATION

Respondent Richard Burgio's Submission Agreement signed on: **February 22, 1994.**

## HEARING INFORMATION

**Hearing Dates/Sessions:**    October 26, 1994 / One Session.  
October 27, 1994 / Two Sessions.

Hearing Location: National Association of Securities Dealers offices located in New York City. New York.

### CASE SUMMARY

Claimants alleged that in or about January 1989 Lorna Selkove ("Ms. Selkove"), Claimant Joseph Selkove's ("Mr. Selkove") daughter, met with Respondent Richard Burgio ("Burgio") to discuss investment of the proceeds of the sale of a house belonging to Joseph Selkove and his wife, now deceased. Claimants further alleged that Ms. Selkove informed Burgio that the investments were intended to provide for Ms. Selkove's children and that she wished to invest in conservative, income producing funds or securities. Claimants alleged that Burgio recommended to Ms. Selkove the purchase of a limited partner interest in Metric Partners Growth Suite Investors, L.P. ("Metric Partners") and that Burgio repeated his recommendation to Mr. Selkove during a visit to Mr. Selkove's home. Claimants next alleged that on January 13, 1989 Ms. Selkove visited Burgio's office and transferred funds to Claimants joint account at Invest Financial Corp. ("Invest") for investment, \$50,000 of which was to be invested in Metric Partners. Claimants also alleged that it was not until January 13, 1989 that Burgio gave Ms. Selkove a copy of the Metric Partner's prospectus and that at no time did Burgio review with Claimants the risks set forth in the prospectus.

Claimants alleged that at the time Burgio received Claimants' investment funds he was aware that the income from the investments Burgio recommended would be for the benefit of the Selkove children and that Claimants wanted safe investments that would produce income and growth. Claimants also alleged that they relied upon the advice provided by Burgio and that Ms. Selkove was an unsophisticated investor and that Mr. Selkove was unable to evaluate the appropriateness of the investment as he was legally blind at the time and that Burgio was aware of the foregoing. Claimants also alleged that Burgio failed to disclose that the objectives of Metric Partners were to provide federal income tax deductions and build equity through the reduction of mortgage loans rather than provide cash distributions and that Claimants would not have invested in Metric Partners had that information been disclosed. Claimants further alleged that Burgio represented to Claimants that quarterly distributions were likely to increase over time but that quarterly distributions actually declined.

Claimants alleged that in recommending to Metric Partners to Claimants Burgio violated Article III, section 2 of the NASD Rules of Fair Practice. Claimants further alleged that Burgio breached his fiduciary duty owed to Claimants and that Burgio's behavior was willful, malicious and of the sort which causes public harm such as to subject Burgio to punitive damages.

Claimants alleged that Respondent Invest was liable to Claimants under the doctrine of respondeat superior and liability of a controlling person.

Respondents maintained that Burgio explained the investment objectives of Metric Partners to Claimants and the risks of investing in the Metric Partners. Respondents also maintained that Burgio emphasized to Claimants that Metric Partners would be a non-liquid asset with a minimum holding period of between 3 to 5 years. In addition, Respondents maintained that the stated investment objectives of Metric Partners were compatible with those stated by Claimants and that the Metric Partners investment represented only 25% of the funds to be invested by Claimants and less than 15% of Claimant's total portfolio. Respondents further maintained that Claimants indicated to Burgio that Mr. Selkove was a retired college professor and that Ms. Selkove was a junior high school teacher and that Burgio had reason to believe they had the mental capacity to understand the features and risks of the partnership. Respondents also maintained that Burgio visited Mr. Selkove at his home to review the investments and that at no time did Mr. Selkove advise Burgio that he was legally blind or that he did not understand the features of the Metric Partners investment. Further, Respondents maintained that at all times Burgio was advised by Ms. Selkove that she was working with an attorney who was advising the Claimants on financial matters.

Respondents maintained the following affirmative defenses: (1) Respondents maintained that they were not guilty of any recommendation of unsuitable securities, misrepresentation and omission of material facts or self dealing; (2) Respondents were not liable to Claimants because any losses in Claimants account were not proximately caused by any unlawful act or conduct of Respondents; (3) Claimants account was handled in accordance with all applicable brokerage industry standards and guidelines and all regulatory requirements; (4) Claimants received a prospectus, at all times material hereto, which reflected and fully disclosed relevant information concerning the nature of the investment, the non-guarantee of any rate of return, the illiquidity of the investment, and the unlimited time frame of the holding period; (5) Claimants authorized and ratified the transaction of which they now complain and are guilty of laches in the presentation of this claim; (6) Respondents did not intend to deceive or defraud Claimants and did not act with scienter or in a reckless manner; (7) Any injury or damage suffered by Claimants was caused by the actions or negligence of parties or persons other than respondents, or some combination of the actions or negligence of Claimants and persons other than Respondents that were not caused by or contributed to by any negligence of Respondents; (8) Claimants' Statement of Claim was barred by the application Statute of Limitations of the State of New York.

**RELIEF REQUESTED**

**Claimants requested:**

1. Compensatory damages in the amount of \$50,000 plus interest from January 13, 1989.
2. Punitive damages in an amount to be determined by the arbitrators.
3. Attorneys' fees incurred in connection with making and arbitrating Claimants' claim, reducing any award to judgment, and obtaining full payment of any such award or judgment.
4. Costs of this arbitration, any court costs that may be incurred and disbursements incurred.
5. Any other and further relief as is just and proper.

**Respondents requested:**

1. Claimants' Statement of Claim be dismissed.
2. All costs be assessed against Claimants.

**AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant has the option of returning Metric Partners Limited Partnership to Respondent Invest by June 30, 1995 or selling Metric Partners Limited Partnership on her own accord by said date. Upon return of Metric Partners Limited Partnership to Invest, Invest shall remit \$6,000 to Claimant.
2. If Metric Partners Limited Partnership is not returned to Invest by June 30, 1995, it will be presumed that Claimant has chosen to retain said investment.
3. Claimants request for punitive damages is denied.

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4. Each party shall bear their respective costs including attorneys' fees.

#### **FORUM FEES**

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

3 sessions X \$400 = \$1,200.

Forum fees Assessed Against:

1. Claimant is assessed the sum of \$400 which represents one-third of the total forum fees due, less hearing session deposit paid by Claimant of \$400 leaving \$0 due.
2. Respondent Invest is assessed the sum of \$400 which represents one-third of the total forum fees due. Respondent Invest is liable and shall pay to the NASD the sum of \$400.
3. Respondent Burgio is assessed the sum of \$400 which represents one-third of the total forum fees due. Respondent Burgio is liable and shall pay to the NASD the sum of \$400.

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

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Concurring Arbitrators' Signatures

Name

Public Chairperson

Robert D. Herschman, Esq.

Name

Public Panelist

Marilyn Salzman, Esq.

Name

Industry Panelist

  
Leon Goldsholl

Date of Decision: January 16, 1995

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STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Robert D. Herschman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

\_\_\_\_\_

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Marilyn Salzman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

\_\_\_\_\_

STATE OF: *New York*

COUNTY OF: *Queens*

SS:

On this *13* day of *January*, 199*5*, before me personally appeared **Leon Goldsholl** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

*Joan Patane*

JOAN PATANE  
Notary Public for the State of New York  
No. 40945000269  
Qualified in Queens County  
Commission Expires Oct. 19, 19*96*

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Concurring Arbitrators' Signatures

Name

Public Chairperson

Robert D. Herschman, Esq.

Name

Public Panelist

Marilyn J. Salzman  
Marilyn Salzman, Esq.

Name

Industry Panelist

Leon Goldsholl

Date of Decision: January 16, 1995



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NASD Award #94-00152

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Robert D. Herschman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

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STATE OF: *New York*

SS:

COUNTY OF: *Nassau*

On this *10<sup>th</sup>* day of *January*, 199*5*, before me personally appeared **Marilyn Salzman, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.



STANLEY P. SALZMAN  
NOTARY PUBLIC, State of New York  
No. 8746425

Qualified in Nassau County  
Commission Expires August 31, 19*96*

STATE OF:

SS:

COUNTY OF:

On this      day of      , 1994, before me personally appeared **Leon Goldsholl** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

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NASD Award #94-00152

Concurring Arbitrators' Signatures

Name

Public Chairperson

Robert D. Herschman  
Robert D. Herschman, Esq.

\_\_\_\_\_

Name

Public Panelist

\_\_\_\_\_  
Marilyn Salzman, Esq.

\_\_\_\_\_

Name

Industry Panelist

\_\_\_\_\_  
Leon Goldsholl

\_\_\_\_\_

Date of Decision: January 16, 1995