

**AWARD**  
**FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Name of Claimant

Lloyd A. Gillespie

vs.

Case Number: 09-05596  
Hearing Site: Houston, Texas

Names of Respondents

Oppenheimer & Co., Inc.,  
Aegis Capital Corp., and  
Joseph Gunnar & Co., LLC

and

Name of Third-Party Claimant

Aegis Capital Corp.

vs.

Name of Third-Party Respondent

Joshua Robert Barg

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**NATURE OF THE DISPUTE**

Customer vs. Members and Member v. Associated Person

**REPRESENTATION OF PARTIES**

Lloyd A. Gillespie ("Claimant") was represented by Bruce D. Oakes, Esq. and Richard B. Foshier, Esq., Oakes & Foshier, LLC, St. Louis, Missouri.

Oppenheimer & Co., Inc. ("Oppenheimer") was represented by Ellen Sheridan-Cona, Esq., Oppenheimer & Co., Inc., New York, New York, and Andrew R. Harvin, Esq., Doyle, Restrepo, Harvin & Robbins, LLP, Houston, Texas.

Aegis Capital Corp. ("Aegis") was represented by Michael H. Ference, Esq. and Daniel Scott Furst, Esq., Sichenzia Ross Friedman Ference LLP, New York, New York.

Joseph Gunnar & Co. LLC ("Joseph Gunnar") was represented by John E. Lawlor, Esq., Mineola, New York.

Joshua Robert Barg ("Barg") was represented by Ted Poretz, Esq., Ellenoff Grossman & Schole, LLP, New York, New York.

### **CASE INFORMATION**

The Statement of Claim was filed on or about September 25, 2009. The Submission Agreement of Claimant was signed on or about September 18, 2009.

The Statement of Answer was filed by Oppenheimer on or about January 6, 2010. The Submission Agreement of Oppenheimer was signed by John T. McGuire, Deputy General Counsel, on or about January 7, 2010.

The Statement of Answer and Third-Party Statement of Claim was filed by Aegis on or about January 4, 2010. The Submission Agreement of Aegis was signed by Aegis on or about January 6, 2010.

The Statement of Answer was filed by Joseph Gunnar on or about November 27, 2009. The Submission Agreement of Joseph Gunnar was signed on or about October 6, 2009.

The Statement of Answer to Aegis' Third-Party Claim was filed by Barg on or about February 22, 2010. The Submission Agreement of Barg was signed on or about February 16, 2010.

Aegis filed a Motion for Sanctions and Preclusion against Claimant on or about October 18, 2011. Claimant filed a Response to Aegis's Motion on or about October 31, 2011. Aegis filed a Reply in Further Support of its Motion on or about November 4, 2011.

Barg filed a Motion to Dismiss on or about January 10, 2012. Oppenheimer joined in Barg's Motion to Dismiss on or about January 16, 2012. Claimant filed a Response to Barg's Motion on or about January 17, 2012. Claimant filed a Clarification of his Response to Barg's Motion on or about January 20, 2012. Aegis filed an Opposition to Barg's Motion on or about January 20, 2012. Barg filed a Reply to Aegis's Opposition to Barg's Motion on or about January 23, 2012. Oppenheimer filed a Reply to Responses of Claimant and Aegis to Barg's Motion on or about January 23, 2012.

Aegis filed a Motion for Sanctions and Preclusion Against Barg on or about October 16, 2012. Barg filed a Response and Opposition to Aegis' Motion on or about October 16, 2012. Aegis filed a Reply to Barg's Response to Aegis' Motion on or about October 18, 2012. Barg filed a Sur-Reply to Aegis' Reply on or about October 18, 2012.

### **CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; violation of Texas' Securities Act; negligence/negligent misrepresentation/omission; common law

fraud; breach of contract; and negligent supervision. The causes of action related to Claimant's allegation that Respondents' agents concentrated Claimant in various unspecified highly speculative stocks, some of which were penny stocks, and on occasions, utilized margin to purchase these securities, which did not comport with Claimant's investment objectives, risk tolerance level, and overall circumstances. Among Claimant's allegations presented at hearing were that the annual turnover ratio was in the range of 5-9 (which Claimant argued was indicative of churning) and that the annualized cost to equity ratio was as high as 24.99%. Claimant asserted that, over approximately a 2½ year period, there were over \$551,000 in commissions generated on an approximately \$2,000,000 account.

Unless specifically admitted in its Answer, Oppenheimer denied the allegations made in the Statement of Claim and asserted affirmative defenses.

Unless specifically admitted in its Answer, Aegis denied the allegations made in the Statement of Claim and asserted affirmative defenses.

Unless specifically admitted in its Answer, Joseph Gunnar denied the allegations made in the Statement of Claim and asserted affirmative defenses.

Aegis asserted the following causes of action in its Third-Party Claim: contractual indemnification; common law indemnification; and common law contribution. The causes of action related to Aegis' allegations that, pursuant to the terms of Barg's employment agreement with Aegis, Aegis is entitled to indemnity and/or contribution from Barg against any loss, liability, claim, or damage.

Unless specifically admitted in his Answer, Barg denied the allegations made in the Third-Party Claim and asserted affirmative defenses.

### **RELIEF REQUESTED**

Claimant requested an award in the amount of:

Actual/Compensatory Damages	\$4,000,000.00
Exemplary/Punitive Damages	Unspecified
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

At the close of the hearing, Claimant requested punitive damages calculated with a multiplier of up to nine times the amount of the compensatory award.

Oppenheimer requested that the claims asserted against it be denied in their entirety.

Aegis requested that the claims asserted against it be dismissed.

Joseph Gunnar requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

In its Third-Party Claim, Aegis requested an award (of indemnification and contribution) from Barg in the amount of:

Actual/Compensatory Damages	\$4,000,000.00
Exemplary/Punitive Damages	Unspecified
Interest	Unspecified
Attorneys' Fees	Unspecified
Other Costs	Unspecified
Other Monetary Relief	Unspecified

At the close of the hearing, Aegis requested recovery of the amount it paid to Claimant in settlement, plus the cost of defending the first party claim, plus attorneys' fees and costs for prosecuting the third-party claim.

Barg requested that the third-party claims asserted against him be dismissed in their entirety and that he be awarded his costs and attorneys' fees.

#### **OTHER ISSUES CONSIDERED & DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Claimant settled his dispute with Aegis on or about December 15, 2011. As such, the Panel did not adjudicate Claimant's claims against Aegis. Aegis's Motion for Preclusion and Sanctions against Claimant was not decided prior to settlement and became moot.

Claimant settled his dispute with Joseph Gunnar on or about January 10, 2012. As such, the Panel did not adjudicate Claimant's claims against Joseph Gunnar.

In its Order entered on or about February 6, 2012, the Panel denied the Motions to Dismiss filed by Oppenheimer and Barg.

In its Order entered on or about October 25, 2012, the Panel denied Aegis's Motion for Sanctions and Preclusion Against Barg.

At the recorded hearing, Oppenheimer requested that the registration records of Respondent Barg and non-parties Russell M. Fiske and Michael G. Solomon maintained by the Central Registration Depository be expunged of all references to this matter. Also at

the hearing, Respondent Barg requested that his registration records maintained by the Central Registration Depository be expunged of all references to this matter.

The Panel reviewed the settlement documents between Claimant and Aegis considered the amounts paid to Claimant, and considered any other relevant terms and conditions of settlement.

At the conclusion of Aegis' third-party case-in-chief, Barg moved for dismissal. The Panel held the Motion in abeyance at the hearing and denies the Motion herein.

Aegis filed a post-hearing submission on or about January 9, 2013. The Panel considered the two cases submitted, but did not consider the letter also enclosed.

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.

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the recorded hearing and the post-hearing submission, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Respondent Oppenheimer & Co., Inc. is liable for and shall pay to Claimant, Lloyd A. Gillespie, the sum of \$848,248.20 in compensatory damages;
- 2.) Respondent Oppenheimer & Co., Inc. is liable for and shall pay to Claimant, Lloyd A. Gillespie, pre-judgment interest on the above-stated sum at the rate of 5% per annum from and including September 25, 2009, through and including January 9, 2013;
- 3.) Respondent Oppenheimer & Co., Inc. is liable for and shall pay to Claimant, Lloyd A. Gillespie, post-judgment interest on the above-stated sum at the rate of 5% per annum from and including thirty (30) days after the service date of this Award through and including the date the Award is paid in full;
- 4.) Respondent, Oppenheimer & Co., Inc., is liable for and shall pay to Claimant, Lloyd A. Gillespie, the sum of \$52,304.00 in costs;
- 5.) Respondent, Oppenheimer & Co., Inc., is liable for and shall pay to Claimant, Lloyd A. Gillespie, the sum of \$174,000.00 in attorneys' fees pursuant to the Texas Securities Act;

- 6.) Third-Party Respondent, Joshua Robert Barg, is liable for and shall pay to Third-Party Claimant, Aegis Capital Corp., the sum of \$87,500.00;
- 7.) Third-Party Respondent, Joshua Robert Barg, is liable for and shall pay to Third-Party Claimant, Aegis Capital Corp., the sum of \$2,000.00 as reimbursement for the non-refundable portion of the FINRA filing fee;
- 8.) Third-Party Respondent Joshua Robert Barg's request for expungement is denied and dismissed with prejudice;
- 9.) The Panel recommends the expungement of all references to the above captioned arbitration from non-party Russell M. Fiske's registration records maintained by the Central Registration Depository ("CRD"), with the understanding that pursuant to Notice to Members 04-16, Russell M. Fiske (CRD #1923202) must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code, the Panel has made the following Rule 2080 affirmative finding of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and

The Panel has made the above Rule 2080 finding based on the following reasons:

Fiske was mentioned in Claimant's Statement of Claim, but otherwise, based on eight days of hearings, had nothing to do with any conduct complained of. In addition, Claimant stipulated that it was appropriate to remove all references to this matter from Fiske's CRD records;

- 10.) Oppenheimer & Co., Inc.'s request for expungement of Michael G. Solomon's (CRD #2024161) CRD records is denied and dismissed with prejudice; and
- 11.) Any relief not specifically enumerated, including punitive damages, and sanctions, is hereby denied and dismissed with prejudice.

## **FEES**

Pursuant to the Code, the following fees are assessed:

### **Filing Fees**

FINRA Dispute Resolution will retain the non-refundable filing fees\* for each claim:

Initial Claim filing fee	= \$ 1,800.00
Third-Party Claim filing fee	= \$ 3,200.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly,

Oppenheimer & Co., Inc. is assessed the following:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

Aegis Capital Corp. is assessed the following:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

Joseph Gunnar & Co. LLC is assessed the following:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$ 5,000.00

### **Adjournment Fees**

Adjournment granted during these proceedings:

October 29-31 and November 1-7, 2012, adjournment requested jointly	Waived
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### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

The hearing beginning October 29, 2012, was adjourned on  
October 28, 2012

Waived

### **Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each hearing session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator x \$450.00	= \$	450.00
Pre-hearing conference: June 15, 2011	1 session	
Six (6) Pre-hearing sessions with Panel x \$1,200.00	= \$	7,200.00
Pre-hearing conferences: June 22, 2010	1 session	
December 16, 2011	1 session	
February 6, 2012	1 session	
February 27, 2012	1 session	
October 25, 2012	1 session	
November 6, 2012	1 session	
Seventeen (17) Hearing sessions x \$1,200.00	= \$	20,400.00
Hearing Dates: February 13, 2012	1 session	
December 10, 2012	2 sessions	
December 11, 2012	2 sessions	
December 12, 2012	2 sessions	
December 14, 2012	2 sessions	
December 15, 2012	2 sessions	
December 16, 2012	2 sessions	
January 8, 2013	2 sessions	
January 9, 2013	2 sessions	
Total Hearing Session Fees	= \$	28,050.00

The Panel has assessed \$1,905.00 of the hearing session fees to Lloyd A. Gillespie.

The Panel has assessed \$17,480.00 of the hearing session fees to Oppenheimer & Co., Inc.

The Panel has assessed \$6,305.00 of the hearing session fees to Aegis Capital Corp.

The Panel has assessed \$480.00 of the hearing session fees to Joseph Gunnar & Co., LLC.

The Panel has assessed \$1,880.00 of the hearing session fees to Joshua Robert Barg.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.



**ARBITRATION PANEL**

Malcolm Edwin Whittaker - Public Arbitrator, Presiding Chair

Donald K. Eckhardt - Public Arbitrator

James M. Alexander - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures:

/s/ Malcolm Edwin Whittaker  
Malcolm Edwin Whittaker  
Public Arbitrator, Presiding Chair

01/17/13  
Signature Date

/s/ Donald K. Eckhardt  
Donald K. Eckhardt  
Public Arbitrator

01/17/13  
Signature Date

/s/ James M. Alexander  
James M. Alexander  
Non-Public Arbitrator

01/17/13  
Signature Date

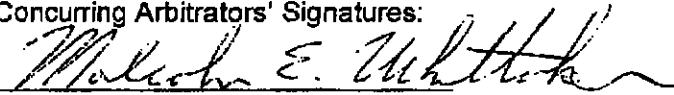
01/17/13  
Date of Service (For FINRA office use only)

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Donald K. Eckhardt - Public Arbitrator  
James M. Alexander - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures:



Malcolm Edwin Whittaker  
Public Arbitrator, Presiding Chair

January 17, 2013  
Signature Date

\_\_\_\_\_  
Donald K. Eckhardt  
Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
James M. Alexander  
Non-Public Arbitrator

\_\_\_\_\_  
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1/17/13  
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Signature Date

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Non-Public Arbitrator

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Non-Public Arbitrator

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