

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Pro Tech Industries, Inc. and
Gregory J. Halpern,

Claimants

No. 91-03978
consolidated with
[REDACTED]

v.

Blunt Ellis & Loewi,
Robert Veenendaal,
Prudential Securities, Incorporated, and
Robert Sayre,

Respondents

REPRESENTATION OF PARTIES

For Claimants Pro Tech Industries, Inc. and Gregory J. Halpern ("Claimants"): Paul Sussman Esq., Chicago, Illinois.

For Respondents Blunt Ellis & Loewi and Robert Veenendaal ("Blunt Ellis"): A. Brac Busscher, Esq., Vice President and Senior Attorney, Kemper Securities, Chicago, Illinois.

For Respondents Prudential Securities Incorporated and Robert Sayre ("Prudential"): Pete Byer, Esq., Vice President, Associate General Counsel, Prudential Securities Incorporated.

CASE INFORMATION

Claimants' Statement of Claim for case number 91-03996 was filed on or about December 23 1991.

Claimants' Submission Agreements was signed on December 5, 1991 and January 6, 1992.

Respondents', Blunt Ellis & Loewi, Incorporated's and Robert Veenendaal's, Joint Statement of Answer was filed on or about March 17, 1992.

Respondent Robert Veenendaal's Submission Agreement was signed on March 12, 1992.

Respondent Blunt Ellis & Loewi, Incorporated's Submission Agreement was signed on March 12, 1992.

Claimants' Statement of Claim for case number 91-03978 was filed on or about December 20, 1991.

Respondents', Prudential Securities Incorporated's and Robert Sayer's, Joint Statement of Answer was filed on or about March 16, 1992.

Respondent Prudential Securities Incorporated's Submission Agreement was signed on March 13, 1992.

Respondent Robert Sayre's Submission Agreement was signed on March 13, 1992.

HEARING INFORMATION

Pre-Hearing conference held: January 19, 1993. One (1) session.

Hearing date: July 7, 1993. Two (2) sessions.
January 14, 1994. One (1) session.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Claimants alleged: Negligence; lack of due diligence; breach of contract; breach of fiduciary duty; concealment; fraud; violation of the Federal Securities acts; violation of State Securities Act; and violation of common law by Respondents Blunt Ellis and Prudential. The allegations arose out of actions surrounding alleged firm orders to purchase Dow Value Rights ("DVRs") on September 6, 1991, with the Respondents.

Prudential, except as otherwise set forth in the facts section of its Answer, denied the material allegations of the Statement of Claim in case No. 91-03978. In addition, Prudential asserted the following affirmative defenses:

1. The Statement of Claim fails to state a claim upon which relief may be granted.
2. Respondents, at all times, acted reasonably, in good faith and in compliance with all applicable laws and regulations and industry practices and standards.

3. The claim is barred by Claimants' refusal to comply with the precondition set by Respondents for placing the order in dispute.
4. Any damages sustained by Claimants were caused by the intentional or negligent acts of claimants.
5. The claim is barred by the absence of any contractual, fiduciary or other relationship between the parties.
6. The claim is barred by Claimants' failure to mitigate damages.

Blunt Ellis denied each and every factual allegation contained i the Statement of Claim which it did not expressly admit in its Answer. In addition, Blunt Ellis asserted the following affirmative defenses:

1. Respondents state that the Claimants' claim is barred since Claimants have come into this proceeding with unclean hands.
2. Respondents state that the Claimants' claim is barred since Claimants have failed to mitigate their damages.
3. Respondents state that the Claimants are estopped from asserting any claim against Respondents since they failed to comply with the preconditions to placing a trade with Blunt.
4. Respondents state that the Claimants' claim is barred since no contractual, agency, or fiduciary relationship was ever entered into between the parties.

RELIEF REQUESTED

In each of the above-referenced arbitrations, the Claimants requested an award of: Actual damages in excess of \$80,000.00; interest at the legal rate from September 6, 1991; costs; any additional and consequential damages Claimants may establish at the arbitration hearing; and attorney's fees.

Prudential requested an award be entered as follows: Dismissing the Statement of Claim in its entirety; awarding Respondents the costs and expenses of this arbitration, including but not limited to reasonable attorney's fees; and granting Respondents such other and further relief as is just and proper.

Blunt Ellis requested that the arbitrators dismiss the Statement of Claim and award Claimants nothing. Respondents also requested that they be awarded their reasonable attorney's fees, in addition to any costs and expenses, incurred in defending this matter.

OTHER ISSUES CONSIDERED & DECIDED

Claimants had originally filed the above-referenced actions separately. On August 12, 1992, Prudential and Blunt Ellis filed a joint request to consolidate case numbers 91-03978 and 91-03996. On August 24, 1992, Claimants filed their response to the request to consolidate. After review of all relevant pleadings and documents, the undersigned panel granted the request to consolidate the aforementioned cases.

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

DECISION AND OPINION

We commenced the evidentiary hearing in this case on July 7, 1993. From the pleadings and the opening statements, it appeared that the principal issue would be whether either of the Respondents became bound to a contractual obligation to fill orders allegedly placed by Claimants, on Friday, September 6, 1991, to purchase certain securities ("Dow Value Rights" or "DVRs"). Whether those rights would eventually have any value, and if so how much, was expected to be determined by an announcement scheduled for Thursday, September 21, 1991.

According to the testimony of Gregory J. Halpern, Claimant Pro Tech's principal officer, by Tuesday, September 10, he learned that neither of the Respondents was willing to execute the orders. He attempted to establish telephone contact with the respective personnel of Respondents in order to get them to change their minds, but did not then or thereafter learn of anything to make him believe that either of the Respondents would execute the orders.

Inasmuch as trading continued in these securities through Thursday, September 12, it became clear to us that even if there had been a breach, a serious issue existed over whether Claimant had fulfilled its obligation to mitigate damages (also known as the duty to "cover"). In this case, the duty to mitigate damages required Mr. Halpern to take whatever steps that were reasonably available to get the order filled through a different broker or in some other way. For example, since Bear Stearns had accepted one of the three orders placed by Claimant and had not renounced executing the order (as Claimant alleges was done by the Respondents), Bear Stearns would have been a logical candidate to serve as an alternative means of executing the orders that Claimant claims the Respondents wrongfully failed to execute. The sum total of Claimant's efforts to mitigate consisted of waiting and hoping that the Respondents (either or both of them) would come around and execute the orders after all.

after they said they would not.

During the proceeding, the issue of mitigated damages arose and the panel focused upon this issue. In fact, all three of the members of the panel were fairly convinced at that time that the uncontradicted facts gave rise to a conclusion as a matter of law that Claimant had failed to act reasonably to fulfill its duty to mitigate damages. However, since it was apparent that the Claimant had not anticipated the issue of mitigation, we adjourned the hearing (July 7, 1993) and gave both sides the opportunity to file briefs, providing their views on the law on this issue and to describe what facts might be proved either way.

Claimant's brief persuaded us that another opportunity should be granted to Claimant to delve into the questions of what opportunity reasonably existed during the period between the cancellation of the trades¹ on September 10, and the close of business on September 12, when the trading would effectively come to an end. For that purpose, we convened a hearing limited to evidence on that question, and both sides were notified of their opportunity to present evidence on that issue. The hearing was thus resumed on January 14, 1994, limited to that narrow issue.

After Prudential and Blunt, Ellis declined to fill the orders, Mr. Halpern apparently made no further effort to have the trades executed, despite the possible availability of Bear, Stearns (as noted above), and despite his having previously done business at several other brokerage houses. We conclude that there was no sound basis for him to conclude that no broker would execute the trades without a full cash deposit and hence he would not have been justified in assuming that it was not worth trying to find a broker who would execute the trades on normal terms. Accordingly, we must conclude that Claimant failed in the duty imposed by law to make a reasonable attempt to do so and the undersigned arbitrators hereby enter a zero award. Hearing costs shall be borne one-half by Claimants and one-half jointly by Respondents.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

1 pre-hearing conference sessions X \$300.00 = \$300.00

3 hearing sessions X \$750.00 = \$2,250.00

¹ We say "cancellation" while keeping in mind Respondents' claim that the trades were never really accepted in the first place.

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Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fees in the amount of \$150.00 for case No. 91-03978 and \$150.00 for case No. 91-03996, and shall RETAIN the hearing session deposit for case No.s 91-03978 and 91-03996 in the amount of \$500.00 and \$500.00, respectively, previously paid to the NASD by the Claimants.

Additional forum fees in the amount of \$1,275.00 are assessed jointly against Respondents Prudential Securities Incorporated, Robert Sayer, Blum Ellis & Loewi, and Robert Veenendaal.

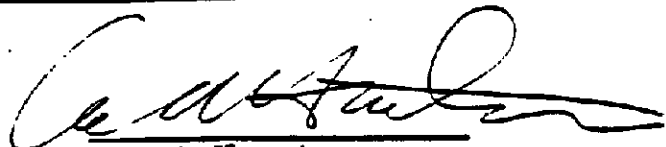
Additional forum fees in the amount of \$275.00 are assessed against the Claimants.

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

CONCURRING ARBITRATORS

Dated:

5 9 / 92



Aram A. Hartunian
Presiding Chairman
Public Arbitrator

Michael J. Diore
Public Arbitrator

Ronald C. Peters
Industry Arbitrator

Date of Service by the NASD: _____

N.A.S.D. Arbitration No.s
91-03978 and 91-03996
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Additional forum fees in the amount of \$1,275.00 are assessed jointly against Respondents Prudential Securities Incorporated, Robert Sayer, Blunt Hill & Loewi, and Robert Veendorst.

Additional forum fees in the amount of \$275.00 are assessed against the Claimants.

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

CONCURRING ARBITRATORS

Dated: _____

Aram A. Harunian
Presiding Chairman
Public Arbitrator

Michael J. Dikore
Public Arbitrator

5/24/94


Ronald C. Peters
Industry Arbitrator

Date of Service by the NASD: _____