

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of Arbitration Between

Name of Claimant

Applied Photonics, Inc.

93-04716

Name of Respondent

Thomas James Associates, Inc.

REPRESENTATION

For Claimant Applied Photonics, Inc. ("Claimant") appeared Thomas V. Dana, Esq., a sole practitioner located in New York, New York.

For Respondent Thomas James Associates, Inc. ("Respondent") appeared Susan A. Roberts of the law firm of Harter, Secrest & Emery located in Rochester, New York.

CASE INFORMATION

Statement of Claim filed: November 11, 1993.

Claimant's Submission Agreement signed on: November 11, 1993.

Statement of Answer filed: January 26, 1994.

Respondent's Submission Agreement signed on: January 26, 1994.

HEARING INFORMATION

Pre-hearing conference:	September 28, 1994	-	One Session/ One Arbitrator
Hearing dates/sessions:	October 31, 1994	-	Two Sessions
	November 1, 1994	-	Two Sessions
	December 14, 1994	-	Two Sessions
	December 15, 1994	-	Two Sessions

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.

CASE SUMMARY

Claimant alleged that Respondent contacted Claimant and represented that it would help Claimant raise new capital through an initial public offering. Claimant further alleged that Respondent represented that, through a public offering, Claimant would get a better stock valuation and have a better chance of raising money than through private financing, which was Claimant's traditional method of raising capital. In addition, Claimant alleged that Respondent represented to Claimant that it supported new deals through active market trading, that it did only one issue at a time, that it did not pipeline, and that it had no problems with the SEC or any other regulatory agencies.

Claimant alleged that Respondent signed a letter of intent on September 16, 1988, in which Respondent confirmed its interest in underwriting a public offering of Claimant's stock. Claimant further alleged that the letter of intent provided that Respondent would inform Claimant, in writing, of any receipt of threat or proceedings which would prevent any public offering by the SEC or other regulatory agency. Claimant also alleged that it paid an advance of \$30,000.00 to Respondent, which, pursuant to the letter of intent, was to be returned if the public offering was terminated.

Claimant alleged that the public offerings were repeatedly aborted because Respondent, contrary to its representations, put other companies into its public offering pipeline in place of Claimant and because of Respondent's problems with its clearing company and with the SEC. Claimant alleged that Respondent never advised Claimant of its regulatory problems, although the letter of intent mandated that it do so. Claimant also alleged that, pursuant to the principles of good faith and fair practice, the NASD Regulations and the common law, Respondent was required to advise Claimant of its regulatory problems.

Claimant alleged that it went into debt because, after each aborted registration, it retained a securities law firm to prepare new registrations and that it also retained auditors, printers, transfer agents and a public relations firm. Claimant also alleged that it had to arrange for bridge loans to pay the expenses of the aborted transactions. Claimant further alleged that Respondent never returned the \$30,000.00 advance that Claimant paid to Respondent for expenses.

Claimant alleged that Respondent's actions constituted fraud and that Respondent violated the agreement between the parties, the NASD rules of fair practice and fair dealing, federal securities laws, and the stated and implied covenants found in common law principles of good fair and fair dealing.

Respondent admitted that it represented to Claimant that it had the ability to assist

Claimant in raising funds. Respondent denied that it made any misrepresentations of material fact and maintained that its statements were made in good faith. Respondent also denied that it made any representation that it does not pipeline and further denied that, at the time of the discussions with Claimant, it had any information that would reasonably lead it to believe the SEC would take enforcement action against it.

Respondent maintained that Claimant failed to meet its business plan and the financial projections that were reflected in the letter of intent, which, Respondent maintained, caused the delays in arranging financing for Claimant. Respondent further maintained that it complied with the terms of the letter of intent, but that the letter of intent did not constitute a binding contract.

Respondent denied that it delayed advising Claimant about its regulatory problems. As an affirmative defense, Respondent maintained that Claimant's federal securities claims were barred by the statute of limitations.

RELIEF REQUESTED

Claimant requested loss of bargain damages of \$2,250,000.00. Alternatively, Claimant requested damages of \$1,800,000.00 representing expenses incurred in repeatedly preparing for the public offering, time in preparing and assembling data for registration statements and amendments thereto for the public offerings, and subsequent expenses incurred in managing the company with inadequate capital and funding. Claimant also requested \$30,000.00 representing the advance paid to Respondent, attorney's fees, costs, disbursements, interest at 9% per annum and such other and further relief as may be lawful, equitable and just.

Respondent requested that the Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED AND 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. Respondent be and hereby is liable and shall pay to the Claimant the sum of \$117,000.00, inclusive of interest.

2. Each party shall bear their respective costs, including attorney's fees.
3. All other claims be and hereby are denied.

FORUM FEES

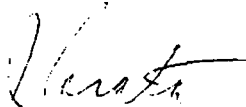
Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$250.00 filing fee previously deposited by Claimant and have assessed the following forum fees:

Pre-hearing conference	=	\$ 300.00
8 hearing sessions x \$1000.00	=	\$8,000.00
minus hearing session deposit	=	<u>\$1,000.00</u>
		\$7,300.00 net due

Respondent be and hereby is liable and shall pay to the NASD the sum of \$7,300.00 representing outstanding forum fees.

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

ARBITRATORS' SIGNATURES



Joseph J. Arata, Esq.
Public Chairperson

Allen Kilik, Esq.
Public Arbitrator

Francis A. Sullivan
Industry Arbitrator

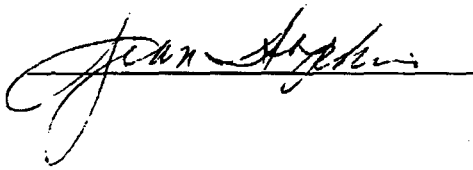
Date of decision: February 16, 1995

STATE OF: NEW YORK

SS:

COUNTY OF: NEW YORK

On this 14th day of February, 1995, before me personally appeared **Joseph J. Arata, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.



JEAN L. HIGGINS
Notary Public, State of New York
No. 41-060000
Qualified in Orange County
Certificate filed in New York County
Commission Expires 5-31-95

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Allen Kilik, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

STATE OF:

SS:

COUNTY OF:

On this day of , 1995, before me personally appeared **Francis A. Sullivan** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that the executed the same.

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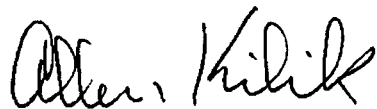
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Public Chairperson



Allen Kilik, Esq.
Public Arbitrator

Francis A. Sullivan
Industry Arbitrator

Date of decision: February 16, 1995

STATE OF:

SS:

COUNTY OF:

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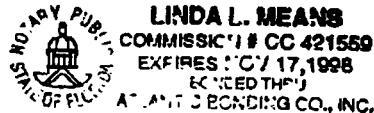
STATE OF: *FLORIDA*

SS:

COUNTY OF: *PALM BEACH*

On this *10th* day of *FEBRUARY* , 1995, before me personally appeared **Allen Kilik, Esq.** known and known to me to be the individual described in and who executed the foregoing instrument and be duly acknowledged to me that he executed the same.

Linda L Means



STATE OF:

SS:

COUNTY OF:

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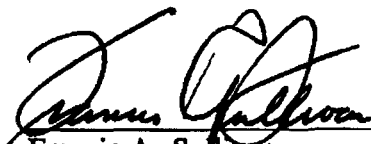
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Public Chairperson

Allen Kilik, Esq.
Public Arbitrator



Francis A. Sullivan
Industry Arbitrator

Date of decision: February 16, 1995

