

MALECKI LAW

11 BROADWAY, SUITE 715
NEW YORK, NEW YORK 10004
(212) 943-1233 TELEPHONE
(212) 943-1238 FACSIMILE
WWW.ABOUTSECURITIESLAW.COM

JENICE L. MALECKI

ASSOCIATE

JULIE K. MATHEW

Notes, Expungement & Good Faith and Fair Dealing: A Case in Point

Jenice L. Malecki, Esq., © 2008

Attached is the Award in Wachovia Securities v. Brucker, Case no. 06-03260 for discussion in the Employment Break-Out Section at the Annual Meeting.

I believe that it is of interest, as it shows of the extent to which things can go wrong for a firm in pursuing something as simple as a note, when they have not acted consistently and in good faith.

It is a reasoned decision in part, as it describes the reasons for an expungement and presumably why the note was not required to be repaid, i.e., the lack of good faith and fair dealing (although other arguments were made at the hearing as to why the note ought not be paid; for example, Wachovia had not proven that it was a successor. Since Wachovia argued in their defense that they were not a successor in interest to Prudential's supervisory conduct or bound by the contract's the good faith and rule adherence requirements with respect to supervision over the years as described in the contract – they wanted the benefits of the contract but not the burdens).

Look at number "4" under the Award section and the "Attachment 1" referred to in the Award section.

It also highlights how the firms "change their story" when it suits their litigation interests and act inconsistently at different points of time. It is very much an illustration of nuances between arbitration vs. litigation.

**Award
FINRA Dispute Resolution**

In the Matter of the Arbitration Between:

Wachovia Securities, LLC (Claimant) vs. Haran Brucker (Respondent)

Case Number: 06-03260

Hearing Site: New York, New York

Nature of the Dispute: Member vs. Associated Person.

REPRESENTATION OF PARTIES

Claimant Wachovia Securities, LLC hereinafter referred to as "Claimant": Victor A. Machcinski, Jr., Esq., Kresbach & Snyder, P.C., New York, NY. Previously represented by Douglas D. Callaway, Wachovia Securities, LLC, Richmond, VA.

Respondent Haran Brucker hereinafter referred to as "Respondent": Jenice Malecki, Esq., Malecki Law, New York, NY.

CASE INFORMATION

Statement of Claim filed on or about: July 12, 2006.

Reply to Counterclaims filed on or about: November 13, 2006.

Claimant signed the Uniform Submission Agreement: July 11, 2006.

Statement of Answer with Counterclaims filed by Respondent on or about: September 27, 2006.

Respondent signed the Uniform Submission Agreement: September 26, 2006.

CASE SUMMARY

Claimant asserted the following causes of action: nonpayment of promissory note.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

In his Counterclaims, Respondent asserted the following causes of action: defamation, breach of fiduciary duty, interference with economic relations, breach of express and implied contract, breach of implied covenant of good faith and fair dealing, and conversion.

Unless specifically admitted in its Answer, Claimant denied the allegations made in the Counterclaims and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$234,072.56, interest at the rate of 5% per annum, the costs of collection and of this proceeding including attorneys' fees, and any other relief as the Arbitrators deem just and equitable.

Respondent requested the dismissal of the Statement of Claim in its entirety.

In his Counterclaims, Respondent requested expungement, compensatory damages in the amount of \$500,000.00, unspecified punitive damages, interest, attorneys' fees, arbitration fees, costs and expenses, and any such other and further relief as the arbitration panel deems just and proper.

Claimant requested the dismissal of the Counterclaims in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators' Report is annexed as Attachment 1, Issue of Expungement.

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 evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are denied in their entirety.
2. Respondent's counterclaims, except for his expungement request, are denied in their entirety.
3. Claimant is liable for and shall pay to Respondent attorneys' fees in the amount of \$47,227.13 pursuant to Synergy Gas Co. v. Sasso, 853 F.2d 59 (2nd Cir), cert. denied, 488 U.S. 994 (1988).
4. The Panel recommends the expungement of "Discharge" as the Reason for Termination and the Termination Comment filed by Wachovia Securities LLC from Haran Brucker's Form U5 dated June 4, 2004 maintained by the Central Registration Depository ("CRD") based upon the defamatory nature of the information. The Panel recommends that the Reason for Termination be changed to "Other," and the "Termination Comment" be expunged and replaced with "Brucker was wrongfully terminated and defamed due to Wachovia Securities' Management's negligence." The Form U5 is not automatically amended to include the changes indicated above. Respondent Haran Brucker must forward a copy of this Award to FINRA's Registration and Disclosure Department for the amendments to be incorporated into the Form U5. See Attachment 1, Issue of Expungement.

Hearing Dates:	August 15, 2007	2 sessions	
	October 10, 2007	2 sessions	
	November 06, 2007	2 sessions	
	November 19, 2007	2 sessions	
	January 7, 2008	2 sessions	
	March 24, 2008	2 sessions	
	June 3, 2008	2 sessions	
<hr/>			
Total Forum Fees			= \$18,200.00

The Panel has assessed \$18,200.00 of the forum fees to Claimant.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Claimant requested copies of tapes = \$ 45.00

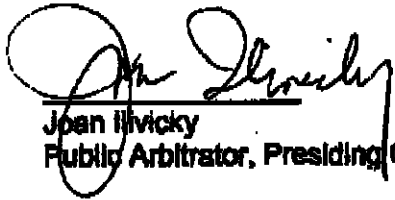
All balances are payable to FINRA Dispute Resolution and are due upon receipt.

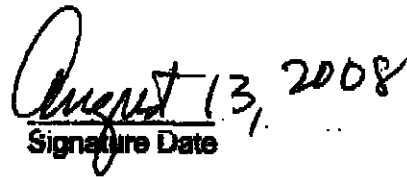
ARBITRATION PANEL

Joan Ilivicky	-	Public Arbitrator, Presiding Chairperson
Arthur T. Jacobs, PhD	-	Public Arbitrator
Kevin B. Naughton	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures


Joan Ilivicky
Public Arbitrator, Presiding Chairperson


Signature Date

Arthur T. Jacobs, PhD.
Public Arbitrator

Signature Date

Kevin B. Naughton
Non-Public Arbitrator

Signature Date

August 19, 2008

Date of Service (For FINRA Dispute Resolution use only)

ARBITRATION PANEL

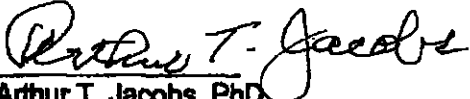
Joan Iivicky - Public Arbitrator, Presiding Chairperson
Arthur T. Jacobs, PhD - Public Arbitrator
Kevin B. Naughten - Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 1507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Joan Iivicky
Public Arbitrator, Presiding Chairperson

Signature Date



Arthur T. Jacobs, PhD
Public Arbitrator

8/15/08

Signature Date

Kevin B. Naughten
Non-Public Arbitrator

Signature Date

August 19, 2008

Date of Service (For FINRA Dispute Resolution use only)

ARBITRATION PANEL

Joan Iivicky	-	Public Arbitrator, Presiding Chairperson
Arthur T. Jacobs, PhD	-	Public Arbitrator
Kevin B. Naughten	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.


Concurring Arbitrators' Signatures

Joan Iivicky
Public Arbitrator, Presiding Chairperson

Signature Date

Arthur T. Jacobs, PhD.
Public Arbitrator

Signature Date



Kevin B. Naughten
Non-Public Arbitrator



Signature Date

August 19, 2008
Date of Service (For FINRA Dispute Resolution use only)

ATTACHMENT 1

ISSUE OF EXPUNGEMENT

The letter from Domenic Raimo ("Raimo"), to Kevin O'Brien ("O'Brien"), dated August 12, 2004 (Respondent's Ex.18-G) clearly states that the issue of Haran Brucker's ("Brucker") termination is based solely on activity regarding the Zefferino account and not based upon the account of David Schwartz ("Schwartz"). Therefore, the Panel must conclude that Wachovia Securities determined that the objections of David Schwartz were not material in Brucker's termination. In fact, no mention is made of the Schwartz account. Therefore, the Panel concurs with Wachovia Securities that the Schwartz account is not an issue in the instant matter and the Panel finds, the Schwartz account shall be removed from any and all consideration.

In said letter, Raimo states the following:

"After Mr. Cresenzo's and Mr. Brucker's former employer, Prudential Securities Incorporated, n/k/a Prudential Equity Group) (Prudential) settled the complaint filed by his former clients, Joseph and Gina Zefferino, who alleged misconduct relating to their account at Prudential, Wachovia Securities conducted its own review of their activities relative to that complaint.

Based upon that review, Wachovia Securities concluded that Mr. Cresenzo had allowed his partner, Haran G. Brucker, to trade options in the Zefferino's Prudential account without actually speaking directly to the customers and without obtaining the account documents required for discretionary option trading. As a result Mr. Cresenzo and Mr. Brucker were discharged from Wachovia Securities on May 5, 2004"

Based upon the above referenced letter, the Panel finds no mention that Richard Cresenzo ("Cresenzo") was let go for suitability reasons regarding the Zefferino account but rather, in part, for allowing Brucker to transact business with the Zefferinos without Brucker having spoken directly to them. The Panel finds that if Wachovia Securities had concerns regarding suitability issues, a significant matter under any circumstances, Wachovia Securities would have undoubtedly addressed the issue in its letter to O'Brien which was not done. The Panel agrees with Wachovia Securities: that the transactions conducted in the account were consistent with the Zefferino's investment objective. Brucker was terminated not because of what he had done but because Brucker had done what he was asked to do and encouraged to do by Cresenzo. Prudential Financial's 'Option Client Information Form and Agreement' (Respondent's Ex.16-J), examined and signed by the Zefferinos and approved by both the Branch Manager and the Options Principal, clearly and unambiguously permits the Options trading that Brucker had undertaken for Cresenzo's clients.

With reference to the issue of suitability, the Panel finds that Brucker did not act outside the requirements of NASD 2860 (19) which states that concerning customer Option transactions:

“... such member or person associated therewith has reasonable grounds to believe upon the basis of information furnished by such customer after reasonable inquiry by the member or person associated therewith concerning the customer's investment objectives, financial situation and needs, and any other information known by such member or associated person, that the recommended transaction is not unsuitable for such customer.”

The 'reasonable grounds to believe' after conducting the 'reasonable inquiry' obligations were satisfied by Brucker when he personally familiarized himself with the signed and approved 'Option Client Information Form and Agreement'. Certainly, it would have been desirable if Brucker had spoken with the Zefferinos. Richard Cresenzo, who had an account relationship with the Zefferinos for more than 10 years, discouraged it. We accept the claim that Brucker sought and relied upon the advice of Branch Manager, Martin Berman ("Berman") and that Berman approved based upon his understanding, that such an arrangement was acceptable under the Rules. Absent testimony from Berman to the contrary, the Panel accepts that claim.

The Rule does not state categorically or otherwise that Brucker 'speak' with the customer; it does require that Brucker, 'after reasonable inquiry' have 'reasonable grounds to believe' the recommended transactions were 'not unsuitable'. Furthermore, the question of Brucker's familiarity with the Zefferino's suitability is clearly and unambiguously documented on the 'Option Client Information Form and Agreement' (Respondent's Ex. 16-J), a document which the Zefferinos had examined and which both signed their approval; the same document signed by both the Options Principal and the Branch Manager granting approval of the FA's 'power of attorney', which lists the customers' 'investment experience in options' at 3 years and that '[t]he activity has been' checked 'Various Strategies'.

The Panel notes that Prudential, up through June 30, 2003, a period of ten months, had ample time to consider the allegations against Brucker. They conducted an investigation and found Brucker not wanting in this regard. He was not penalized, reprimanded, terminated, retrained and/or placed on heightened supervision. Furthermore, Prudential Securities defended Brucker against all allegations made against him. Upon taking over from Prudential, the Panel would expect that one of Wachovia Securities' priorities would be to examine the complaints filed against all FAs it was taking on as a result of its merger with Prudential. Yet, from July 1, 2003, through March, 2004, Wachovia Securities took no action against Brucker. He was neither reprimanded, penalized, placed on heightened security, nor terminated. It was not until the SPRU report was issued that the instant matter was revisited. No new information was obtained; nevertheless, Brucker's role in the instant matter was elevated to be equal to that of Cresenzo and Brucker was terminated from Wachovia's employment.

Based upon the facts and circumstances set forth above, the Panel finds that Brucker was wrongfully charged with responsibility for the actions taken in the Zefferino account. Brucker acted with the approval and blessing of Wachovia Securities' Branch and other Managers. Therefore, the Panel finds that Brucker was wrongfully terminated and that the decision to terminate him was arbitrary and capricious.

And finally, for the reasons set forth above, the Panel finds that the disclosures included in Brucker's record to be disclosures that we find are unfounded, inaccurate and totally without merit.

Accordingly, the Panel recommends that the disclosures on Haran Brucker's record be expunged.

i Respondent's Exhibit 16-G

August 12, 2004:

Dear Mr. O'Brien:

As we discussed during our telephone conversation of this date, I am writing in response to your letter of July 7, 2004 and to Ryan Burke's letter, concerning Haran George Brucker, of July 30, 2004.

After Mr. Cresenzo's and Mr. Brucker's former employer, Prudential Securities Incorporated (n/k/a Prudential Equity Group) (Prudential) settled the complaint filed by his former clients, Joseph and Gina Zefferino, who alleged misconduct relating to their account at Prudential, Wachovia Securities conducted its own review of their activities relative to that complaint.

Based upon that review, Wachovia Securities concluded that Mr. Cresenzo had allowed his partner, Haran G. Brucker, to trade options in the Zefferino's Prudential account without actually speaking directly to the customers and without obtaining the account documents required for discretionary option trading. As a result Mr. Cresenzo and Mr. Brucker were discharged from Wachovia Securities on May 5, 2004

Since the terminations relate to complaints filed at Prudential for activity that occurred at that firm, all of the referenced documents can be obtained directly from Prudential. In this regard, attorney Renee Rettig, of Prudential, has informed me that said documents have already been produced to the Exchange in response to the Form U5 Amendment filed by Prudential reporting the settlement of the Zefferino complaint.

If you have any questions, kindly contact me at (212) 778-6185.

Very truly yours

Dominick C. Raimo

ii NASD Rule 2860 (19) Suitability (Dealing with Options)
(19) Suitability

(A) No member or person associated with a member shall recommend to any customer any transaction for the purchase or sale (writing) of an option contract unless such member or person associated therewith has reasonable grounds to believe upon the basis of information furnished by such customer after reasonable inquiry by the member or person associated therewith concerning the customer's investment objectives, financial situation and needs, and any other information known by such member or associated person, that the recommended transaction is not unsuitable for such customer.

(B) No member or person associated with a member shall recommend to a customer an opening transaction in any option contract unless the person making the recommendation has a reasonable basis for believing, at the

time of making the recommendation, that the customer has such knowledge and experience in financial matters that he may reasonably be expected to be capable of evaluating the risks of the recommended transaction, and is financially able to bear the risks of the recommended position in the option contract.