

Tradewinds Financial Corp. v REFCO Securities, Inc.
2005 NY Slip Op 30066(U)
March 3, 2005
Supreme Court, New York County
Docket Number: 0606052/6052
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

TRADewINDS Financial Corp.

INDEX NO.

606052/01

MOTION DATE

3

MOTION SEQ. NO.

ReFCO Securities, Inc.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

FILED
MAR 04 2005
NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/2/05

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
WALTER B. TOLUB J.S.C.

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----x
 TRADEWINDS FINANCIAL CORPORATION,
 a California corporation,
 TRADEWINDS DEBT STRATEGIES FUND, L.P.,
 A California limited partnership,
 TRADEWINDS OFFSHORE FUND, LIMITED,
 a Cayman Islands Exempted Company,
 TRADEWINDS CLIPPER FUND, LTD.,
 A California limited partnership, and
 TRADEWINDS SECURED DEBT FUND LTD.,
 A Cayman Islands Exempted Company,

Plaintiffs,

Index No. 606052/01
Post-Trial Motion

-against-

REFCO SECURITIES, Inc., a New York
 corporation, REFCO CAPITAL MARKETS, LTD.,
 A Bermuda corporation and MARTIN LOFTUS,
 an individual,

Defendants.

-----x
WALTER B. TOLUB, J.:

This is a post trial motion, brought by the defendant pursuant to CPLR 4404, for judgment in favor of the defendants, and pursuant to CPLR 4404(a) to set aside a verdict in favor of the plaintiffs on the grounds, *inter alia*, that the verdict is against the weight of the evidence and that prejudicial statements made by plaintiff's counsel mandate a new trial.

To warrant judgment as a matter of law under CPLR 4404, the court would have to conclude that there was no valid line of reasoning that could lead rational people to the conclusion rendered by the jury (*Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493 [1978]; *Stephenson v. Hotel Employees and Restaurant Employees*

Union Local 100 of the AFL-CIO, 787 NYS2d 289, ___AD ___ [1st Dept. 2005]). This is not the case here, and the application to the extent that it seeks a verdict in favor of the defendants is denied.

After a thorough review of the record it is the Court's opinion that the jury's finding, that defendants breached their duty of good faith and fair dealing, was against the weight of the evidence and that the remarks made by plaintiffs' counsel in the course of these proceeding mandate a new trial.

In considering whether to set aside a verdict under CPLR 4404(a), the question is whether there is sufficient evidence to support the verdict, and if so, whether the evidence on the whole so preponderates in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence (*Lora v. City of New York*, 305 AD2d 171 [1st Dept. 2003]; *Harris v. Parwez*, 785 NYS2d 781, 13 AD3d 675 [3rd Dept. 2004]; *Tannenbaum v. Mandell*, 51 Ad2d 593 [2nd Dept. 1976] *Cholewinski v. Wisnicki*, 2004 WL 2452594, 5 Misc3d 1009 [Sup. Ct. NY Co. 2004]).

At the outset, the court notes that it rejects the balance of the grounds advanced by defendants for vacatur. More specifically, plaintiffs' evidence of custom and practice in the securities trade, the transactional history, provisions of the contracts and negotiations were all essential to understanding the transactions which formed the basis for the claims in this lawsuit. They were

admitted in order for the jury to understand, evaluate and make an informed decision. Although this court is in disagreement with the determination reached by the Jury, defendants' objections, if sustained, would have left the jury in a state of abject ignorance, unable to make heads or tails of the transactions underlying the claims of this case.

The facts underlying plaintiffs' claims have been amply set forth in Justice Cahn's decision of September, 2003 and do not require elaborate repetition, other than to note that this action was brought by a group of Hedgefunds to recover for damages incurred when their executing broker effectively called their margin loans. The Appellate Division, in its decision of March 16, 2004 (*Tradewinds v. Refco*, 5 AD3d 229 [1st Dept. 2004]), narrowed the only surviving issue. The Appellate Court stated "our review of the record discloses that the motion court properly found issues of fact as to defendant's good faith and the reasonableness of their conduct. This is especially so with respect to defendants' margin call" (*Id.* at 239).

This is a case where there was no smoking gun and there was no memo which evinced any ulterior motive or malice. Rather, simply stated, plaintiffs presented evidence to show that defendants made what plaintiffs claim was an unreasonable margin call on a loan which was amply secured, and that because it violated custom and usage it manifested defendants' failure to exercise good faith and

reasonableness. Plaintiffs relied on circumstantial evidence to prove unreasonableness.

Circumstantial evidence, as the court instructed (Tr. 1867-69), is evidence of a fact which does not directly prove a fact in dispute but which permits a reasonable inference or conclusion that the fact exists. However, the inference must be logical and compelling (*Gayle v. City of New York*, 92 NY2d 936 [1998]) and, more important for our consideration here, the jury may not rely upon equivocal evidence to draw unwarranted inferences (*Markel v. Spencer*, 5 AD2d 400 [4th Dept. 1958]; *aff'd*, 5 NY2d 958 [1959]).

In this regard, the court finds that the evidence was, at best, equivocal. The jury, to reach its conclusion, had to reconcile its finding with the uncontroverted evidence regarding the contemporaneous global financial crisis and the inability to value the Pamco bonds which served as security for these loans.

The Global Crisis

On June 7, 2004, Robert Scannell, Tradewinds founder and General Partner was cross examined and the Jury heard evidence for the first time about the global financial crisis of the summer of 1998. The description of the global financial crisis comes not from any expert or defense witness but rather from the plaintiffs, and witnesses called by the plaintiffs. Counsel read from Exhibit V-4, Tradewinds report to its investors, reporting the quarter ending September 30, 1998.

The description, authored by the plaintiffs and excerpted below, describes the financial market at that time:

Q: "First and foremost, Russia's collapse sparked a panic throughout global bond markets". Do you agree with that statement?

A: Yes.

Q: Having only just weeks before received a \$24 billion commitment from the International Monetary Fund, the Russians were unable to restore confidence in the ruble and gave up its defense. The result was a currency devaluation and a rescheduling of short-term GKO debt. To make matters worse, the Russians then froze trading of the assets and the currency, causing complete chaos. The ensuing legal disputes will take years to unwind." As you reflect back on the historical facts, is that an accurate description of what happened?

A: Yes.

Q: ... "After trying to convince investors that there was, in fact, no problem, government leaders are now scrambling to do something about it. President Clinton declared in mid-September that the current financial crisis was the biggest economic threat since the Great Depression. We, frankly, think that the government will be proven impotent in the face of this challenge."

Is it correct, in your recollection, that the government tried to convince investors that there was, in, fact, no problem?

A: No.

Q: That's not correct?

A: The government didn't try to - it - I don't believe the government tried to convince people that there was no problem. The government tried to address the problem and they did - did that through the

Federal Reserve, which cut interest rates substantially and which, soon thereafter, restored some measure of confidence to the markets.

Q: And you conclude that section with the paragraph: "Finally, the bailout of long term Capital Management speaks volumes about market conditions over the past several quarters. We will touch on this topic below."

Now, we haven't talked about the bailout of Long-Term Capital Management. When did that occur?

A: September of '98.

Q: And the bailout occurred in what way?

A: Two things happened concurrently. The Fed cut interest rates significantly - the Federal Reserve, U.S. Federal Reserve, which sets short-term interest rates and a consortium of Wall Street firms, including most of the big brokerage houses and some of the big banks agreed to make loans to Long-term Capital for some period of time.

Q: And the loans were in the amount of \$3.5 billion, weren't they?

A: I don't know the amount, but I don't - I don't dispute it, if that's what you're suggesting.

Q: On the next page, you have a section entitled, The Global Financial Crisis. Let's take a look at that section, first paragraph: "We have had great fun watching economists talk about how to fight off the crisis or how to defend Brazil. These comments tell us people don't understand the problem. The problem is simple: global supply exceeds global demand, and this is particularly the case for commodity-based goods. If you think back to basic economics, the problem can't be solved until prices fall to the point where supply and demand return to equilibrium. Falling prices mean falling stock markets, falling standards of living and falling expectations."

Now, do I understand from this paragraph that you are advising the investors that before there would be a recovery, there would be falling prices, falling stock markets, falling standards of living and falling expectations?

A: In emerging markets, yes.

Q: The last paragraph on the page: "We expect this process, otherwise known as deflation, to get substantially worse before it gets better. We expect China to devalue early next year. We expect the Hong Kong dollar peg to break. We expect Brazil eventually to devalue, and we expect all of these factors to have a growing impact on U.S. markets over the next several months. As we've noted in the past, we believe these events will have very negative implications for U.S. stock prices."

Do I understand from that statement that in October of 1998, you believed that this financial crisis would cause the U.S. stock market to decline?

A: Yes.

Q: On the next page, you address what you call "Wall Street's liquidity crisis." You begin: "A significant amount of the recent damage to global credit markets was self-inflicted by Wall Street. After taking large hits on their Russian exposure, the Street scaled back lending against all types of financial assets. Sharp reductions in credit prompted forced selling of debt securities of almost every type, causing prices to spiral lower. "As prices dropped, risk managers cut back trading capital, virtually ensuring that the bottom would fall out of certain market sectors. As losses grew, many leveraged players were forced to sell, at any price. As bad as it has been for EDF, our long-side leverage has only been around 1.5 to 1. No wonder the Fed was worried about Long-term

Capital Management, which was rumored to have 40-1 leverage."

Do I understand correctly from this paragraph that the impact of this financial crisis caused U.S. financial institutions to stop lending against all kinds of securities?

A: I think it said, "scaled back". But, eyes, they - I believe they did scale back.

Q: And they scaled back by making sharp reductions in credit; correct?

A: Yes.

Q: And that scaling back had an impact on the prices of securities?

A: Yes.

Q: And it significantly lowered the prices, correct?

A: Yes.

Q: And that's pursuant to this principle of supply and demand

A: Yes.

Q: Under the "Tradewinds" section, it says: "For reasons which shouldn't require elaboration, numerous people have asked us if we plan to remain in business. Throwing in the towel is a thought that has crossed our minds repeatedly, particularly in the past few weeks."

Let's talk about that. Did you discuss with your partner, Scott Peters, the prospect of folding up shop in this financial crisis?

A: Um, I - I - I'm not sure if we talked about it but I'm sure we both thought about it.

Q: Well, you both wrote this report, correct?

A: Yes.

Q: Did that particular paragraph reflect what you were thinking?

A: Yes (Tr. p. 450-456).

This then, in plaintiffs' own words, was the state of the world

financial market at the time that the defendants made their decision to effectively terminate the margin loan.

Mr. Maggio, defendant Refco's president, called by the plaintiffs, further characterized the situation as follows:

A: However, that's exactly what happened and there was an absolute crisis and panic in the marketplace.

Q: Okay. And when you say that there was a credit crisis, what do you mean by that?

A: A credit crisis is a situation where banks refuse to make loans, and so, the availability of money dries up. So there is a tendency that they will not be nearly as aggressive in lending money because they're very concerned about, first of all, taking care of what's home, making certain that their own little portfolio of lending, of the - of the loans is fine. That's their primary target. And then, very conservative, because everybody's watching over them, whether or not they're going to make any more loans.

And that's the credit crisis.

Q: And when you said that there was a liquidity crisis, what did you mean by that?

A: Liquidity crisis is - is the ability for people to stand up and be able to buy. Liquidity crisis is that there are too many buyers or sellers in the marketplace.

In the case of - in the case of '98, clearly, the liquidity crisis was anything that was less than investment grade of bonds or U.S. Treasuries. So if it was U.S. Treasuries -

There's what they call a "flight to quality." A flight to quality is - all right? - you sell your stocks, you sell any, - any bonds that you have a - that there's a risk of default and you buy the best-quality bonds you have. In that case, it's

going to be U.S. Treasuries or, maybe, AAA-Rated or AA-rated corporate.

So what happens in that situation, the people try to sell what they have and buy something that has more quality. And so, in that situation, there's a liquidity crisis because there's no buyers trying to buy the - the - the securities that are less wanted or less accessible - acceptable - all right? - by the portfolio managers, and nobody willing to stand up to the plate to make a market (Tr. p. 900-901).

The magnitude of the crisis was confirmed by Mr. Peters, plaintiffs' other General Partner (Tr. p. 534-537). Mr. Peters also testified on direct as to the impact the crisis had on Tradewinds in August, before the margin call.

Q: Could you tell the Court the impact that the Russian Default in mid-August 1998 had on Tradewinds?

A: Well, as you've heard, we definitely lost a good deal of money, but we were still in business and we were still solvent and we were looking ahead to the opportunities we saw down the road (Tr. p. 562).

Finally, and with respect to the issue of the impact the global financial crisis had on the parties, the court permitted the introduction of defendants' Exhibit TT-1, plaintiffs' complaint, on the examination of Mr. Peters.

Q: Let me place TT-1 on the screen. I'm going to ask you if you recognize this as being the allegations that were made in your complaint in this case.

A: Yes, I do.

Q: Paragraph 48 reads:

"In or about August of 1998, as a result of the devaluation of the Russian ruble, the financial markets were faced with a severe economic crisis in the emerging market sector."

49 reads:

"In or about September of 1998, the markets were faced with yet another economic crisis caused by the collapse of the hedge fund Long-Term Capital Management. On September 24, 1998, lead articles appeared in the Wall Street Journal and over the Dow Jones news wire about the resulting global fallout and bail-out of Long Term Capital Management."

That's a preparatory to showing you the next allegation which appears in Paragraph 50. I'll read that

"Upon information and belief, the foregoing economic crises were a source of considerable financial pressure for Refco (and it needed to raise immediate capital to fund its operations and protect its economic interest"

[...]

That is an allegation that you've made in this case, correct?

A: Yes, it is (Tr. p. 686-687)

Finally, there is this description by Mr. Thomas Yorke, an executive Vice President at Refco, called by the plaintiffs who described the condition of the financial market:

A: It was an extremely chaotic period. It was very difficult to get any to buy any bonds because the Russian market had defaulted.

All the other sort of dicey credits started really deteriorating rapidly and that sort of spun into a collapse of one of the larger hedge funds out

there, Long-Term Capital, which basically meant that everybody had everything for sale and it was very difficult to get bids on even U.S. Treasuries much less exotic or junk bonds.

Q: Was there a liquidity issue at the time?

A: There was a liquidity issue on U.S. Treasuries at that point in time. It basically seemed like complete world economic collapse. People were avoiding U.S. Treasuries that weren't absolutely the most recent ones issued.

Q: And was there any credit issues with the banks and broker-dealers on the street at that time?

A: Well, certainly the major player in the junk bond market, Chase Manhattan Bank, no longer was bidding on junk bonds at all.

Q: What do you mean by that?

A: I mean that they wouldn't take them, they wouldn't buy them from anyone. If you wanted to purchase from them, take securities off their inventory, they would be happy to sell them to you, but they didn't want to buy any new ones.

Q: And describe for the jury what a junk bond is?

A: A junk bond is essentially is a bond that is issued by an entity that has what we call a below investment grade rating. Investment grade ratings are generally the caveat for most pension funds and the like they can invest in. They have to have investment grade rating bonds. It has to be a viable concern, a high probability that it will repay the money it borrowed and also the interest. If you get below investment grade, the probability that your principal will be returned or that the interest payments will be made becomes, you know, much less (Tr. p. 1240-1241).

Evaluating the Pamco Bonds

In addition to the Global Financial Crisis, the precariousness of plaintiffs' financial position detailed above, and Refco's financial pressures, there were problems surrounding the evaluation of the Pamco Bonds which were the primary security for the underlying loans. Mr. Scannell, plaintiffs' founder and General Partner, testified on direct about the Pamco CLOs:

Q: Tell the jury what a CLO is.

A: A CLO is another unusual security as you heard earlier (Tr. p. 111-112) [...] at the time we started looking at these, they were brand new securities. And just like the emerging market debt that we had been involved in earlier, the interesting thing about these CLOs were that they were brand new and nobody understood them (emphasis supplied) (Tr. p. 112, lines 16-20).

The Pamco Bonds, as described by plaintiffs' expert, Professor Charles Jones, were collateralized loan obligations. Dr. Jones testified as follows:

Q: Let's start, Dr. Jones, by having you describe what is a collateralized loan obligation that the jury has heard so much about.

A: Think of it just as an institutionally-owned mutual fund. What it does, it's an entity that goes out, raises money from investors and then goes and invests that money, in this case, in loans and bonds in various fixed income instruments. And that's at its simplest.

Q: And how does a collateralized loan obligation, a CLO, generate cash flow?

A: The CLO, the trust here, this entity actually owns these loans and bonds and those generate interest.

And so it's that interest and also the paybacks on those loans that generates cash flow. And then those cash flows are just distributed to all the investors in the CLO.

Q: And could you please describe the assets that were in the Pamco CLO, the Pamco bonds?

A: The phrase CLO stands for collateralized loan obligation. And what the bulk of the assets in the trust were senior secured bank loans of companies. And so these would be the kinds of loans that banks would make and those banks would originate those loans, make those loans to these companies and often they would sell those loans off.

And so Pamco and other CLOs and other money managers would sometimes buy those bank loans to hold in their various funds.

Q: And then how does the trust or the CLO generate cash flow from these bank loans?

A: So these bank loans have interest rates. The companies that have borrowed money pay interest on those and those are passes through to the loan holder which is in this case Pamco, and then those cash flows are distributed out to the various investors.

I should say that while the bulk of these things were bank loans, there was also about 20 percent of the CLO was held in corporate bonds of lesser rated companies. So these are called junk bonds, So it is about 80-20, 80 percent bank loans, 20 percent high yielding corporate bonds (Tr. p. 1044-1046).

[...]

Q: What kind of investor are these CLOs designed for? What kind of investor purchases these CLOs?

A: These are all private placements. This CLO was not sold to the general public, so it was sold generally to large institutions. So it was large institution that is held each of the tranches of

this CLO.

Q: Now, you have referred to the tranches of the CLO. Explain what you mean by that when you describe the three or the four tranches.

A: In this Pamco II's there are four tranches, and I have them listed on the screen.

Essentially how it would work, think of this basically as a big pizza. So the Class A-1 has first claim. They are obligated, they are contractually entitled to a certain payment every three months.

And so think of it as they have first dibs on the pizza and basically they will take their slice, what they are entitled to.

And then assuming there is left over pizza, then the next tranche, the Class A-2 in this case basically will take their contractual entitlement.

And again assuming there is cash flow left over, which there almost always is, the next tranche in line would be Class B. Class B would receive its contractual entitlement.

And then assuming there's cash flow left over, again, which there usually is and in which there was in the case of these particular CLOs, the leftover cash, whatever was remaining at the end, is what would be distributed to Tradewinds or whoever was holding the Class C notes (emphasis supplied).

Q: And could you describe the role of the collateral manager, because the jury has heard testimony yesterday about the collateral manager in this case which was Pamco that changed its name to Highland Capital.

A: That's right. It was originally Pamco and then changed their name to Highland Capital Management. I think they are just the fund manager.

What they do is they decide what kinds of, which bank loans to invest in, which corporate bonds to purchase. They are the ones who are responsible for making the investment decision. They are also responsible for providing regular financial statements to the investors.

So in the case of Highland Capital, they would put together a monthly statement saying what each of the loans was worth and what each of the bonds was worth in the underlying CLO (Tr. p. 1047-1049).

Martin Loftus, an employee of the defendant Refco securities and a named defendant, testified extensively about the transactions between the parties from August of 1997 through September of 1998. He testified that he ran the financing desk for Refco and that Tradewinds was using Refco to finance some of its assets (Tr. p. 1301 line, 17).

Mr. Loftus' testimony detailed the financing agreement between Tradewinds and Refco, emphasizing the difficulty Refco encountered in getting back-up financing for the margin loan on the Pamco securities and the difficulties encountered in getting an evaluation on the bonds. Indeed, it was Mr Loftus' position that the initial loan that was extended to Tradewinds for the acquisition of the Pamco CLOs was based on Tradewinds other assets:

A: We made a loan at that time based on assets in the account, other than Pamco (Tr. p. 1305, line 13).

Finally, in February of 1998 Refco found a "French Bank" (Tr. p. 1321, 1322) willing to refinance the loan, secured by the Pamco

CLOs. The loan agreement between the French Bank and Refco contained a termination provision indicating that

"Either party can call the loan on the 20th of each month upon five business days' notice" (Tr. p. 1329 line 1, 2; Exhibit JJ-3).

Plaintiffs, although told about the loan, were never given the details of the refinancing agreement, and indeed it is uncertain whether plaintiffs were ever told the name of the French Bank which had agreed to the financing. Although plaintiffs made much of the fact that Refco profited on the spread between the interest rate paid to the French Bank and the interest rate charged to Tradewinds, the issue is completely irrelevant to the court's determination.

The Crisis and Pamco

On September 10, 1998, in the midst of the global financial crisis, Refco received three different valuations for the Pamco CLOs from Highland Capital Management within a twenty four hour period (Tr. p. 1242, line 7). The Class C Pamco notes, which had previously been valued at par, were valued at \$70.09 and \$63.387 on September 10, 1998 and \$90.59 on September 11, 1998 (Exhibits 18, 20, 23). CDC, the French Bank that was refinancing the loan secured by the Pamco Class C notes, called the loan. Refco gave plaintiffs notice six days later (September 16th 1998) indicating that because of the present market conditions and the significant

decline in the liquidity and market value of the Pamco bonds, (Tr. Exhibit 21), it was increasing the margin level to 100%, effectively calling the loan during the period of time we are concerned with.

Therefore, at the time Refco made its margin call, the financial markets were in a state of chaos, there was a liquidity crisis, and Highland Capital, the collateral manager providing financial statements to the investors, reported a drop in value of 30% to \$70.04, and 37% to \$63.39, and finally "revised" these figures at plaintiffs' urging (Tr. p. 1495-1496) to \$90.59, representing a roughly 10% drop in value. Moreover, CDC, the French Bank that refinanced the loans, called the loans, and Refco, according to plaintiffs' complaint, was under "considerable financial pressure". It should be noted that subsequent sales of the Pamco CLOs, 8 million units at 96, 10 million in Pamco notes at 92 and 5 million in Pamco notes at 94 3/8 demonstrated that although there was a drop in the value of the CLOs, the drop in value was not as drastic as Refco had feared. Hindsight of course, is a great teacher. However, the question of reasonableness is something which has to be judged at the time that Refco made its decision to call these loans.

Prejudicial Statements

Additionally, and considering the weakness of plaintiffs' case, the court is convinced that the jury was unduly prejudiced by

plaintiffs pejorative and inflammatory remarks and repeated accusations that Refco, its witnesses, experts and even its counsel had lied and committed perjury in the course of these proceedings. Plaintiffs' counsel's remarks went beyond zealous advocacy and fair comment, and the cumulative effect of these comments compels a new trial.

It began with the opening statement of Mr. Glauber, who told the jury, among other things, that:

All you need is basic common sense and all that you need to know is the difference between right and wrong, between fairness and unfairness. That's all that you need. And what you need also to do is to be able to smell a rat and to be able to tell a lie when one is given to you. Because what Refco is going to do in this case is exactly what they did to my clients (indicating), to Mr. Scannell and to Mr. Peters, back in 1998.

Refco lied to Mr. Scannell and to Mr. Peters in 1998, and I assure you, Refco is going to lie to you. And all that you need to do is to be able to see a lie (Tr. p. 21, lines 12-24).

[...] it [Refco] didn't care about the customer agreements that it had signed, it didn't care about good faith, it didn't care about reasonability, it didn't care about commercial integrity, but you care about that and I care about that, because we have to send a message to Refco in this trial.

We have to show Refco that you can't treat a customer like this, you can't make promises, you can't sign customer agreements that obligate you to act in a commercially reasonable manner and then just ignore it because you panicked, no.

But Refco, they are going to come here and they are going to give you a story, oh, I assure of that. They are going to give you a story. They are going to tell you they had a loan with the French bank, that's who they financed with, and that this French bank called the loan on them and because their loan got called or got pulled, they had the right to call our loan.

Well, Ladies and Gentlemen, that's hogwash [...] (Tr. p. 47-48)

In the course of his summation, Mr. Glauber returned to this theme.

"And I told you in my opening statement all that you have to know is how to smell a rat" (Tr. p. 1827, line 10).

"They told you, ladies and gentlemen, that the bid did not set the price. Not true. My God, if they were Pinocchio, their nose would grow out to here" (Tr. p. 1833-1834).

"your job now is, Ladies and Gentlemen, is that you can send a message through the verdict that you are going to render in this courthouse, you can send a message not just to the folks over there at Refco, but you can send a message to all of the large corporations on Wall Street and you can say no" (Tr. p. Transcript p. 1834, line 15).

Plaintiff's comments on opening and summation were highly prejudicial, inappropriate, and were intended to divert the jury's attention from the issues to be determined, and although such deplorable conduct might not compel a retrial were plaintiffs' case strong (see, *Calzado v. NYC Transit Authority*, 304 AD2d 385 [1st Dept. 2003]), in a close case, as was presented here, a retrial is

required (*Reynolds v. Burghezi*, 227 AD2d 941 [4th Dept 1996]; *Rodriguez v. NYC Housing Authority*, 209 AD2d 260 [1st Dept. 1994]; *Melendez v. NYC Transit Authority*, 196 AD2d 460 [1st Dept. 1993]; *Nuccio v. Chow*, 183 AD2d 511 [1st Dept. 1992]; *Clarke v NYC Transit Authority*, 174 AD2d 268 [1st Dept. 1992]).

Accordingly, and for the reasons set forth, defendants' motion to set aside the verdict as against the weight of the evidence is granted.

Counsel for the parties are directed to appear for a pretrial conference in IA Part 15, Room 335, 60 Centre Street, New York, New York on Friday, April 8, 2005 at 11:00 a.m.

Dated:

3/3/05



HON. WALTER B. TOLUB, J.S.C.

FILED
MAR 04 2005
NEW YORK
COUNTY CLERK'S OFFICE