

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Dean Witter Reynolds, Inc., (Claimant) vs. Prudential Securities Incorporated, Joseph Amato, Michael Braccia, Daniel Delrosso, John A. Zadwydas, and Gerard Marini, (Respondents)

Case Number: 00-04507

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Dean Witter Reynolds, Inc., hereinafter referred to as "Claimant": Lawrence D. Bernfeld, Esq., Graubard Mollen & Miller, New York, NY.

Respondents, Prudential Securities Incorporated ("Prudential"), Joseph Amato ("Amato"), Michael Braccia ("Braccia"), Daniel Delrosso ("Delrosso"), John A. Zadwydas ("Zadwydas"), and Gerard Marini ("Marini"), hereinafter collectively referred to as "Respondents": Leonard Weintraub, Esq., Paduano & Weintraub LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: October 10, 2000.

Amended Statement of Claim filed on or about: October 18, 2000.

Claimant signed the Uniform Submission Agreement: October 10, 2000.

Statement of Answer filed by Respondents on or about: October 16, 2000.

Amended Statement of Answer filed by Respondents on or about: November 1, 2000.

Counterclaim filed by Amato, Braccia, Delrosso, Zadwydas, and Marini on or about: November 1, 2000.

Second Amended Statement of Answer filed by Respondents on or about: November 6, 2000.

Amended Counterclaim filed by Amato, Braccia, Delrosso, Zadwydas, and Marini on or about: November 6, 2000.

Prudential signed the Uniform Submission Agreement: October 24, 2000.

Amato signed the Uniform Submission Agreement: October 25, 2000.

Braccia signed the Uniform Submission Agreement: October 25, 2000.

Delrosso signed the Uniform Submission Agreement: October 25, 2000.

Zadwydas signed the Uniform Submission Agreement: October 25, 2000.

Marini signed the Uniform Submission Agreement: October 25, 2000.

### **CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty and breach of the duty of loyalty; vicarious liability/respondeat superior; unfair competition; conversion; breach of employment agreement; permanent injunction; and breach of contract for repayment of promissory note.

Unless specifically admitted in their Answers, Respondents denied the allegations made in the Statement of Claim and Amended Statement of Claim and asserted the following defenses: the Statement of Claim fails to state a claim upon which relief can be granted; the Statement of Claim is barred in whole or in part because Claimant has sustained no injury arising from the conduct alleged; the Statement of Claim is barred in whole or in part because any and all losses sustained by Claimant were due to its actions, omissions, or negligence; Claimant has failed to mitigate any damages it may have suffered; Claimant is precluded from any recovery because it has breached the purported agreements entered into by Amato, Braccia, Delrosso, Zadwydas, and Marini; Claimant is precluded from any recovery because it has unclean hands; Claimant is precluded from recovery because the purported agreements are void and unenforceable; Claimant is precluded from any recovery because the damages it seeks are necessarily speculative and not recoverable under the law; and Claimant is precluded from seeking any of the equitable relief it demands because of the superior and intervening rights of the investors served by the individual Respondents.

In their Counterclaims, Amato, Braccia, Delrosso, Zadwydas, and Marini asserted the following causes of action: improper prosecution; unpaid commissions; defamation; tortious interference; and unfair competition.

### **RELIEF REQUESTED**

Claimant requested:

- a. On the First Claim for Relief against the individual Respondents a declaration that:
  - i. The individual Respondents have breached their fiduciary duties and duties of loyalty to Claimant;
  - ii. The individual Respondents have forfeited such rights, if any, as otherwise they might claim to have received commissions, draws, salaries, and/or any other monetary compensation from Claimant;
  - iii. The individual Respondents must return to Claimant all sums that Claimant paid to such Respondents during the period of their disloyalty; and

- iv. The individual Respondents must return to Claimant all original or copies of documents and things which Respondents unlawfully removed or otherwise misappropriated from Claimant, together with an Award of damages to Claimant, to the extent such damages may become determinable;
- b. On the Second Claim for Relief against Prudential:
  - i. A declaration that Prudential (A) has aided and abetted a breach of the fiduciary obligations of the individual Respondents to Claimant and, under the doctrine of respondeat superior, is responsible to Claimant for such breaches, and (B) must return any of Claimant's information that, in any form, Prudential may have in its possession, custody, or control; and
  - ii. An Award of damages to Claimant, to the extent such damages may become determinable;
- c. On the Third Claim for Relief, a declaration that:
  - i. The individual Respondents, in breach of their contractual obligations to Claimant, have engaged in unfair competition;
  - ii. Prudential has aided and abetted the breach of fiduciary obligations which the individual Respondents have to Claimant, and is responsible therefore; and
  - iii. The individual Respondents must return to Claimant all sums that Claimant paid to such Respondents during the period of their disloyalty, together with an Award of damages, to the extent such damages may become determinable;
- d. On the Fourth Claim for Relief:
  - i. A declaration that Respondents have converted, and aided and abetted the conversion of, Claimant's property;
  - ii. An Award of damages, to the extent such damages may become determinable; and
  - iii. A declaration that the individual Respondents must return to Claimant all sums that Claimant paid to such Respondent during the period of their disloyalty;
- e. On the Fifth Claim for Relief:
  - i. A declaration that (A) the individual Respondents have breached the confidentiality and non-solicitation provisions of their respective Employment Agreements with Claimant, and (B) Prudential has aided and abetted such breach;
  - ii. A declaration that Claimant, as a matter of contract, is entitled to an order of injunction to prevent Respondents the "prospective or continuing breach" thereof by the individual Respondents;

- iii. An Award of damages, to the extent Claimant's damages may become determinable; and
- iv. A declaration that the individual Respondents must return to Claimant all original or copies of documents and things which such Respondents removed or otherwise misappropriated from Claimant;
- f. On the Sixth Claim for Relief, a permanent injunction:
  - i. Barring Respondents from using or disclosing for any purpose any of Claimant's information which the individual Respondents obtained during the course of their employment with Claimant;
  - ii. Barring the individual Respondents for a period of one year from the date of termination of their employment with Claimant (plus an additional period to cover the time of any breach of each such Respondent's obligations to Claimant), from soliciting or otherwise attempting to conduct any brokerage or other financial services business with any customer of Claimant (other than members of Respondents' immediate family) whose name became known to such Respondent while in the employ of Claimant, or to whom Respondent provided any service while in the employ of Claimant;
  - iii. Barring the individual Respondents for a period of one year from the date of termination of their employment with Claimant (plus an additional period to cover the time of any breach of each such Respondent's obligations to Claimant), from soliciting any employee of Claimant to terminate his or her employment with Claimant;
  - iv. Barring Prudential (A) from aiding and abetting any breach by the individual Respondents of their respective fiduciary and contractual obligations to Claimant, and (B) from accepting any customers of Claimant or accounts that either such Respondent directly or indirectly solicited in breach of his fiduciary and contractual obligations to Claimant;
  - v. Barring all Respondents from accepting business from any customers of Claimant or accounts that, in whole or in part, Respondents obtained through the use of Claimant's information;
  - vi. Directing all Respondents to return to Claimant any of its information that they may have in their possession, custody, or control; and
  - vii. Awarding Claimant its costs, disbursements, and reasonable attorneys' fees incurred in connection with this arbitration proceeding;

- g. On the Seventh Claim for Relief:
  - i. A declaration that Respondent Marini is obligated to repay Claimant the unpaid principal sum due and owing under the January 1999 Promissory Note, to wit: the principal sum of \$112,500.00, together with interest, costs, and expenses (including attorneys' fees) pursuant to such Note, and
  - ii. An Award of damages to Claimant in such amount;
- h. On the Eighth Claim for Relief:
  - i. A declaration that Respondent Marini is obligated to repay Claimant the unpaid principal sum due and owing under the March 1999 Promissory Note, to wit: the principal sum of \$28,125.00, together with interest, costs, and expenses (including attorneys' fees) pursuant to such Note, and
  - ii. An Award of damages to Claimant in such amount; and
- i. An Award to Claimant of such other and further relief as the Panel may deem just, proper, and equitable.

Respondents requested that Claimant's Claim be denied in its entirety and that the Panel enter an Order:

- a. Requiring Claimant to comply with Section 11870 of the NASD Uniform Practice Code and NYSE Rule 412 (which require member firms to cooperate in processing account transfer forms);
- b. Requiring Claimant to effect transfers of accounts in compliance with client instructions within three business days and otherwise pursuant to the rules and regulations of the National Securities Clearing Corporation;
- c. Enjoining Claimant not to interfere with the right of the individual Respondents' clients to receive advice and services from them;
- d. Requiring Claimant to refrain from misleading the individual Respondents' clients concerning their whereabouts and current affiliation;
- e. Requiring Claimant to refrain from misleading the individual Respondents' clients concerning the circumstances of, and reasons for, their change of employment;
- f. Requiring Claimant to refrain from misleading the individual Respondents' clients concerning their ability to continue to serve as their financial advisor or their right to have their accounts transferred;
- g. Requiring Claimant to refrain from filing a Form U-5 falsely indicating that the individual Respondents have engaged in wrongdoing in connection with their change of employment including, but not limited to, their retention of information concerning their clients;
- h. Requiring Claimant to pay the individual Respondents all earned and unpaid compensation and/or benefits;

- i. Requiring Claimant to adhere to the provisions of Rule 10106 of the NASD Code of Arbitration Procedure;
- j. Declaring that any account executive agreement signed by the individual Respondents is void and unenforceable;
- k. Granting the individual Respondents compensatory, consequential, and punitive damages on their Counterclaims in an amount to be determined at the hearing;
- l. Granting the individual Respondents commission checks and other compensation due and owing, and statutory damages and attorneys' fees; and
- m. Granting Respondents such other and further relief as the Panel deems just and proper.

#### **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.

#### **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. All claims by Claimant and Respondents for injunctive relief, punitive damages, and attorneys' fees are denied.
2. Respondents Amato and Prudential are liable, jointly and severally, and shall pay to Claimant, the sum of \$10,000.00 as compensatory damages.
3. Respondents Braccia and Prudential are liable, jointly and severally, and shall pay to Claimant, the sum of \$10,000.00 as compensatory damages.
4. Respondents DelRosso and Prudential are liable, jointly and severally, and shall pay to Claimant, the sum of \$10,000.00 as compensatory damages.
5. Respondents Zadwydas and Prudential are liable, jointly and severally, and shall pay to Claimant, the sum of \$10,000.00 as compensatory damages.
6. Respondents Marini and Prudential are liable, jointly and severally, and shall pay to Claimant, the sum of \$10,000.00 as compensatory damages.

7. Respondent Prudential is solely liable, and shall pay to Claimant, the sum of \$150,000.00 as compensatory damages.
8. Respondent Marini is solely liable, and shall pay to Claimant, the sum of \$110,937.50, being the balance due on his promissory notes, pro-rated at the date of his resignation, plus interest, at the rate of 9%, to the date of this Award, in the amount of \$14,976.56.
9. Claimant is liable, and shall pay to Respondents, unpaid commissions and/or liquidated damages pursuant to Section 198(1-a) of the New York Labor Law as follows:
  - a. to Respondent DelRosso, unpaid commissions of \$2,255.91 plus liquidated damages of \$563.98;
  - b. to Respondent Amato, unpaid commissions of \$2,486.72 plus liquidated damages of \$621.68;
  - c. to Respondent Braccia, unpaid commissions of \$2,351.81 plus liquidated damages of \$587.95;
  - d. to Respondent Marini, liquidated damages of \$747.17; and
  - e. to Respondent Zadwydas, liquidated damages of \$702.01.
10. All other requests for relief are hereby denied.

#### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 500.00
Injunctive Relief Fee	= \$ 2,500.00
Counterclaim filing fee	= \$ 250.00

### **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 persons at the time of the events giving rise to the dispute. In this matter, Dean Witter Reynolds, Inc. and Prudential Securities Incorporated are parties.

#### **Dean Witter Reynolds, Inc.**

Member surcharge	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,500.00

#### **Prudential Securities Incorporated**

Member surcharge	= \$ 1,200.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$ 2,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

April 6, 2001, adjournment by Claimant	= \$ 1,125.00
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### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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: July 19, 2001	1 session

Five (5) Pre-hearing sessions with Panel x \$1,125.00	= \$ 5,625.00
Pre-hearing conferences:	
November 1, 2000	1 session
November 6, 2000	1 session
December 6, 2000	2 sessions
October 17, 2001	1 session

Thirty-four (34) Hearing sessions x \$1,125.00	= \$38,250.00
Hearing Dates:	
November 7, 2000	2 sessions
December 8, 2000	2 sessions
December 18, 2000	1 session
January 29, 2001	2 sessions



February 1, 2001	2 sessions
February 7, 2001	2 sessions
February 9, 2001	1 session
April 30, 2001	2 sessions
May 3, 2001	2 sessions
June 15, 2001	2 sessions
June 26, 2001	2 sessions
August 3, 2001	2 sessions
August 17, 2001	2 sessions
August 21, 2001	2 sessions
September 5, 2001	2 sessions
November 15, 2001	2 sessions
November 29, 2001	2 sessions
December 3, 2001	2 sessions

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Total Forum Fees	= \$44,325.00
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1. The Panel has assessed \$22,162.50 of the forum fees against Claimant.
2. The Panel has assessed \$22,162.50 of the forum fees against Prudential.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant, requested tapes, \$735.00.
2. Respondents, requested tapes, \$705.00.

#### **Fee Summary**

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 500.00
Injunctive Relief Fee	= \$ 2,500.00
Member Fees	= \$ 4,300.00
Adjournment Fee	= \$ 1,125.00
Forum Fees	= \$22,162.50
<u>Administrative Costs</u>	= \$ 735.00
Total Fees	= \$31,322.50
<u>Less payments</u>	= \$ 7,500.00
Balance Due NASD Dispute Resolution, Inc.	= \$23,822.50

2. Prudential be and hereby is solely liable for:

Forum Fees	= \$22,162.50
<u>Member Fees</u>	<u>= \$ 4,300.00</u>
Total Fees	= \$26,462.50
<u>Less payments</u>	<u>= \$ 4,055.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$22,407.50

3. Amato, Braccia, Delrosso, Zadwydas, and Marini be and hereby is solely liable for:

<u>Counterclaim Filing Fee</u>	<u>= \$ 250.00</u>
Total Fees	= \$ 250.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 250.00

4. Respondents be and hereby are jointly and severally liable for:

<u>Administrative Costs</u>	<u>= \$ 705.00</u>
Total Fees	= \$ 705.00
<u>Less payments</u>	<u>= \$ 450.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$ 255.00

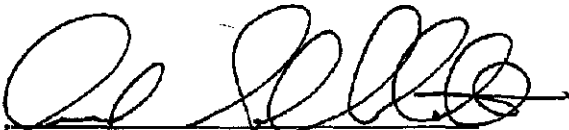
All balances are due and payable to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

David I. Goldblatt, Esq.	-	Public Arbitrator, Presiding Chair
Simon S. Kogan, Esq.	-	Public Arbitrator
Jonathan R. Morris, Esq.	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

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.



David I. Goldblatt, Esq.  
Public Arbitrator, Presiding Chair

4/3/02  
Signature Date

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Simon S. Kogan, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Jonathan R. Morris, Esq.  
Industry Arbitrator

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

April 16, 2002  
Date of Service (For NASD office use only)

**ARBITRATION PANEL**

David I. Goldblatt, Esq.	-	Public Arbitrator, Presiding Chair
Simon S. Kogan, Esq.	-	Public Arbitrator
Jonathan R. Morris, Esq.	-	Industry Arbitrator

**Concurring Arbitrators' Signatures**

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.

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David I. Goldblatt, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date



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Simon S. Kogan, Esq.  
Public Arbitrator

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Signature Date

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Jonathan R. Morris, Esq.  
Industry Arbitrator

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Signature Date

April 16, 2002

Date of Service (For NASD office use only)

**ARBITRATION PANEL**

David I. Goldblatt, Esq.	-	Public Arbitrator, Presiding Chair
Simon S. Kogan, Esq.	-	Public Arbitrator
Jonathan R. Morris, Esq.	-	Industry Arbitrator

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David I. Goldblatt, Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

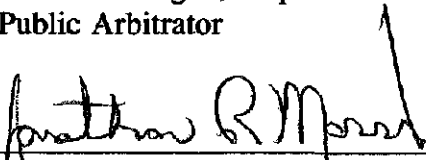
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Simon S. Kogan, Esq.  
Public Arbitrator

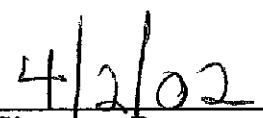
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Signature Date

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Jonathan R. Morris, Esq.  
Industry Arbitrator

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Signature Date

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April 16, 2002  
Date of Service (For NASD office use only)