

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the matter of the Arbitration Between

Charles R. Wallace, Claimant

and

No. 91-01055

**Prudential-Bache Securities Inc., Respondent
Arden H. Berg, Respondent**

ARBITRATORS AWARD

HEARD BEFORE:

John L. Evans, Jr.

Public Arbitrator

1. PARTIES:

Claimant: Charles R. Wallace

**Represented by: Walter V. Hines
Attorney at Law**

**Respondents: Prudential-Bache Securities, Inc.
Arden H. Berg**

**Represented by: Christopher P. Trapani
Attorney at Law**

2. CLAIM FILED:

The claim of Charles R. Wallace was filed with the National Association of Securities Dealers on April 2, 1991. The answer of Respondents was filed on May 20, 1991.

The Claimant's Submission Agreement was executed on March 13, 1991.

Respondents Prudential Securities Incorporated and Arden H. Berg executed their respective Submission Agreements on May 20, 1991.

3. STATEMENT OF CLAIM AND ISSUES IN THE CLAIM:

Claimant, a 57 year old medically retired bookkeeper, claims that Respondent Prudential-Bache and its registered representative, Respondent Arden H. Berg, breached their fiduciary duties to him and violated various applicable laws and regulatory requirements in soliciting purchases by Claimant on three separate occasions, of the common stock of Unilab Corporation, a stock which is traded over the counter. Claimant thereafter disposed of the stock in three separate transactions each of which yielded prices less than what Claimant paid for the stock and he seeks damages therefrom in the amount of \$8339 based upon the theory of a "well managed account" as he alleges the same to be set forth in Miley v. Oppenheimer & Co., 637 F2d 318 (Fifth Cir. 1981).

Respondents assert that (1) the purchase of the Unilab stock was not inappropriate for Claimant, at least in the initial instance and (2) the second and third purchases of the stock were made in unsolicited transactions and specifically made against the advice and recommendations of Respondent Berg. They further assert that Claimant would have sustained no loss had he held the stock till the present time. In the alternative Respondents assert that damages should be limited to actual losses incurred on the stock when it was sold.

Each party seeks to recover the costs of the arbitration plus attorneys fees and in the case of Claimant his Expert Witness fees.

4. RELIEF REQUEST

Claimant seeks compensatory damages in the amount of \$8,339. Respondents seek to have Claimants claim dismissed in its entirety.

5. THE HEARING

The hearing was held on September 4, 1991 at 1900 Fifth Third Center, 511 Walnut St., Cincinnati, Ohio and consisted of one hearing session. The record was left open for closing briefs by the parties which were submitted by September 19, 1991. This award was rendered on October 18, 1991.

6. AWARD

The claimant shall be entitled to recover from Respondents the amount of \$568.00 which represents the loss sustained on the 1250 shares of Unilab Corporation purchased by Claimant on the recommendation of Respondents on May 22, 1990 at a cost of

\$6.2845 per share and sold by Claimant on October 16, 1990 at a price of \$5.831 per share. Claimant shall have no recovery with respect to the purchases of Unilab Corporation which were subsequently made, as the Arbitrator finds that such purchases were in fact unsolicited and were initiated and directed by Claimant against the recommendation of Respondent Berg. Claimant shall be entitled to reimbursement of Arbitration fees in the amount of \$275 advanced by him, which shall be paid by Respondents to the National Association of Securities Dealers. Any additional costs of the arbitration shall be paid by Respondents. The claim for Punitive Damages and the claim for payment of Expert Witness fees is denied.

The claim included a claim for the payment of Claimant's attorney fees. No amount of such fees was adduced at the hearing, but Claimant's attorney specified in papers filed with the Arbitrator that he was working with a \$1,000 retainer to be applied against recovery on a 25% contingent fee arrangement. Since the recovery provided for in this award does not create any recoupment for the Claimant with respect to the retainer paid his attorney, the Arbitrator will assume that at least one half of the attorney time attributable to the retainer dealt with the initial purchase of Unilab Corporation shares for which Claimant is being allowed a recovery and accordingly awards attorney fees of \$500.00 to Claimant to be paid by Respondent.

Total award to Claimant:	
Damages -	\$568.00
Attorney fees-	\$500.00

7. FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASD, Inc. shall refund the fees previously deposited by Claimant and as directed above these fees are to be paid by the Respondents to the National Association of Securities Dealers, Inc.

This arbitration award signed the 18th day of October, 1991 at Cincinnati, Ohio.



John L. Evans, Jr., Arbitrator

DATED: October 23, 1991

FINDINGS OF FACT

1. Charles R. Wallace, the claimant, is a man who has engaged for most of his adulthood in the field of bookkeeping. He had no investing experience prior to becoming a client of Respondents Prudential-Bache Securities, Inc., and Arden H. Berg in the spring of 1989.
2. Mr. Wallace is a man of limited means, who was forced to retire from his last employment for medical reasons. Prior to his retirement, he was making \$6.00 per hour or approximately \$16,000 per year.
3. The reason for the first engagement of Respondents by Mr. Wallace was the death of his mother and the inheritance by Mr. Wallace of some \$50,000 for which he needed investment help.
4. The parties concur in the proposition that Mr. Wallace had investment goals of principal protection, income maximization and some growth consistent with the protection of principal. Among the initial investments counseled for Mr. Wallace were Certificates of Deposit and Utility Mutual Funds.
5. In May, 1990 one of the mutual funds in which Claimant was invested had declined in value and he wanted out of it. He also wanted a different investment in which he could seek a greater growth.
6. Respondent Berg recommended the purchase of Unilab Corporation, an over the counter company which in recent years had not had a significant record of earnings and had paid no dividends. The basis on which Berg recommended the stock was that Corning Incorporated had made an investment in the company and that within a year claimant could turn a good profit on his investment.
7. I find that Unilab Corporation was in May of 1990 a stock which would in no way meet the investment criteria of Claimant other than on the highly speculative assumption that Corning Incorporated would invest more money in Unilab and by virtue of its increased investment would cause the stock price of Unilab Corporation to rise. While this in fact appears to have happened it does not change the character of the investment which when made was not suitable nor appropriate for Claimant given his stated investment objectives.

8. I find from the testimony presented that Claimant initiated and directed the May 30, 1990 and June 12, 1990 purchases against the urging of Respondent Berg.
9. Following review of briefs from counsel, I find that Respondent did not violate its duties to Claimant in accepting and processing the May 30, 1990 and June 12, 1990 unsolicited trades which were made against respondents advice.
10. Respondents urge that since Unilab Corporation has proven to be a good buy Claimant if he had held the stock till August 30, 1991, a date just prior to the Arbitration, would have made a good profit thereon and that he should not be entitled to damages since he did not hold it till this time. I reject that theory. Indeed, Respondents would probably have sought to reduce damages for failure to mitigate had Claimant not sold his stock and it had continued its downward trend resulting in a greater loss.