

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

---

In the Matter of the Arbitration Between

Name of Claimant

Prudential-Bache Securities Inc.  
n/k/a Prudential Securities, Inc.

91-03873

Name of Respondent

Robert Cohen

---

REPRESENTATION

Claimant, Prudential-Bache Securities, Inc. n/k/a Prudential Securities, Inc. ("Prudential") was represented by Newman R. Porter, Esq. and Bradley P. Balson, Esq. of Lewis and Roca, Phoenix, Arizona.

Respondent, Robert Cohen ("Cohen") was represented by Marion Smith, II, Esq. and Linda S. Pacer, Esq. of White, Smith, Howard & Ajax, of Atlanta, Georgia.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") by Prudential on December 5, 1991.

Claimant, Prudential's Submission Agreement was signed on December 4, 1991 by Kevin Frawley, Vice President of Prudential Securities, Inc.

The Statement of Answer, Affirmative Defenses and Counterclaim was filed with the NASD by Respondent, Cohen on January 16, 1992.

Respondent, Cohen's Submission Agreement was signed on January 15, 1992.

Prudential's Answer to the Counterclaim was filed with the NASD on March 19, 1992.

Cohen filed a Motion to Strike Prudential's Answer to the Counterclaim

with the NASD on March 21, 1992.

Cohen filed a First Amended Answer, Affirmative Defenses and Counterclaim with the NASD on September 18, 1992.

Prudential filed a reply to the First Amended Answer, Affirmative Defenses and Counterclaim with the NASD on November 5, 1992.

### **HEARING INFORMATION**

Telephonic pre-hearing conferences which lasted for one (1) hearing session each were held on March 3, 1993, March 22, 1993 and March 25, 1993.

The hearing dates and number of hearing sessions on each respective hearing date were as follows:

March 30, 1993 for one (1) hearing session;  
May 25, 1993 for three (3) hearing sessions;  
May 26, 1993 for two (2) hearing sessions;  
May 27, 1993 for two (2) hearing sessions; and,  
October 21, 1993 for two (2) hearing sessions.

The hearing location was Scottsdale, Arizona.

### **CASE SUMMARY**

Claimant, Prudential, alleged that Respondent, Cohen voluntarily entered into an employment agreement with Prudential on September 19, 1990. Upon Cohen's employment with Prudential, he was loaned the sum of \$417,982.00 which sum was evidenced by a promissory note. Prudential alleged that Cohen voluntarily signed that note concurrent with the execution of his employment agreement. The terms of the note stated that it would be repaid in four equal annual installments of \$104,892, plus interest accrued on the eleventh day of September 1991, 1992, 1993 and 1994. The note further provided that the loan would become immediately due and payable upon the termination, for whatever reason, of Cohen's employment with Prudential.

Cohen resigned his employment with Prudential on or about September 27, 1991 upon which the balance of the note principal became due and owing to Prudential. Under the terms of the note, Prudential was obligated to pay to

Cohen, as transitional compensation, the sum of \$417,982.00 plus 10% interest, in four equal installments of \$104,473.00 on the eleventh day of September, 1991, 1992, 1993 and 1994. Prudential asserted that it was not obligated to pay any installments of unearned transitional compensation if Cohen resigned or was terminated for cause prior to completion of four years of employment.

In addition, Prudential asserted that Cohen was indebted to Prudential in the sum of \$73,750.00 based upon trading errors which he caused. This sum was as a consequence of Cohen's solicitation and sale of a security, Ann Taylor warrants, that was not blue skied in the state of Arizona. Despite Prudential's demand to Cohen to repay the principal of the note and the amount of the trading errors caused by him, Cohen has refused to honor his obligations.

Respondent, Cohen alleged that Prudential's statements and actions in recruiting and hiring him were based on fraud and misrepresentations and the employment agreement and promissory note were executed under legal duress. Cohen asserted that any debt allegedly owed to Prudential is therefore void and unenforceable as a matter of law. In addition, Cohen asserted that Prudential exonerated him in the sale of the Ann Taylor warrants which were allegedly not blue skied in the state of Arizona and this issue was never raised until six months after Cohen's resignation from Prudential.

Cohen specifically alleged that at no time during his pre-employment discussion with Prudential was he ever advised that the "transitional compensation" was merely a loan to him which must be repaid and the letter agreement did not specifically include such a provision. Cohen asserted that when he signed the agreement and promissory note, he pointed out the inconsistencies to the branch manager, Nicholas Meris. Cohen asserted that Meris advised him that if he sought legal advice or failed to sign the documents as drafted, Cohen would be immediately terminated by Prudential. Cohen alleged that he had already resigned from Shearson, purchased a new home in Scottsdale, Arizona and transferred many of his accounts to Prudential, he had no choice but to sign the documents in order to save his book of business. Cohen alleged that he would never have accepted the position with Prudential if he knew of the conditions imposed upon him which were the payment of transitional compensation only if Cohen remained in the employ of Prudential for four years and the fact that he could be terminated for cause if he failed to produce minimum gross commissions of \$348,242.00 during any six month period.

Prudential answered the counterclaim and denied the allegations and

asserted that Cohen knew and understood the terms and obligations he had when he accepted employment with Prudential.

Cohen filed an amended counterclaim wherein he asserted a claim for violation of Section 970 of the California Labor Code.

Prudential answered the amended counterclaim and asserted that Cohen waived any such claim and his claim for double damages under this statute was barred by Section 340 of the California Code of Civil Procedure.

**RELIEF REQUESTED**

Prudential requested the sum of \$313,419.00 based on Cohen's default in repayment of the Note, interest on that sum, at the contract rate of 10% per annum from September 19, 1990, to the date of payment, \$73,750.00 based upon Cohen's failure to comply with Blue Sky regulations, the costs of collection and of this proceeding including reasonable attorney's fees as Cohen agreed to pay under the terms of the Note, and any other relief as the arbitrators deemed fit.

Cohen requested dismissal of the claim and an award on his counterclaim in the following approximate amounts:

- a. payment of the balance of his transitional compensation as specified in the letter Agreement dated August 23, 1990 for \$313,419.00;
- b. loss from the sale of San Francisco home for \$300,000.00;
- c. loss from sale of Scottsdale home for \$200,000.00;
- d. relocation costs from San Francisco to Scottsdale and from Scottsdale to Atlanta for \$25,000.00;
- e. the difference between his present salary and salary he would have earned but for Prudential's misrepresentations, in an amount to be determined by the arbitration panel; and,
- f. for all costs, expenses and disbursements, including attorney's fees associated with this arbitration proceeding.

Prudential requested dismissal of Cohen's Counterclaim in its entirety.

**OTHER ISSUES CONSIDERED & DECIDED**

During a pre-hearing conference, the panel of arbitrators considered Cohen's Motion to bar Prudential's Answer to his counterclaim as untimely. The panel denied the motion and ruled to allow Prudential's reply to the counterclaim.

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 and post hearing briefs on the issue of attorney's fees, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

**PRUDENTIAL'S CLAIM AGAINST COHEN**

1. In connection with Prudential's claim regarding the promissory note, the panel finds in favor of Prudential and against Robert Cohen in the principal amount of \$313,419.00 and interest in the amount of \$66,118.53, for a total award in the amount of \$379,537.53. The panel also awards continuing and accruing interest at the promissory note rate of 10%, which yields additional interest in the amount of \$85.8682 per day, commencing on October 22, 1993, to and including the day the award is paid in full;

2. In connection with Prudential's claim regarding the Ann Taylor warrants, the panel finds in favor of Prudential and against Robert Cohen in the total amount of \$36,875.00. No interest is awarded or will accrue on this amount;

3. Cohen is liable for and shall pay to Prudential, its reasonable attorney's fees incurred to collect on the Promissory Note executed by Cohen on September 19, 1990 pursuant to the paragraph of the Promissory Note set forth below:

" It is expressly understood and agreed that in the event of default in any of the provisions of this Note, by the undersigned, the undersigned agrees to pay all costs of collection, including reasonable attorney's fees whether incurred by P-B Securities' in-house legal staff or outside counsel."

Unless a sum is agreed to between the parties, Claimant's attorney is to submit an affidavit of attorney's fees and costs to the NASD within 7 (seven) days of receipt of this award. Respondent's attorney will then submit his response to the NASD within 14 (fourteen) days of receipt of this award. The submissions of the parties will then be forwarded to the arbitration panel for its review and consideration. Upon determination of a reasonable attorney's fee, the panel will issue an Order detailing the amount of attorney's fees Cohen is to pay Prudential. No attorney's fees are awarded to Prudential in connection with the recovery on the Ann Taylor warrants portion of their claim; and,

#### **COHEN'S COUNTERCLAIMS AGAINST PRUDENTIAL**

4. With regard to the counterclaims of Robert Cohen against Prudential, the panel finds in favor of Prudential and awards no recovery to Robert Cohen.

#### **FORUM FEES**

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD will retain the \$500.00 non-refundable filing fee and the \$750.00 hearing session deposit previously made with the NASD by Prudential. In addition, the NASD shall retain the \$500.00 non-refundable counterclaim filing fee and the \$1000.00 hearing session deposit previously made with the NASD by Cohen. Cohen is assessed additional Forum Fees in the sum of \$9150.00.

Forum Fees were calculated at the rate of \$1000.00 per hearing session for ten (10) hearing sessions and \$300.00 for each of the three (3) pre-hearing conferences.

The NASD will also retain the \$1000.00 postponement fee paid by Cohen to obtain a postponement of a previously scheduled hearing date.

**NASD ARBITRATION NO. 91-03873**  
**AWARD      Page 7 of 7**

Additional Forum Fees assessed to the parties are payable to the National Association of Securities Dealers, Inc.

**Concurring Arbitrators' Signatures**  
**Name**

|                             |                         |
|-----------------------------|-------------------------|
| <u>/s/ Steven R. Chanen</u> | <u>January 25, 1994</u> |
| Steven R. Chanen, Esq.      | Dated                   |
| Presiding Chairperson       |                         |
| Industry Arbitrator         |                         |

|                           |                         |
|---------------------------|-------------------------|
| <u>/s/ Charles Taylor</u> | <u>January 22, 1994</u> |
| Charles Taylor            | Dated                   |
| Panelist                  |                         |
| Industry Arbitrator       |                         |

|                               |                         |
|-------------------------------|-------------------------|
| <u>/s/ James M. Rapisarda</u> | <u>January 24, 1994</u> |
| James M. Rapisarda            | Dated                   |
| Panelist                      |                         |
| Industry Arbitrator           |                         |

Date award served on the parties by the NASD: February 3, 1994