

AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC. OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Everen Securities, Inc.,

Claimant

and

Case Number 96-03254

David W. Cade,

Respondent.

REPRESENTATION OF PARTIES

Claimant, Everen Securities, Inc. was represented by Ronald P. Kane, Esquire and Diane C. Fischer, Esquire of Gomberg, Kane & Fischer, Ltd. located in Chicago, IL.

Respondent, David W. Cade appeared pro se.

CASE INFORMATION

The Statement of Claim was filed by Everen Securities, Inc. on or about July 30, 1996.

The Submission Agreement of Claimant, Everen Securities, Inc. was signed on July 29, 1997 by A. Brad Busscher, Esquire, Senior Vice President and Senior Attorney.

The Statement of Answer and Counter-Claim was filed by Respondent, David W. Cade on or about October 29, 1996.

The Submission Agreement of Respondent, David W. Cade was signed on October 29, 1996.

HEARING INFORMATION

The hearing was held on September 10, 1997 for two (2) sessions and on September 11, 1997 for two (2) sessions

The hearing was held in Houston, TX.

CASE SUMMARY

In the Statement of Claim, Everen Securities, Inc. ("Claimant" or "Everen") sought to recover monies allegedly owed by David W. Cade ("Respondent" or "Mr. Cade") for breach of two promissory notes. On March 15, 1994, the parties voluntarily entered into a promissory note ("Note 1") whereby Respondent was loaned the sum of \$118,530.00 by Claimant. According to the terms of Note 1, Respondent allegedly agreed to repay the \$118,530.00 in one lump sum on April 10, 1998 plus interest while Everen agreed to forgive 1/4 of the principal balance plus interest annually on April 10, 1995, April 10, 1996, April 10, 1997 and April 10, 1998. As alleged, the parties entered voluntarily into another promissory note ("Note 2") on June 12, 1995 for which Respondent received a \$85,577.00 loan from Claimant. The terms of Note 2 allegedly provided that Respondent agreed to repay Claimant a lump sum payment of \$85,577.00 on June 10, 1998 plus interest which Everen would forgive 1/3 of the principal balance annually plus interest on June 10, 1996, June 10, 1997 and June 10, 1998. Claimant contended that Notes 1 and 2 contained provisions where if Respondent's employment terminated for any reason whatsoever during the terms of the Notes, Everen could declare the remaining balances on the Notes immediately due and payable. Claimant further contended that Notes 1 and 2 provided that interest on the remaining balances would accrue at the rate of 9% from date of termination until paid. Mr. Cade resigned from Everen on February 16, 1996. According to Claimant, the remaining principal balances on Notes 1 and 2 were \$88,897.50, and \$85,577.00, respectively, plus interest. Despite several demands, Respondent failed and refused to honor his obligation to Everen.

In his Statement of Answer, Mr. Cade denied the allegations made by the Claimant and specifically alleged that he entered into an employment agreement of four years in which he accepted a total sum of \$204,107.00. Allegedly, this agreement between Mr. Cade and the branch manager was that if Respondent believed his business was adversely effected for any reason, then the amount to be repaid would be pro-rated daily over the period employed. Respondent alleged that he felt his business was irreversibly affected when the firm changed ownership and became Everen Securities, Inc., successor in interest to Kemper Securities Inc. According to Mr. Case, the balance due was \$104,094.57 since he worked for Respondent from March 11, 1994 until February 16, 1996 or a total of 709 days out of 1,461.00 equalling 49% of the agreed period.

In his Counter-claim, Mr. Cade alleged that Everen, with intent to obtain advantage to retain clientele, willfully detained the transfer of his securities license to PaineWebber, Inc. As alleged, Everen also failed to compensate or send to him a final summary for production for the period of February 10, 1996 through February 16, 1996. In addition, Everen allegedly failed to reimburse Mr. Cade \$1,037.38 in expenses for which he filed an expense report on February 1, 1996. On or about July 3, 1996, Everen allegedly filed an amended Form U-5 containing an erroneous report damaging Mr.

Cade's reputation of high ethics which had been maintained during his eleven years in the securities business. Although Everen submitted another amended Form U-5, Mr. Cade allegedly had a "status Z" notation on CRD with the NASD which clouded his permanent record. Finally, Respondent alleged that Claimant adversely impacted and undermined his ability to generate business by its changed of name and ownership resulting in a reduction of average monthly production.

Everen denied all allegations made by Mr. Cade claiming that it could not provide clearance to Mr. Cade on February 16, 1996 until a customer complaint issue was resolved. Everen denied owing the Respondent commissions and expenses since Respondent allegedly had a commission deficit of \$2,049.94 on his final commission run, as provided in the terms of the Notes. Everen contended that its second amended Form U-5 clearly stated the first amended Form U-5 was filed in error. Claimant asserted that the decreases in production by Mr. Cade primarily a function of his own efforts and Everen was not a guarantor of production level nor under an obligation not to change ownership of the company or the company's name

RELIEF REQUESTED

Everen Securities, Inc. requested an award for \$88,897.50 for the principal on Note 1, \$4,558.32 in interest during the term of Note 1; \$8,153.20 in interest on Note 1 plus \$21.92 a day in interest from July 29, 1997 until paid; \$85,577.00 for the principal on Note 2; \$7,546.49 in interest plus \$21.10 in interest per day from July 29, 1996 to date of payment; costs; and attorneys' fees. Everen also request that the Counter-Claim submitted by Mr. Cade be dismissed with prejudice.

David W. Cade requested an award for the following amounts: \$50,000.00 as restitution for delay in transferring his license; \$5,000.00 for commissions; \$1,037.38 in expenses; \$50,000.00 for damage to his permanent record; and \$8,700.00 for reduction in monthly production.

OTHER ISSUES CONSIDERED & DECIDED

On or about August 15, 1997, David W. Cade filed a motion to preclude the Everen from presenting defenses to the counter-claim. After review and consideration of the motion and response, the undersigned arbitrators denied the motion.

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 original(s) remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, David W. Cade is liable for and shall pay to Claimant, Everen Securities, Inc. the sum of \$245,503.12 in damages. This amount is the sum of the following amounts: \$106,037.90 for the principal and interest on Note 1; \$101,774.49 for the principal and interest on Note 2; \$34,968.00 in attorneys' fees as provided by the terms of the Notes and \$2,722.73 in costs.
2. Respondent, David W. Cade's Counter-Claim is denied in its entirety and dismissed with prejudice.
3. Other than forum fees, which are specifically addressed below, all other claims and requests for relief not specifically awarded here are denied in their entirety and dismissed with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There were four (4) hearing sessions x \$750.00 = \$3,000.00 in forum fees. Pursuant to §10205(b) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500.00, the \$350.00 member surcharge imposed pursuant to §103343 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant, Everen Securities, Inc.

Pursuant to §10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall also retain the non-refundable filing fee in the amount of \$500.00 and shall retain as forum fees the hearing session deposit in the amount of \$750.00 previously deposited by Respondent, David M. Cade. David M. Cade is liable for and shall pay to Claimant, Everen Securities, Inc. the sum of \$750.00 as reimbursement of its hearing session deposit. In addition, David M. Cade is liable and shall pay to the NASD Regulation, Inc. the amount of \$1,500.00 in additional forum fees.

Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Arbitrators' Signatures:

Dated:

Robert N. Mackey
Robert N. Mackey
Industry Arbitrator, Presiding Chair

September 22, 1997

Thomas H. Vann
Thomas H. Vann
Industry Arbitrator, Panelist

September 22, 1997

Ronald R. Simpson
Ronald R. Simpson
Industry Arbitrator, Panelist

September 22, 1997

For NASD use only
Date served: October 6, 1997