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UBS Loses Claim for \$1.2 Million Note Balance from Broker

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(Corrects dollar amount in headline to \$1.2 million, not \$1.9 million.)

A divided arbitration panel in New York denied UBS Financial Services' claim to collect \$1.18 million on a promissory note from a former broker who left the firm, according to an award posted on Finra's dispute resolution site on Thursday.

The decision is unusual since notes that brokers sign obligating repayment of "forgivable" loans tied to signing or retention bonuses are contractually due if they leave a firm, lawyers said.

UBS brought its claim against Benjamin Marcano, who left the broker-dealer in March 2015 after four-and-a-half years to join Wells Fargo Advisors. It sought the balance on his note, plus accrued interest and the costs of arbitration.

The three-person arbitration panel denied UBS's claim in its entirety, and also denied Marcano's counterclaim for unspecified compensatory and punitive damages. One of the arbitrators dissented from the decision, but neither he nor the majority explained their decisions.

Marcano argued that the promissory note was invalid because UBS breached its own employment policies that the broker relied on when he signed the note, according to Jarrod J. Malone, the lawyer at Shumaker, Loop & Kendrick who represented the broker.

The firm permitted another UBS broker in New York City in another complex to "poach" Marcano's top client, who represented about half of his book and who often referred people to the broker, Malone said. Since UBS and branch officials looked the other way, in violation of its solicitation guidelines, Marcano had no choice but to quit, he explained.

"There is a growing sense among arbitrators that firms must take into account the equitable circumstances of an FA's departure," the lawyer said in a prepared statement. "No longer will a note be enforced simply because it's a note."

In the rare cases where brokerage firms lose note-balance claims, brokers present compelling monetary evidence of damages that offset the amount owed, other lawyers said.

"I don't think there's any way that a firm loses unless there's a very compelling set of facts supporting the counterclaim," said Ethan Brecher, a lawyer in New York who often represents brokers.

The majority arbitrators did "split the baby" by cancelling the note balance instead of awarding damages sought in the counterclaim, according to Malone. The offsetting factor was the revenue Marcano lost as a result of the poached client, he said.

He blamed his client's woes more on the poaching colleague, who he declined to name, than on UBS, but said the decision should send a message to firms pressing to collect on notes.

"They would be better served if they took the circumstances of of the FA's departure into consideration," Malone said.

A UBS spokesman did not respond to a request for comment, and Marcano did not return calls to his office at Wells Fargo and to his personal phone number.

