

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Dean Witter Reynolds, Inc.,

Claimant,

and

No. 96-00064

Bryan J. O'Leary,

Respondent,

REPRESENTATION OF PARTIES

Claimant Dean Witter Reynolds, Inc. was represented by Will Montgomery, Esquire of Jenkins & Gilchrist located in Dallas, Texas.

Respondent Bryan J. O'Leary was represented by John E. Dees, Esquire, solo practitioner, of Dallas, Texas.

CASE INFORMATION

Claimant Dean Witter Reynolds, Inc.'s Statement of Claim was filed on or about January 5, 1996. Claimant Dean Witter Reynolds, Inc.'s Submission Agreement was signed on January 2, 1996 by Ralph P. Schiavo, Vice President of Dean Witter Reynolds, Inc.

Respondent Bryan J. O'Leary's Statement of Answer was filed on or about February 28, 1996. Respondent Bryan J. O'Leary also submitted a letter incorporating corrections into his Statement of Answer on or about November 25, 1996. Respondent Bryan J. O'Leary's Submission Agreement was signed on February 26, 1996.

HEARING INFORMATION

No pre-hearing conferences were held.

The hearing was held on January 27, 1997 for three (3) sessions.

The hearing was held in Dallas, Texas.

CASE SUMMARY

Claimant Dean Witter Reynolds, Inc. ("Dean Witter" or "Claimant") alleged that respondent Bryan J. O'Leary ("Respondent") is liable for an amount due on an Account Executive Incentive Compensation Agreement (the "Agreement"). Claimant asserted that on September 15, 1993 Respondent signed the Agreement, which stated that Respondent would receive a monthly payout of \$6,000 on all gross commissions earned during the first 16 weeks of his employment with Dean Witter. Claimant further asserted that Respondent, by entering into the Agreement, agreed to reimburse Dean Witter a prorated portion of the incentive compensation, which was reduced by 1/48 each month of his employment with Dean Witter. According to Claimant, on December 31, 1994, Respondent voluntarily terminated his employment with Dean Witter. Consequently, Claimant argued, Respondent received \$80,315.00 between September 15, 1993 and December 31, 1994, of which he is only entitled to \$26,771.68, the amount he actually earned during this period, and Respondent has failed to pay the remaining \$53,543.32 due and owing Claimant pursuant to the Agreement.

Respondent acknowledged that he was employed with Dean Witter during the dates specified and that he entered into the Agreement, but he denied that he is indebted to Claimant as it alleged. Respondent asserted that his employment with Dean Witter was induced by misrepresentations of material facts. Respondent specifically alleged that Claimant promised that he would work in a particular group of people with already established leads to potential clients, which were not provided as promised. In addition, Respondent contended that it was agreed that he would be paid a minimum of \$6,000 per month, that the commissions generated would not equal his draw, and that there would be no charge back to him of any shortfall.

RELIEF REQUESTED

Claimant Dean Witter Reynolds, Inc. requested an award for: compensatory damages in the amount of \$53,543.32 plus accrued interest at the legal rate from December 31, 1994 through the date of this award; costs of arbitration; and attorneys' fees.

Respondent Bryan J. O'Leary requested that he be entitled to a total offset for all amounts claimed.

OTHER ISSUES CONSIDERED & DECIDED

Due to an administrative delay of the inception of the hearing in the arbitration of this matter, the NASD Regulation, Inc. Office of Dispute Resolution will bear the cost of one (1) hearing session.

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 NASD Regulation, Inc. Office of Dispute Resolution.

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 Bryan J. O'Leary is liable for and shall pay claimant Dean Witter Reynolds, Inc. compensatory damages in the amount of \$14,000;
2. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were three (3) hearing sessions $\times \$600 = \$1,800$ in total forum fees. Pursuant to §10332(b) of the NASD Code of Arbitration Procedure (the "Code") 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, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Dean Witter Reynolds, Inc.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant Dean Witter Reynolds, Inc.

Claimant Dean Witter Reynolds, Inc. is further liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution forum fees in the amount of \$600 ($= \$1,800$ total forum fees - \$600

hearing session deposit - \$600 for one session covered by the NASD Regulation, Inc. Office of Dispute Resolution).

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

Dated:

/s/ Jack R. Settles
Jack R. Settles, Jr., Esquire
Industry Arbitrator

March 5, 1997

/s/ Stephen C. Thayer
Stephen C. Thayer, Esquire
Industry Arbitrator, Presiding Chair

March 5, 1997

/s/ Henry Hermann
Henry Hermann
Industry Arbitrator

March 6, 1997