

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Dean Witter Reynolds, Inc.,

Claimant,

v.

No. 96-04396

Rauscher Pierce Refsnes, Inc.,
and Thorne Robalin,

Respondents.

REPRESENTATION OF PARTIES

Claimant Dean Witter Reynolds, Inc. was represented by Paul M. Green, Esquire of Lang, Ladon, Green, Coghlan & Fisher located in San Antonio, Texas.

Respondents Rauscher Pierce Refsnes, Inc. and Thorne Robalin were represented by Michael J. McAllister, Esquire of Lane & Mittendorf, LLP located in New York, New York.

CASE INFORMATION

Claimant Dean Witter Reynolds, Inc.'s Statement of Claim was filed on or about October 3, 1996.

Respondents Rauscher Pierce Refsnes, Inc. and Thorne Robalin's joint Statement of Answer was filed on or about October 8, 1996.

HEARING INFORMATION

The hearing was held on October 18, 1996 for two (2) sessions in Houston, Texas.

CASE SUMMARY

Claimant Dean Witter Reynolds, Inc. ("Claimant") alleged that Respondent Thorne Robalin ("Respondent Mr. Robalin"), an employee of Claimant until September 27, 1996 who is currently employed by Respondent Rauscher Pierce Refsnes, Inc. ("Respondent Rauscher"), (hereafter collectively referred to as "Respondents") either subsequent or prior to his termination and in violation of his employment agreement with Claimant, solicited certain customers of Claimant and encouraged them to transfer their accounts to Respondent Rauscher under his prospective

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management. Claimant further alleged that Respondent Robalin had copied or otherwise obtained its records, in written and computerized form, and had failed, upon demand, to return them upon demand, also in violation of his employment agreement with Claimant. Claimant asserted that in excess of ten of its customers had indicated that they would be transferring their accounts to Respondent Rauscher under Respondent Robalin's management. In addition, Claimant asserted that its records in the possession of Respondent Robalin include confidential customer information, proprietary information, trade secrets, and lists of customer accounts and other account information, as well as leads about its current and prospective customers. Claimant made other specific claims including, but not limited to, (1) application for injunctive relief under Section 10335(g) of the Code of Arbitration Procedures to enjoin Respondents from soliciting Claimant's clients, converting Claimant's property to their own use, and requiring Respondents to return all original and copied records; (2) conversion; (3) misappropriation of confidential information; (4) common law misappropriation; (5) tortious interference with employment contract; (6) tortious interference with Claimant's contracts with its customers; (7) breach of fiduciary duty by Respondent Robalin; and (8) breach of contract by Respondent Robalin.

Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that Claimant constructively discharged Respondent Robalin by failing to provide him with the support it promised him, and that, therefore, any restrictive covenants contained in any employment agreement were thereby nullified. According to Respondents, the acts of Claimant constituted a breach of an implied covenant of good faith in the employment contract, which effectively released Respondent Robalin from any obligation under this agreement. Respondents further stated that Respondent Robalin was an at will employee of Claimant and that even if he did sign an employment contract, that contract had expired or was otherwise unenforceable.

RELIEF REQUESTED

Claimant Dean Witter Reynolds, Inc. requested an award for: actual damages from loss of commission revenue, reimbursement of respondent Thorne Robalin's travel and expenditure allowance, reimbursement of respondent Thorne Robalin's seminar and remodeling expenses and other expenses advanced, and the value of personal property not returned; attorneys' fees of at least \$75,000; pre-award interest; and post-award interest.

Respondents Rauscher Pierce Refsnes, Inc. and Thorne Robalin requested: that Claimant Dean Witter Reynolds, Inc. be enjoined from interfering with Respondent Thorne Robalin's ability to solicit or otherwise compete for the business of his clients; and that it be declared that Respondent Thorne Robalin did not engage in any wrongful conduct, Claimant Dean Witter Reynolds, Inc. constructively discharged Respondent Thorne Robalin, thereby breaching any employment agreement that may have existed and nullifying any restrictive covenant, and Respondent Thorne Robalin is not liable to Claimant Dean Witter Reynolds, Inc. in damages or otherwise.

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OTHER ISSUES CONSIDERED & DECIDED

Claimant Dean Witter Reynolds, Inc., Respondent Rauscher Pierce Refsnes, Inc. and Respondent Thorne Robalin did not file with NASD Regulation, Inc. Office of Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to Section 10301 of the Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted. Claimant Dean Witter Reynolds, Inc., Respondent Rauscher Pierce Refsnes, Inc. and Respondent Thorne Robalin stated on the record at the hearing that they would submit to arbitration pursuant to Section 10301 of the Code of Arbitration Procedure and would be bound by the determination of the arbitrators on all issues.

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) That with respect to the Claimant Dean Witter Reynolds, Inc.'s claims for the following, the arbitrators have ruled as follows:
 - (A) An Application for Injunctive Relief is hereby granted as more fully described below;
 - (B) Conversion is hereby denied in its entirety with prejudice;
 - (C) Misappropriation of Confidential Information is hereby denied in its entirety with prejudice;
 - (D) Common Law Misappropriation is hereby denied in its entirety with prejudice;
 - (E) Tortious Interference With Contract is hereby denied in its entirety with prejudice;
 - (F) Tortious Interference With Dean Witter Reynolds, Inc.'s Contracts With Its Customers is hereby denied in its entirety with prejudice;
 - (G) Breach of Fiduciary Duty by Respondent Thorne Robalin is hereby denied in its entirety with prejudice; and
 - (H) Breach of Contract by Respondent Thorne Robalin is hereby granted as more fully described below;
- (2) That, except as otherwise provided hereinbelow, for a period of time through and including December 31, 1996, Respondent Thorne Robalin, directly, and Respondent Rauscher Pierce Refsnes, Inc. indirectly through its employees or other associated persons, are enjoined from

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soliciting or attempting to solicit any of Claimant Dean Witter Reynolds, Inc.'s customers living within a twenty-five (25) mile radius of Claimant Dean Witter Reynolds, Inc.'s San Antonio, Texas branch office who were served by or whose names became known to Respondent Thorne Robalin while in the employ of Claimant Dean Witter Reynolds, Inc. with respect to securities, commodities, financial futures, insurance, tax advantaged investments, mutual funds or any other line of business in which Claimant Dean Witter Reynolds, Inc. or any of its affiliates is engaged;

- (3) That all of the above accounts which may already have been transferred to Respondent Rauscher Pierce Refsnes, Inc. or for which transfer is currently pending in the Automatic Customer Account Transfer System or which customers may on their own, without the solicitation prohibited above, seek to have transferred to Respondent Rauscher Pierce Refsnes, Inc., may, for the period of time through and including December 31, 1996, be received and serviced by Respondents Rauscher Pierce Refsnes, Inc. and Thorne Robalin, but all gross commissions earned thereon during that period of time (as defined by trade date) shall be promptly (i.e. within thirty (30) calendar days of each transaction) remitted by Respondent Rauscher Pierce Refsnes, Inc. to Claimant Dean Witter Reynolds, Inc., and Respondent Rauscher Pierce Refsnes, Inc. shall provide Claimant Dean Witter Reynolds, Inc. with a duplicate confirmation of each transaction at the same time it is provided to the customer;
- (4) That after December 31, 1996, all the parties may freely compete for all customers and retain commissions as they would in the normal course of business, except for any continuing obligation of Respondent Rauscher Pierce Refsnes, Inc. to transmit to Claimant Dean Witter Reynolds, Inc. gross commissions generated on or before December 31, 1996; and
- (5) The parties shall bear their own costs including attorneys' fees; and
- (6) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded are hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$600.00 per hearing session. There were two (2) sessions x \$600.00 = \$1,200.00 in forum fees. Pursuant to Section 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 Sections 10205 and 10333 of the Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500.00, the non-refundable surcharge in the amount of \$2,500.00, the member surcharge in the amount of \$350.00, the and shall retain as forum fees the hearing session deposit in the amount of

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\$600.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by
Claimant Dean Witter Reynolds, Inc.

Pursuant to Section 10333 of the Code of Arbitration Procedure, NASD Regulation, Inc. Office
of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$350.00
previously paid by Respondent Rauscher Pierce Refsnes, Inc.

Pursuant to Section 10205 of the Code of Arbitration Procedure, Respondents Thorne Robalin and
Rauscher Pierce Refsnes, Inc. are hereby, jointly and severally, liable for and shall pay to the NASD
Regulation, Inc. Office of Dispute Resolution the sum of \$600.00 in forum fees. Respondents
Thorne Robalin and Rauscher Pierce Refsnes are hereby, jointly and severally, liable for and shall
pay to Claimant Dean Witter Reynolds, Inc. the sum of \$1,500.00 as reimbursement for 50% of the
non-refundable claim filing fee of \$500.00 and the non-refundable surcharge of \$2,500.00.

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

Signed:

Dated:

Marshall H. Lichtenstein, Esquire
Marshall H. Lichtenstein, Esquire
Industry Arbitrator, Presiding Chair

October 29, 1996

Laila M. Asmar, Esquire
Laila M. Asmar, Esquire
Industry Arbitrator

October 29, 1996

Ramona V. Larson
Ramona V. Larson
Industry Arbitrator

October 28, 1996

Date served by the NASD Regulation, Inc.: October 29, 1996