

NASD REGULATION AWARD

In the Matter of the Arbitration Between

Name of Claimant

Dean Witter Reynolds Inc.

96-04978

Name of Respondents

Legg Mason Wood Walker, Inc.
Peter V. Caruso
Robert M. Cotter
Michael S. Kelleher
Mark G. Cote

REPRESENTATION

For Claimant Dean Witter Reynolds ("Claimant" or "Dean Witter") appeared Pete S. Michaels, Esq. and Neal F. Splaine, Esq. of the firm Murphy, MacKenzie, Michaels & Sullivan, LLP, located in Boston, Massachusetts.

For Respondents Mark Cote ("Cote"), Robert M. Cotter ("Cotter"), Peter V. Caruso ("Caruso") and Michael S. Kelleher ("Kelleher") appeared Bryan Killian, Esq. of the firm Sherin & Lodgen located in Boston, Massachusetts.

For Respondent Legg Mason Wood Walker, Inc. ("Legg Mason") appeared Dana Pescosolido, Esq. and Stacey Boyd, Esq. of the firm Weinberg & Green, LLC, located in Baltimore, Maryland.

CASE INFORMATION

Claimant's Statement of Claim was filed on November 6, 1996. Claimant's Submission Agreement was signed on November 6, 1996. Claimant, pursuant to the NASD Code of Arbitration Procedure Rule 10335, simultaneously filed a Complaint for Injunctive and Monetary Relief in Suffolk Superior Court in the Commonwealth of Massachusetts on November 6, 1996. On November 15, 1996, the Court entered a Preliminary Injunction against Respondents Cote, Cotter, Caruso and Kelleher.

Respondents Cote's, Cotter's, Caruso's and Kelleher's Statement of Answer was filed on

December 5, 1996. Respondents Legg Mason, Cote, Cotter, Caruso and Kelleher initiated a Counterclaim on November 21, 1996. Respondent Legg Mason's Submission Agreement was signed on November 21, 1996. Respondent Cote's, Cotter's, Caruso's and Kelleher's Submission Agreements were signed on November 21, 1996.

HEARING INFORMATION

Pre-hearing Conferences:

November 26, 1996

Hearing Dates/Sessions:

December 9, 1996	-	One Session
December 12, 1996	-	Two Sessions
December 13, 1996	-	Two Sessions
January 28, 1997	-	Two Sessions
January 29, 1997	-	Two Sessions
February 5, 1997	-	Two Sessions
February 6, 1997	-	Two Sessions
May 15, 1997	-	One Session
May 28, 1997	-	Two Sessions
May 29, 1997	-	Two Sessions
June 20, 1997	-	Two Sessions
August 1, 1997	-	Two Sessions
August 2, 1997	-	Two Sessions
August 27, 1997	-	One Session
August 28, 1997	-	Two Sessions

The hearings conducted on December 9, 1996, February 5, 1997 and February 6, 1997 were held at the American Arbitration Association located in Boston, Massachusetts. The hearings conducted on December 12, 1996, December 13, 1996, January 28, 1997, January 29, 1997, May 15, 1997, May 28, 1997, May 29, 1997, June 20, 1997 and August 28, 1997 were held at the offices of NASD Regulation, Inc. located in Boston, Massachusetts. The hearings conducted on August 1, 1997 and August 2, 1997 were held at the law offices of Sherin & Lodgen located in Boston, Massachusetts. The hearing on August 27, 1997 was conducted telephonically.

CASE SUMMARY

Claimant brought this action to recover damages it allegedly sustained from Respondents Cote's, Cotter's, Caruso's and Kelleher's (hereinafter collectively referred to as "Individual Respondents") breach of their employment agreements with Dean Witter by misappropriating confidential information, by violating certain covenants not to compete, and by engaging in unfair competition. Dean Witter also brought this action against Respondent Legg Mason for wrongfully and intentionally interfering with its contracts between its customers as well as its contracts with the Individual Respondents (hereinafter Individual Respondents and Legg Mason will be collectively referred to as "Respondents").

Respondents Cotter, Caruso and Kelleher executed Account Trainee Employee Agreements containing confidentiality of records and unfair competition provisions. Similarly, Respondent Cote executed an Account Executive Employment Agreement with Dean Witter. Specifically, the confidentiality of records provision stated that all records and documents concerning the business and affairs of Dean Witter were confidential and the exclusive property of Dean Witter, and therefore, an employee's use of such company records stops immediately upon resignation from employment. Under the unfair competition clause, Respondents Cotter, Caruso and Kelleher were precluded from soliciting or attempting to solicit Dean Witter customers for a period of one year and within a radius of one hundred (100) miles from the Dean Witter office to which they were last assigned. Under the unfair competition clause, Respondents Cotter, Caruso, and Kelleher were also prohibited from recruiting or soliciting any employee of Dean Witter for employment with another organization for the period of one year following termination of their employment at Dean Witter. Under Respondent Cote's employment agreement, he was prohibited from soliciting Dean Witter's customers as well.

Dean Witter alleged that the Individual Respondents with the aid of Legg Mason: (1) successfully solicited Dean Witter's customers, improperly gaining in excess of \$1,700,000.00 of gross commissions (representing over 20% of the gross commissions of the Worcester branch office); (2) successfully recruited a Dean Witter Sales Assistant to work at Legg Mason; and that (3) Individual Respondents copied and/or otherwise obtained confidential Dean Witter records.

Dean Witter's causes of action included the following: (1) application for injunctive relief against Individual Respondents; (2) misappropriation of confidential information against all Respondents; (3) common law misappropriation against all Respondents; (4) tortious interference with Dean Witter's contract with Individual Respondents against Legg Mason; (5) tortious interference with Dean Witter's contracts with its customers against Legg Mason; (6) breach of fiduciary duties against Individual Respondents; (7) breach of contract against Individual Respondents regarding confidential information; (8) breach of contract against Individual Respondents regarding unfair competition by improperly soliciting Dean Witter's customers; (9) breach of contract against Individual Respondents for unfair competition by improperly recruiting Dean Witter's employee; (10) a request for permanent injunctive relief to enforce the terms of Individual Respondents' contracts with Dean Witter.

Respondents denied all wrongdoing. Respondents contended that the customs and practices of the securities industry (to which customs and practices Dean Witter has subscribed) permitted the individual respondents to take with them copies of certain records and to contact their customers upon their departure; that the documents claimed to be "confidential" by Dean Witter were not confidential; that the "contracts" that the brokers were forced to sign after joining Dean Witter are unenforceable for numerous reasons, including lack of consideration, unconscionability, estoppel, overbreadth, violation of public policy and lack of legitimate business purpose.

Respondent Legg Mason denied all claims of tortious interference and "raiding" and contended that hiring 4 out of 30 brokers who accounted for 17% of a branch's production, while hiring only 1 out of 12 support staff and no management personnel, did not constitute unfair

competition or in any way threaten the viability of Dean Witter's Worcester branch. Legg Mason contended that it did not know of the individual respondents' contracts with Dean Witter, even if those contracts were enforceable.

Respondents filed counterclaims alleging that Dean Witter wrongfully obtained an improvidently granted injunction, that remained in force for 25 days, until the full panel could be assembled, at which time all injunctive relief was dissolved. Respondents claimed damages for effectively having been "shut down" for an entire month, and arising out of Dean Witter's intentional violation of NYSE Rule 412 and NASD Rule 11870 regarding the obligation to transfer accounts. In addition, the individual respondents claimed damages arising from the reputational harm they suffered as a consequence of the injunction and as a consequence of Dean Witter's unlawful refusal to transfer accounts upon the instruction of the customers.

Dean Witter responded to the counterclaim by denying all allegations. Dean Witter asserted the following defenses to Respondents counterclaim: (1) Respondents should be barred from presenting any facts or defenses at the time of the arbitration hearing under the NASD Code of Arbitration Procedure Rule 10314(b)(2)(A) and (B) for failing to serve a Statement of Answer with their Counterclaim; (2) declaratory relief is not available to Respondents to dissolve a valid and enforceable preliminary injunction issued by the state superior court; (3) the state superior court's issuance of a preliminary injunction was consistent with the applicable law in Massachusetts and based on compelling evidence that the Individual Respondents violated the terms of their agreements with Dean Witter; (4) Respondents are guilty of unclean hands in making their request for declaratory relief as they have unjustifiably represented that these employment agreements are unenforceable and inconsistent with just and equitable principles of trade; (5) Respondents Counterclaims are moot; (6) Dean Witter has committed no fraud against Individual Respondents by allegedly inducing them to sign their employment agreements with Dean Witter; (7) Dean Witter has made no efforts to delay the arbitration process; (8) Dean Witter contests Respondents' assessment of damages for its counterclaims (that being 10% of Individual Respondents' trailing 12 months' gross commission); (9) the counterclaims failed to state a claim upon which relief may be granted; (10) the counterclaims are barred in whole or in part by the doctrine of laches; (11) Respondents have failed to mitigate their alleged damages, if any; (12) the counterclaims are barred, in whole or in part, by the doctrine of estoppel; (13) the counterclaims are barred, in whole or in part, by the doctrine of waiver; and (14) the action and conduct of Dean Witter has not caused any damages to Respondents.

RELIEF REQUESTED

In the Statement of Claim, Claimant Dean Witter requested an award for actual damages in an amount to be determined at the hearing for the following: (1) the loss of commission revenue from clients taken by Legg Mason; (2) the value of personal property not returned to Dean Witter; and (3) the loss of good will with its customers and its personnel and loss of business reputation in the community. Dean Witter also requested an award of reasonable attorneys' fees in addition to an award of pre-award interest and post-award interest at the highest rate allowed by Massachusetts law.

Based upon the evidence presented at the hearing, Claimant Dean Witter requested an award

against Respondents for actual damages for loss of commission revenue from clients taken by Legg Mason in the amount of \$1,376,711.00. In addition, for damages to Dean Witter's future loss of profits, damage to its reputation in the Worcester community, and the loss of good will with its customers and its personnel for unreturned personal property to Dean Witter, Dean Witter requested and award in the amount of \$1,000,000.00. Finally, Dean Witter requested punitive damages to be awarded against Legg Mason in the amount of \$1,000,000.00 for its conduct constituting an improper predatory raid against Dean Witter's Worcester office.

Respondents collectively requested damages of \$60,000.00 for lost production and \$500,000.00 for each individual respondent for reputational harm arising from the wrongful injunction.

OTHER ISSUES CONSIDERED & DECIDED

Upon the stipulation of the parties at the hearing held on December 9, 1997, the panel ordered that the injunctive relief provided in the November 15, 1996 Preliminary Injunction of the Superior Court, County of Suffolk, was immediately terminated and dissolved.

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 NASD Regulation, Inc.

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. Claimant Dean Witter Reynolds, Inc. shall recover nothing from the Respondents with respect to any of the claims asserted against any of the Respondents.
2. Respondents/Counterclaimants Peter V. Caruso, Robert M. Cotter, Michael S. Kelleher, and Mark G. Cote shall recover from the Claimant/Counterclaim-Respondent Dean Witter Reynolds, Inc. the sum of \$45,000.00, to be equally divided among them based upon their claims of damages suffered as result of lost production.
3. Respondent/Counterclaimant Legg Mason Wood Walker, Inc. shall recover against the Claimant/Counterclaim-Respondent Dean Witter Reynolds, Inc. the sum of \$15,000.00 based upon its claim of damages suffered as a result of lost production.
4. Respondents/Counterclaimants Peter V. Caruso, Robert M. Cotter, Michael S. Kelleher, and Mark G. Cote shall EACH recover from the Claimant/Counterclaim-Respondent Dean Witter Reynolds, Inc. the sum of \$100,000.00 based upon their claims of damages for loss of reputation, for

wrongful injunction, and as punitive damages.

5. Respondents/Counterclaimants Robert M. Cotter and Michael S. Kelleher shall recover nothing from the Claimant/Counterclaim-Respondent Dean Witter Reynolds, Inc. based upon their claims of fraud related to the alleged conduct of John Pierce.
6. All remaining claims of the parties are dismissed.
7. Each party shall bear their respective costs, except that Claimant is liable and shall pay Respondents the sum of \$1,500.00 to reimburse Respondents for the hearing session deposit paid to NASD Regulation, Inc.

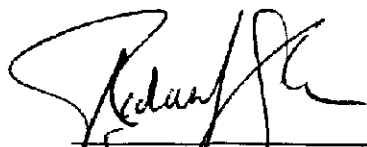
FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee, the \$2,500.00 non-refundable expedited hearing fee and the \$350.00 member surcharge previously paid by Claimant and the \$2,500.00 non-refundable expedited hearing fee previously paid by Respondents. The arbitrators have assessed the following Forum Fees:

1 pre-hearing conference x \$300.00	= \$ 300.00
27 hearing sessions x \$1,000.00	= <u>\$27,000.00</u>
Total Forum Fees	= \$27,300.00

1. Claimant Dean Witter is hereby liable for the sum of \$27,300.00, representing the total amount of forum fees assessed. Claimant previously deposited \$750.00 and Respondents previously deposited \$1,500.00 with NASD Regulation, Inc. Claimant shall pay the sum of \$1,500.00 to Respondents as provided in the "Award" section above and shall pay the balance of \$25,050.00 to NASD Regulation, Inc.
2. Respondent Legg Mason is hereby liable and shall pay to NASD Regulation, Inc. the sum of \$350.00, representing the member surcharge.

Arbitrators' Signatures

A handwritten signature in dark ink, appearing to read 'Richard J. Grahn', written over a horizontal line.

Richard J. Grahn, Esq.
Chairperson-Public Arbitrator

Mary C. Kelleher
Public Arbitrator

John Hansen, Esq.
Industry Arbitrator

Date of decision: November 5, 1997

Arbitrators' Signatures

Richard J. Grahn, Esq.
Chairperson-Public Arbitrator

Mary C. Kelleher

Mary C. Kelleher
Public Arbitrator

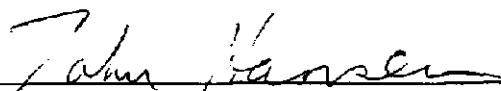
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