

97-0018

AWARD

NASD REGULATION, INC. OFFICE OF DISPUTE RESOLUTION
In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Dean Witter Reynolds, Inc.

and

97-00018

Name of Respondent/Counter-Claimant

Robert D. Zielke

REPRESENTATION OF PARTIES

For Claimant/Counter-Respondent: Dean Witter Reynolds, Inc. ("Dean Witter") was represented by Mark L. Kowalsky, Esq. and Miles D. Hart, Esq. of Hertz, Schram & Saretsky, P.C., located in Bloomfield Hills, Michigan.

For Respondent/Counter-Claimant: Robert D. Zielke ("Zielke") was represented by Nicholas P. Iavarone, Esq. of Bellows & Bellows, located in Chicago, Illinois.

CASE INFORMATION

Statement of Claim was filed on: January 3, 1997

Dean Witter's Submission Agreement signed on: January 6, 1997 by Scott L. Crawford, Vice President, Dean Witter Reynolds, Inc.

Zielke's Statement of Answer and Counterclaim was filed: January 28, 1997.

Zielke did not file a properly executed submission agreement.

Zielke's Counterclaim for Damages filed on: February 5, 1997.

HEARING INFORMATION

Section 10335(d) Immediate Injunctive Hearing: January 7, 1997 for One (1) session.

Pre-hearing Conference Held: April 7, 1997 before One (1) arbitrator.

Hearing Dates/Sessions: April 9, 1997 for Two (2) sessions;
May 16, 1997 for Two (2) sessions; and
July 1, 1997 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

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CASE SUMMARY

Dean Witter alleged that Zielke resigned on December 30, 1996 to work for Bear Stearns & Co. Inc. According to Dean Witter, Zielke violated the Dean Witter Account Executive Trainee Employment Agreement by misappropriating Dean Witter records and by soliciting Dean Witter customers to move their accounts to Bear Stearns.

Zielke denied the allegations set forth in the Statement of Claim. Respondent specifically stated that he believed that the non-compete provisions of the training agreement had expired when he completed the three-year obligation to remain at Dean Witter or be liable for the costs of training. In addition, Zielke alleged that the non-compete provisions are inappropriate for the circumstance of a brokerage account and the broker servicing the account and that the non-compete agreement is unenforceable. Zielke further counterclaimed for damages for Dean Witter's refusal to process the ACATS forms of customers of Zielke who wished to move their accounts to Bear Stearns, thus harming his business and reputation.

Dean Witter denied owing any sums under the counterclaim, asserting that the claims were for violation of NASD and NYSE rules and that there is no private right to action for violation of these rules. Therefore, there was no legal basis for the claim.

RELIEF REQUESTED

Dean Witter requested an order prohibiting Zielke from soliciting Dean Witter customers who came known to him when he was employed with Dean Witter; the return of Dean Witter records; and to discontinue any contact with Dean Witter customers. In addition, Dean Witter requested that the counterclaim be dismissed.

Zielke requested that the claims asserted against him be denied in their entirety and that he be awarded compensatory damages for lost commissions; a monetary award for the injury to his reputation; punitive damages of \$1,000,000.00; a referral to the Business Conduct Committee for investigation of its wrongful conduct to its public customers; and his attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Zielke did not file a properly executed submission agreement, but is required to submit to arbitration pursuant to Section 10201 of the Code of Arbitration Procedure.

The original injunctive order was entered on January 8, 1997 (see Exhibit A attached), but was later modified by court order. On January 13, 1997, Zielke filed an Emergency Motion to Vacate TRO. On February 5, 1997, the panel determined that the Motion would be denied.

On February 20, 1997, Zielke filed a new Emergency Motion to Modify the Injunctive Order. After the Motion and all responses were forwarded to the Panel, on March 3, 1997, the Panel granted the Motion, permitting the process of the ACATS forms and separating commissions earned from these accounts until full hearing on the issues. On May 12, 1997, an addendum to this Motion was granted, adding additional customers' accounts to the original modification.

After conclusion of the hearing, Respondent Zielke presented a Motion to Present Additional Evidence. The panel hereby denies 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 originals remain on file with the NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. The claims and relief requests filed by Claimant/Counter-Respondent Dean Witter Reynolds, Inc. are dismissed with prejudice and denied in their entirety;
2. Claimant/Counter-Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to Respondent/Counter-Claimant Robert D. Zielke the sum of \$10,000.00 in attorneys' fees. In deciding to award attorneys' fees, the panel considered the evidence and arguments presented by the parties and determined that the authority existed for an award of attorneys' fees to Robert D. Zielke;
3. In addition, Claimant/Counter-Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the Respondent/Counter-Claimant Robert D. Zielke the sum of \$25,000.00 in punitive damages. In deciding to award punitive damages, the panel considered the evidence and arguments presented by the parties, and determined that authority existed for an award of punitive damages to Robert D. Zielke;
4. Any commissions held by Bear Stearns pursuant to the Panel's Modification of the Injunctive Order shall be released to Respondent/Counter-Claimant Robert D. Zielke;

5. Any remaining costs of arbitration, including additional attorneys' fees, shall be borne by the party incurring the cost, except for those sums specifically enumerated herein; and
6. Any relief not specifically awarded is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$1,000.00 per hearing session and \$300 for each prehearing conference, if any. There were six (7) hearing sessions x \$1,000.00 and One (1) pre-hearing conference x \$300.00 = \$7,300.00 in total forum fees. Pursuant to §10205(b) a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **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 \$600.00 and the additional sum of \$150.00 previously deposited by the Claimant/Counter-Respondent Dean Witter Reynolds, Inc. Claimant/Counter-Respondent Dean Witter Reynolds, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$6,550.00 as forum fees. In addition, pursuant to §10205(c) of the NASD Code of Arbitration Procedure, Respondent/Counter-Claimant Robert D. Zielke is liable for and shall to the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable filing fee in the amount of \$500.00.

Pursuant to the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$350.00 and the \$2,500.00 injunctive hearing fee paid by Dean Witter Reynolds, Inc.

Dated:

/s/ Steve Wine, Esq.
Steve Wine, Esq.
Industry Arbitrator, Presiding Chair

August 15, 1997

/s/ Thomas M. Lehner
Thomas M. Lehner, Industry Arbitrator

August 15, 1997

/s/ Carmen P. Michelotti
Carmen P. Michelotti, Industry Arbitrator

August 15, 1997

"EXHIBIT A"

INJUNCTIVE ORDER

NASD REGULATION, INC., OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Name of Claimant

Dean Witter Reynolds Inc.

97-00018

Name of Respondent

Robert D. Zielke

ORDER

This matter coming to be heard on Claimant Dean Witter Reynolds Inc.'s ("Dean Witter") request for injunctive and monetary relief pursuant to Section 10335 of the Code of Arbitration Procedure, after due notice to the parties, the parties being represented by counsel, the Office of Dispute Resolution having duly designated the undersigned Arbitrator and the Arbitrator having read the Pleading filed and having heard oral arguments of counsel on Tuesday, January 7, 1997:

It is hereby ordered:

1. Effective immediately, Respondent Robert D. Zielke ("Zielke") is enjoined and restrained from soliciting any Dean Witter customers who were served by or whose names became known to him during his employment at Dean Witter;
2. Effective immediately, Respondent Zielke is enjoined and restrained from using, disclosing or transmitting for any purpose the information contained on any of the documents taken from Dean Witter, including the holding pages, lead cards and any other conceivable record, whether on paper or any electronic medium. In addition, Respondent Zielke shall return all documents or records relating to Dean Witter customers which were taken from Dean Witter. These documents and records shall be returned to counsel for Claimant within 24 hours of receipt of this Order;
3. Effective immediately, Respondent Zielke and/or any of his agents, associates or employers, are enjoined from accepting business from any Dean Witter customer who were served by or whose names became known to Zielke during his employment at Dean Witter;

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4. The matters enjoined above shall not include Zielke's immediate family and clients residing more than 100 miles from the Dean Witter office where Respondent was last employed;

5. This Order shall remain in effect for a period of sixty (60) days from receipt of this order or until a decision on the merits of the entire controversy by an arbitration panel appointed under this Code;

6. The parties shall provide, within seven (7) days of receipt of this Order, the Office of Dispute Resolution with four sets of agreed hearing dates for scheduling a hearing on the merits. If the parties are unable to agree on dates, the arbitration panel selected to hear the case on the merits shall select the dates pursuant to Section 10335(f); and

7. Any relief not specifically determined in this Order is hereby denied without prejudice to renewal and reconsideration at further hearings and without prejudice to any parties right to seek damages at later hearings.

Arbitrator's Signature

Date:

/s/ Scott Goldsher, Esq.
Scott Goldsher, Esq.

January 8, 1997