

**Award**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between:

Dean Witter Reynolds, Inc., (Claimant) vs. Kevin Blackburn, (Respondent)

Case Number: 99-04260

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Dean Witter Reynold, Inc., hereinafter referred to as "Claimant": Kevin B. Walker, Esq., Bressler, Amery & Ross, Morristown, NJ.

Respondent, Kevin Blackburn, hereinafter referred to as "Respondent": Brian J. Neville, Esq., Law Offices of Brian J. Neville, P.C., New York, NY (Mr. Neville was with the law firm of Kogan Taubman & Neville, LLC, New York, NY, when he first appeared in this matter). Previously represented by: Richard G. Primoff, Esq., RubinBaum LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: September 14, 1999.

Reply to Counterclaim filed by Claimant on or about: January 21, 2000.

Claimant signed the Uniform Submission Agreement: September 8, 1999.

Statement of Answer and Counterclaim filed by Respondent on or about: December 17, 1999.

Respondent signed the Uniform Submission Agreement: December 16, 1999.

**CASE SUMMARY**

Claimant asserted the following causes of action: failure to repay balance of Promissory Note ("Note"); breach of contract; and breach of the covenant of good faith and fair dealing.

Unless specifically admitted in his Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: in order to induce Respondent to come to Claimant with his substantial book of business, Claimant made various material misrepresentations to Respondent concerning the amount of his compensation and the basis on which it would be computed; just a few months into his employment, Respondent learned that Claimant had decided to change substantially its commission structure in a way that would result in significantly less compensation to Respondent than he had been led to believe he would earn; it was not consistent with the stated purpose or language of the Note, or with

the covenant of good faith and fair dealing implied therein, for Claimant to attempt to use the Note to force Respondent to accept compensation drastically lower than that which had been promised to him, by threatening to enforce it against him if he refused to accept the change in his terms of employment; and the Note is not due and owing under its express terms because Claimant fraudulently induced Respondent to accept employment with Claimant and then materially breached the terms of the Note by terminating Respondent without cause as part of a wrongful scheme to convert his business assets.

In his Counterclaim, Respondent asserted the following causes of action: breach of contract; fraudulent inducement; tortious interference with contractual relations; misappropriation; unfair competition; and unjust enrichment.

Unless specifically admitted in its Reply, Claimant denied the allegations made in the Counterclaim and asserted the following defenses: the Counterclaim fails to state a claim upon which relief can be granted; Respondent was an at-will employee whose employment and compensation could be terminated with or without cause and could resign for any reason; Respondent voluntarily resigned his employment with Claimant thereby barring his claims; all employment actions regarding or affecting Respondent were based upon legitimate business decisions; all applicable statutes of limitation and the doctrine of laches bar each and every count of the Counterclaim; Claimant did not breach any duty to Respondent allegedly imposed by contract or operation of law; Claimant's conduct was consistent with all applicable policies and procedures; the statute of frauds bars Respondent's breach of contract claim; Claimant's conduct was justified and in the exercise of a privilege or superior right; the Counterclaim is barred by the doctrines of accord and satisfaction, payment and set-off, unclean hands, waiver, estoppel, and ratification; the Counterclaim lacks any basis in law or fact; and Respondent has failed to diligently mitigate his alleged damages and, therefore, is barred from receiving all or part of the relief requested in the Counterclaim.

### **RELIEF REQUESTED**

Claimant requested:

- a. Compensatory damages in the amount of \$273,300.00 for the principal balance due and owing under the Note;
- b. Interest accrued during the term of the Note at the Note rate of 6% or higher applicable Federal rate;
- c. Interest on the balance due and owing under the Note from the date of default to the present, at the contract rate of 6% per annum or higher applicable Federal rate;
- d. Interest due and owing under the Note from the date of judgment to the date of payment;

- e. The cost of collection and of this proceeding, including attorneys' fees and forum fees; and
- f. Any and all further relief that the Panel deems just and proper.

In his Answer and Counterclaim, Respondent requested an Award:

- a. Dismissing Claimant's Claim in its entirety;
- b. Awarding Respondent damages on all Counterclaims in an amount to be proven at the hearing of this matter, but not less than \$1,300,000.00;
- c. Awarding Respondent the costs of this proceeding, including reasonable attorneys' fees; and
- d. Awarding such other and further relief as the Panel may deem just and reasonable.

In its Reply, Claimant requested an Award dismissing Respondent's Counterclaim with prejudice, and awarding Claimant its attorneys' fees, costs of suit, and such other and further relief as the Panel deems just and equitable.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

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.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

- 1. Respondent be and hereby is liable for and shall pay to Claimant the sum of \$273,300.00 as compensatory damages, plus compounded interest at the rate of 6% per annum accruing from March 18, 1999 until date of payment in full.
- 2. Respondent's Counterclaim is hereby dismissed in its entirety.
- 3. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

|                          |               |
|--------------------------|---------------|
| Initial claim filing fee | = \$ 1,000.00 |
| Counterclaim filing fee  | = \$ 500.00   |

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. In this matter, Dean Witter Reynolds, Inc. is a party.

|                         |               |
|-------------------------|---------------|
| Member surcharge        | = \$ 1,500.00 |
| Pre-hearing process fee | = \$ 600.00   |
| Hearing process fee     | = \$ 4,500.00 |

#### **Adjournment Fees**

Adjournments requested during these proceedings:

|   |                  |
|---|------------------|
| Feb. 1 & 2, 2001, adjournment by both parties | = \$ Waived      |
| May 3 & 4, 2001, adjournment by both parties  | = \$ 500.00 each |

#### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

|   |               |
|---|---------------|
| One (1) Pre-hearing session with a single arbitrator x \$450.00 | = \$ 450.00   |
| Pre-hearing conference: April 18, 2001                          | 1 session     |
| Four (4) Pre-hearing sessions with Panel x \$1,200.00           | = \$ 4,800.00 |
| Pre-hearing conferences: August 2, 2000                         | 1 session     |
| September 28, 2000  | 1 session     |
| January 17, 2001  | 1 session     |
| June 19, 2002   | 1 session     |

Nine (9) Hearing sessions x \$1,200.00 = \$10,800.00

|                |               |            |
|----------------|---------------|------------|
| Hearing Dates: | May 22, 2002  | 2 sessions |
|                | May 23, 2002  | 2 sessions |
|                | May 24, 2002  | 1 session  |
|                | June 18, 2002 | 2 sessions |
|                | July 23, 2002 | 2 sessions |

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Total Forum Fees = \$16,050.00

1. The Panel has assessed \$8,025.00 of the forum fees against Claimant.
2. The Panel has assessed \$8,025.00 of the forum fees against Respondent.

**Fee Summary**

1. Claimant be and hereby is solely liable for:

|                                     |                      |
|-------------------------------------|----------------------|
| Initial Filing Fee                  | = \$ 1,000.00        |
| Member Fees                         | = \$ 6,600.00        |
| Adjournment Fee                     | = \$ 500.00          |
| <u>Forum Fees</u>                   | <u>= \$ 8,025.00</u> |
| Total Fees                          | = \$16,125.00        |
| <u>Less payments</u>                | <u>= \$ 7,287.50</u> |
| Balance Due NASD Dispute Resolution | = \$ 8,837.50        |

2. Respondent be and hereby is solely liable for:

|                                     |                      |
|-------------------------------------|----------------------|
| Counterclaim Filing Fee             | = \$ 500.00          |
| Adjournment Fee                     | = \$ 500.00          |
| <u>Forum Fees</u>                   | <u>= \$ 8,025.00</u> |
| Total Fees                          | = \$ 9,025.00        |
| <u>Less payments</u>                | <u>= \$ 2,200.00</u> |
| Balance Due NASD Dispute Resolution | = \$ 6,825.00        |

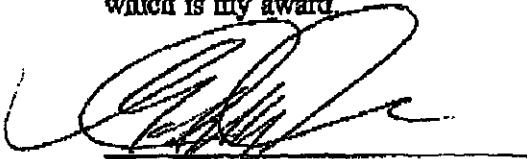
All balances are payable to NASD Dispute Resolution, and are due upon receipt pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

|                        |   |  |
|------------------------|---|--|
| G. Robert Abrams, Esq. | - | Non-Public Arbitrator, Presiding Chair |
| Michael Todd Clements  | - | Non-Public Arbitrator                  |
| Rick F. Suppa          | - | Non-Public Arbitrator                  |

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.



G. Robert Abrams, Esq.  
Non-Public Arbitrator, Presiding Chair

Aug 28, 2002  
Signature Date

\_\_\_\_\_  
Michael Todd Clements  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Rick F. Suppa  
Non-Public Arbitrator

\_\_\_\_\_  
Signature Date

August 29, 2002  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

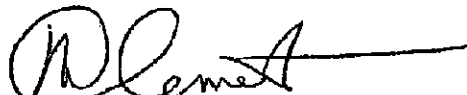
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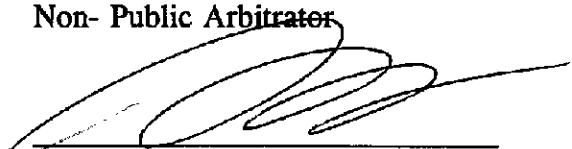
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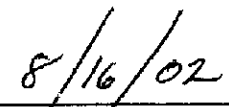
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Non-Public Arbitrator, Presiding Chair

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