

NASD Regulation, Inc., Award

In the Matter of Arbitration Between

**Daniel P. Son and Philip A. Pendergraft,
Claimants,**

and

No. 95-04678

**Southwest Securities, Inc., f/k/a
Barre & Co., Inc., and David Glatstein,
Respondents.**

REPRESENTATION OF PARTIES

Claimants, Daniel P. Son ("Son") and Philip A. Pendergraft ("Pendergraft") and Respondent, were represented by Thomas W. Craddock, Esquire, of McGuire Craddock Strother & Lutes, PC, located in Dallas, Texas.

Respondents, Southwest Securities, Inc., ("Southwest Securities,") formerly known as Barre & Co., Inc., ("Barre") and David Glatstein ("Glatstein") were represented by Stuart Blaugrand, Esquire of Gardere & Wynn, LLP, located in Dallas, Texas.

CASE INFORMATION

Claimants, Son's and Pendergraft's Statement of Claim was filed on or about November 1, 1995. Claimants, Son's and Pendergraft's Submission Agreements were each signed on September 25, 1995.

Respondents, Southwest Securities' and Glatstein's Statement of Answer and Counterclaim was jointly filed on or about December 21, 1995. Respondents' Submission Agreement was signed on .

HEARING INFORMATION

The hearing was held on August 4, 5, 6, 7, 11, 12, and 13, 1998, at 9:00 a.m., for two (2) sessions each day in Dallas, Texas.

CASE SUMMARY

Daniel Son and Phil Pendergraft ("Claimants,") contended that David Glatstein, the Chairman of Barre & Company, Inc., has breached the agreement with Claimants and has not honored the promises to the Claimants, made in order to induce them to begin a clearing division for Barre. Claimants said that they were concerned about their autonomy under the relationship and that they only made the agreement with Glatstein

and Barre because of the terms of the agreement and promises that Glatstein made to them. First, Claimants said that it was clearly understood and agreed to between the parties that Son and Pendergraft were establishing the clearing division as a new line of business for Barre based upon their collective expertise and contacts. Second, Claimants stated that it was agreed between the parties that should Son and Pendergraft ever leave Barre's employment, that Barre, Son and Pendergraft would all be free to compete for the clearing clients of Barre, and that no party would take any action to hinder such free and open competition, an important clause to Claimants as they were in the middle of a dispute about this very issue with First Southwest Company. Third, Claimants indicated that it was agreed between the parties that Son and Pendergraft's compensation was to be based solely upon the profitability of the clearing division. Claimants said that they were concerned that they would expend a great deal of time and energy building the clearing division, only to have it sold out from underneath them, so there were discussions concerning stock options, but based on the representations of Glatstein that the company would not be sold out from under them, they agreed to the profit based compensation plan only. As alleged, Claimants became successful employees, officers and directors of Barre, developing the clearing division so that it constituted approximately sixty percent (60%) of Barre's total revenue, and were virtually assured of significant bonuses beginning after March of 1995. However, in late March 1995, Glatstein announced that he had decided to sell Barre to Southwest Securities, Inc., where he became President and Son and Pendergraft were merely offered positions as salesmen for the already existing Southwest clearing division. Glatstein was then said to have granted the two permission to seek to set up a new firm, which they informed him they were going to do with SunGard Financial Services, Inc., ("SunGard") and he then asked them to speak to the employees and let them know they were leaving, but to give Southwest Securities a fair hearing before deciding which firm to join.

Claimants said that when most of their clients decided to go with them to their new firm, Penson Financial Services, Inc., despite Southwest's intense marketing efforts to keep them, and after they had gained most all of the memberships and approvals necessary to allow their new firm to enter the clearing business, Southwest and Glatstein filed for a Temporary Injunction against SunGard, which delayed Penson's opening date and allowed Southwest time to forcibly convert all of Barre's clearing clients to Southwest. SunGard then withdrew its financial support, so Son and Pendergraft found new backing and after receiving NASD approval, opened for business on July 11, 1995.

Then, Claimants related how Southwest then filed a lawsuit directly against Son and Pendergraft alleging that they had tortiously interfered with its business and breached fiduciary duties to Barre through the disclosure of trade secrets. Finally, Claimants indicated that Southwest had also sued Son individually for the repayment of a note that was part of an understanding with Glatstein related to Son's future compensation.

Southwest Securities, Inc., David Glatstein and Barre & Company, Inc., ("Respondents,") denied any wrongdoing or liability as alleged in the Claimants' Statement of Claim. Respondents contended that Claimant's actions constituted tortious interference with Southwest Securities' business and contractual relations in using trade secrets and confidential information relating to their customers. Respondents asserted the

following affirmative defenses: failure to state a claim upon which relief might be granted; Claimants' claims are preempted or barred in whole or in part by state or federal law; all actions taken by Southwest Securities and Glatstein relating to Claimants were based on legitimate, non-discriminatory reasons and were taken in good faith and/or are privileged; the claims are barred under the doctrines of waiver, estoppel and unclean hands; Claimants have suffered no damages; breach of contract is excused by the failure to inadequacy of consideration; Claimants suffered no damages; the claims are barred by Claimants' prior or concurrent breach; Claimants failure to mitigate their damages; Claimants failure to take the necessary and appropriate steps to avoid the consequences alleged; the applicable Statutes of Limitations; the doctrine of laches; exemplary or punitive damages requested are capped or barred in whole or in part at common law; Respondents denied that all conditions precedent to the institution of suit by Claimants have been performed or have occurred; Claimants lack standing; the Statute of Frauds; the claims are not arbitrable; the claims are barred by Claimants' prior fraud.

RELIEF REQUESTED

Claimants, Daniel P. Son and Philip A. Pendergraft, requested an award for lost business opportunities resulting in lost compensation totaling in excess of \$1,750,000.00 and other expenses related to this matter in excess of \$50,000.00; \$140,000.00 for their inability to sell their Barre stock; legal fees and other expenses totaling \$40,000.00; unpaid bonus compensation for the time period between April 1, 1995 and April 11, 1995 (estimated at \$3,200.00 each;) compensation for Son from February 17, 1994 thorough February 28, 1994 (estimated at \$2,000.00;) \$60,800.00 for the IRA of Son; and compensation for Pendergraft for the week of February 22, 1994 through February 28, 1994 (estimated at \$2,000.)

Respondents, Southwest Securities, Inc., David Glatstein and Barre & Company, Inc., requested that the claims asserted against them be dismissed in their entirety and that they be awarded actual damages, punitive damages, as well as their costs and attorney fees.

OTHER ISSUES CONSIDERED AND DECIDED

Upon review of the file and the representations made by/on behalf of Claimants, Daniel P. Son and Philip A. Pendergraft, the undersigned Arbitrators have determined that Respondents, Southwest Securities, Inc., David Glatstein and Barre & Company, Inc., have been properly served with the Statement of Claim pursuant to Rules 10302 and 10314 of the NASD Code of Arbitration Procedure ("the Code.") The undersigned Arbitrators have also determined that Respondents, Southwest Securities, Inc., David Glatstein and Barre & Company, Inc., did receive due notice of the hearing as required under Rule 10318 of the Code.

Respondent, Southwest Securities, Inc., David Glatstein and Barre & Company, Inc., did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration, but is required to submit to arbitration pursuant to Rule 10301

of the NASD Code of Arbitration Procedure and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 the 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 Respondents, Southwest Securities, Inc., and David Glatstein are jointly and severally liable for and shall pay to Claimants Daniel P. Son and Philip A. Pendergraft, the joint sum of \$284,373.00 (two hundred eighty four thousand, three hundred seventy three dollars and no cents) in compensatory damages, with interest thereon at ten percent (10%) per annum beginning one week after service of the award in this matter;
2. That Respondents, Southwest Securities, Inc., and David Glatstein are jointly and severally liable for and shall pay to Claimants Daniel P. Son and Philip A. Pendergraft, the joint sum of \$200,000.00 (two hundred thousand dollars and no cents) in attorneys' fees in connection with the \$284,373.00 (two hundred eighty four thousand, three hundred seventy three dollars and no cents) in compensatory damages, pursuant to §38.01 of the Texas Civil Practices and Remedies Code for the suit on contract;
3. That Respondents, Southwest Securities, Inc., and David Glatstein are jointly and severally liable for and shall pay to Claimant Daniel P. Son and his IRA, the sum of \$40,000.00 (forty thousand dollars and no cents) in compensatory damages, with interest in the amount of \$9,665.51 (nine thousand, six hundred sixty five dollars and fifty one cents), and interest upon these combined amounts at ten percent (10%) per annum beginning one week after service of the award in this matter;
4. That Respondents, Southwest Securities, Inc., and David Glatstein are jointly and severally liable for and shall pay to Claimant, Daniel P. Son, the sum of \$15,500.00 (fifteen thousand, five hundred dollars and no cents) in attorneys' fees in connection with the award of \$49,665.51 (forty nine thousand, six hundred sixty five dollars and fifty one cents) in compensatory damages for his IRA, pursuant to §38.01 of the Texas Civil Practices and Remedies Code for the suit on contract;

5. That all claims brought by Cross Claimant, Southwest Securities, Inc., are hereby dismissed with prejudice; and,
6. That 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 \$1,000.00 per hearing session and \$300.00 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were fourteen (14) hearing sessions x \$1,000.00 = \$14,000.00 in forum fees. Pursuant to Rule 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 Rule 10332(c) of the Code, Claimants, Daniel P. Son and Philip A. Pendergraft, have paid to the NASD Regulation, Inc., Office of Dispute Resolution, the non-refundable filing fee of \$500.00 and has also paid both the hearing session deposit of \$1,000.00 and \$250.00 of the \$1,000.00 postponement fees in this matter. Claimants, Daniel P. Son and Philip A. Pendergraft shall pay to the NASD Regulation, Inc., Office of Dispute Resolution, the \$750.00 still remaining due on the postponement fees. Respondents, Southwest Securities, Inc., and David Glatstein, are jointly and severally liable for the forum fees in this matter and shall pay the sum of \$13,000.00 to NASD Regulation, Inc., Office of Dispute Resolution.

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

OTHER FEES

Pursuant to Rule 10333 of the Code, Respondent, Southwest Securities, Inc., has paid to the NASD Regulation, Inc., Office of Dispute Resolution, the \$500.00 member surcharge previously invoiced.

Concurring Arbitrators' Signatures:

/s/ Howard V. Tygrett

September 30, 1998

Howard V. Tygrett, Jr.
Chairperson
Public Arbitrator

Date

/s/ Carroll V. Galbreath

September 18, 1998

Carroll V. Galbreath
Panelist
Public Arbitrator

Date

/s/ Stephen C. Thayer

October 1, 1998

Stephen C. Thayer, Esq.
Panelist
Industry Arbitrator

Date