

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Pax Options, (Claimant) vs. Sander Gerber, (Respondent) vs. S & S Securities (Third-Party Respondent)

Case Number: 99-02962

Hearing Site: New York, New York

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**REPRESENTATION OF PARTIES**

Claimant, Pax Options, hereinafter referred to as "Claimant": Max Folkenflik, Esq., Folkenflik & McGerity, New York, NY. Previously represented by: Andrew P. Weiss, Esq., a sole practitioner, New York, NY.

Respondent, Sander Gerber, hereinafter referred to as "Respondent": David O. Wright, Esq., a sole practitioner, Shrub Oak, NY.

Third-Party Respondent, S&S Securities ("S&S"): Max Folkenflik, Esq., Folkenflik & McGerity, New York, NY. Previously represented by: Andrew P. Weiss, Esq., a sole practitioner, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: January 18, 1994.

Reply to Counterclaim filed by Claimant on or about: August 8, 1994.

Claimant signed the Uniform Submission Agreement.

Statement of Answer, Counterclaim, and Third-Party Claim filed by Respondent on or about: June 21, 1994.

Amended Statement of Answer, Counterclaim, and Third-Party Claim filed by Respondent on or about: October 10, 1995.

Respondent signed the Uniform Submission Agreement: June 22, 1994.

Reply to Third-Party Claim filed by S&S on or about: October 26, 1994.

S&S did not sign a Uniform Submission Agreement.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of written agreement; unjust enrichment; and false representations.

Unless specifically admitted in its Answer and Amended Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: Claimant lacks standing to bring this arbitration, and is an improper Claimant in this arbitration; the American Stock Exchange has no right to adjudicate this matter because an Award in favor of Claimant would violate the public policy of the State of New York and federal common law; the alleged agreement is invalid by reason of duress, illegality, and unconscionability; the Statement of Claim fails to state a claim because it is inconsistent with the alleged agreement; the claim is barred by the doctrine of unclean hands; the alleged agreement violates the Statute of Frauds and is unenforceable; the alleged agreement is unenforceable because it lacked consideration ab initio, or in the alternative, because the alleged consideration thereafter failed; and the alleged agreement, if written, never became effective due to lack of delivery to the party to be bound thereby.

In its Counterclaim and Third-Party Claim, Respondent asserted the following causes of action: Respondent is entitled to a declaratory judgement declaring that it is not bound by the alleged agreement; money had and received; unjust enrichment; conversion; and breach of contract.

Unless specifically admitted in its Reply, Claimant denied the allegations made in the Counterclaim.

Unless specifically admitted in its Reply, S&S denied the allegations made in the Third-Party Claim and asserted the following defenses: the Third-Party Claim fails to state a cause of action or a claim for relief; Respondent's claims are barred by Respondent's own "unclean hands"; and Respondent's claims are barred by the doctrines of laches and estoppel.

### **RELIEF REQUESTED**

Claimant requested:

1. Compensatory damages in the approximate amount of \$19,000.00 and equal to 15% of all profits Respondent makes in his trading account;
2. An accounting from Respondent of all monies withdrawn from its account at First Options Corporation after the execution of the agreement for which Respondent did not make a 15% payment to Claimant;
3. Affirmative relief directing that Respondent specifically perform all of his obligations to Claimant in accordance with the agreement;
4. Affirmative relief directing Respondent to pay Claimant an amount equal to 15% of his operating trading profits as such profits are earned until Respondent earns \$1.0 million (and makes payment of 15% thereof to Claimant);

5. Exemplary damages equal to three times the amount of compensatory damages; and
6. Interest, costs, and attorneys' fees, and such other relief as to the Panel may seem just and proper.

Respondent requested an Award:

1. As against S&S, awarding Respondent an accounting and damages in the amount of \$40,000.00, plus approximately \$40,000.00 for expenses wrongly taken by S&S in connection with this transaction;
2. As against Claimant, dismissing the Statement of Claim and awarding Respondent an accounting and damages in the amount of \$19,500.00, plus other sums unfairly received by Claimant, and the approximately \$40,000.00 in expenses taken by S&S in connection with this transaction;
3. As against S&S and Claimant, declaring the alleged agreement dated December 15, 1992 null and void and holding unenforceable the concept of "restrictive covenant";
4. As against S&S, awarding Respondent its proportionate share of profits during the period of July through October 1992; and
5. On all claims, interest and costs.

In its Reply, Claimant requested an Award:

1. Dismissing the Counterclaims against Claimant;
2. Granting Claimant the relief sought in its Statement of Claim; and
3. Awarding Claimant interest, costs, disbursements, and such other and further relief as to the Panel may seem just and proper.

In its Reply, S&S requested an Award:

1. Dismissing each of Respondent's Counterclaims and Third-Party Claims; and
2. Awarding S&S costs, disbursements, and attorneys' fees, and such other relief as to the Panel may seem just and proper.

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

This matter was originally filed with, and administered by, the American Stock Exchange ("AMEX") Arbitration Department. As of June 1, 1999, the AMEX Arbitration Department was dissolved and the further administration of this matter was assumed by NASD Dispute Resolution, Inc. (formerly NASD Regulation, Inc. Office of Dispute Resolution).

S&S did not file with the AMEX Arbitration Department a properly executed submission to arbitration but is required to submit to arbitration pursuant to the AMEX Code of Arbitration Procedure and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

During the hearing in this matter, Respondent made a Motion to Amend its Amended Answer. After due consideration, The Panel denied said 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.

### **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 \$80,628.00 as compensatory damages, plus interest in the amount of \$60,643.00.
2. Claimant's request for punitive damages is hereby denied.
3. Respondent's Counterclaim is hereby dismissed in its entirety.
4. Respondent's Third-Party Claim is hereby dismissed in its entirety.
5. All other requests for relief are hereby denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 200.00
Third-Party Claim filing fee	= \$ 500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

November 8, 2000, adjournment by Claimant = \$ 1,000.00

### **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 the proceedings conducted at NASD Dispute Resolution, Inc. are:

One (1) Pre-hearing session with Panel x \$750.00 = \$ 750.00

Pre-hearing conference: May 24, 2000 1 session

Sixteen (16) Hearing sessions x \$750.00 = \$12,000.00

Hearing Dates:	October 3, 2000	2 sessions
	October 4, 2000	2 sessions
	October 17, 2000	2 sessions
	October 18, 2000	2 sessions
	January 23, 2001	2 sessions
	January 24, 2001	2 sessions
	February 13, 2001	2 sessions
	May 2, 2001	2 sessions

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Total Forum Fees = \$12,750.00

1. The Panel has assessed \$6,375.00 of the forum fees against Claimant.
2. The Panel has assessed \$6,375.00 of the forum fees against Respondent.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant requested tapes, \$180.00.
2. Respondent requested tapes, \$180.00.

**Fee Summary**

1. Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 200.00
Adjournment Fee	= \$1,000.00
Forum Fees	= \$6,375.00*
<u>Administrative Costs</u>	= \$ 180.00
Total Fees	= \$7,755.00
<u>Less payments</u>	= \$2,130.00
Balance Due NASD Dispute Resolution, Inc.	= \$5,625.00

2. Respondent be and hereby is solely liable for:

Third-Party Claim Filing Fee	= \$ 500.00
Administrative Costs	= \$ 180.00
<u>Forum Fees</u>	= \$6,375.00*
Total Fees	= \$7,055.00
<u>Less payments</u>	= \$2,080.00
Balance Due NASD Dispute Resolution, Inc.	= \$4,975.00

\*NASD Dispute Resolution Inc.'s forum fees have been reduced by fees paid to AMEX by Claimant (\$950.00) and Respondent (\$1,900.00).


All balances are due and payable to NASD Dispute Resolution, Inc.

**ARBITRATION PANEL**

Eva H. Posman, Esq.	-	Industry Arbitrator, Presiding Chair
Nancy Plessner Wendell	-	Industry Arbitrator
Alfonso G. Figliolia	-	Industry 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.

  
\_\_\_\_\_  
Eva H. Posman, Esq.  
Industry Arbitrator, Presiding Chair

June 1, 2001  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Nancy Plessner Wendell  
Industry Arbitrator

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

\_\_\_\_\_  
Alfonso G. Figliolia  
Industry Arbitrator

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

June 11, 2001

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Date of Service (For NASD office use only)

**ARBITRATION PANEL**

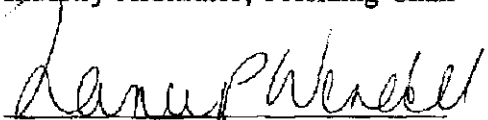
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Industry Arbitrator, Presiding Chair

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Signature Date

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Nancy Plessner Wendell  
Industry Arbitrator

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Signature Date

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*Alfonso G. Figliolia*  
Alfonso G. Figliolia  
Industry Arbitrator

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*5/31/01*  
Signature Date

June 11, 2001

Date of Service (For NASD office use only)