

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

GAUTAM B. BOSE
4350 East West Highway
Suite 1025
Bethesda, Maryland 20814

Plaintiff

v.

Case No. _____

THE HOUSEHOLDER GROUP, LLLP,
an Arizona Limited Liability Limited
Partnership
8985 E. Bell Road
Building H
Scottsdale, Arizona 85260

Defendant

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES Plaintiff Gautam B. Bose, by and through counsel, and brings this original Complaint for Declaratory Judgment against The Householder Group, LLLP, an Arizona Limited Liability Limited Partnership, and as grounds states the following:

PARTIES

1. At all times relevant, Gautam B. Bose (hereafter "BOSE") was registered with the State of Maryland as an Investment Adviser Representative of The Householder Group, LLLP, an investment adviser firm registered with the U.S. Securities and Exchange Commission (hereafter "SEC"). At all times relevant, BOSE also was registered with the State of Maryland as a registered representative of SagePoint Financial, Inc (hereafter "SagePoint") (formerly known as AIG Financial Advisors, Inc.), a broker-dealer registered

with the SEC. BOSE's principal place of business is at 4350 East West Highway, Suite 1025, Bethesda, Maryland 20814.

2. The Householder Group, LLLP (hereafter "THG") is an Arizona Limited Liability Limited Partnership, which is registered with the SEC as an Investment Adviser firm. THG's corporate office and principal place of business is in Arizona. THG does business as The Householder Group, Estate and Retirement Specialists. In the State of Maryland, THG also transacts business under the name, "Householder Group." THG is qualified to transact business in the State of Maryland with Maryland residents by virtue of its federal Investment Adviser firm registration. As a federal covered adviser, and as condition of conducting business in Maryland, THG made the requisite Notice Filing and paid a fee to the State of Maryland in accordance with the Maryland Securities Act, §11-405, and the rules or regulations promulgated thereunder by the Maryland Commissioner of Securities. In Maryland, THG has offered a full range of financial planning services, including retirement, investment, tax, insurance and estate planning, and investment advisory services to Maryland residents through BOSE, its Investment Adviser Representative.

3. On June 19, 2009, BOSE resigned as a registered representative of SagePoint and resigned as an Investment Adviser Representative of THG to join NEXT Financial Group, Inc., a SEC registered broker-dealer and investment adviser firm.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action under 28 U.S.C. § 1332(a)(1) because the Plaintiff and Defendant are citizens of different states, and the amount in controversy exceeds \$75,000, excluding interest and costs.

5. Venue in this District is proper pursuant to the provisions of 28 U.S.C. § 1391(a) and (c). In addition, the claims set forth in this Complaint arise in Bethesda,

Maryland (Southern Division), wherein BOSE transacts business and generates the gross revenues which are the subject of this Declaratory Judgment action.

6. Plaintiff brings this claim for declaratory judgment pursuant to Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201-2202.

SUMMARY OF THE DISPUTE

7. On October 14, 2004, BOSE and THG executed “The Householder Group Branch Office Agreement” (hereafter “BOA”). A copy of the BOA is attached hereto as Exhibit 1. Section XI of the BOA, page 6, contains a liquidated damages clause that purports to obligate BOSE to immediately pay to THG upon termination of the BOA a sum of money equal to sixty percent (60%) of the amount of his Gross Revenues generated during the last full year of the BOA.

8. BOSE seeks a declaratory judgment from this Court declaring that the liquidated damages provision is unenforceable as a matter of law.

9. The identical liquidated damages provision was adjudged unenforceable by the United States District Court for the Northern District of California in *The Householder Group v. Randy S. Fuss*, Case No. C-07-573 SI. On July 22, 2008, Judge Susan Illston entered a Summary Judgment Order holding that the liquidated damages clause was unenforceable under Arizona law, *inter alia*, as it was not a reasonable forecast of damages. *See* Exhibit 2.

10. BOSE seeks a declaratory judgment that the Order of the Court in *The Householder Group v. Randy S. Fuss*, decided the issue of law and that decision precludes THG from asserting a claim for liquidated damages against BOSE and relitigating the issue in any forum.

11. In summary, BOSE requests the Court to declare the rights, status and other legal relations between BOSE and THG with respect to the liquidated damages provision.

ALLEGATIONS COMMON TO ALL COUNT(S)

12. As referenced in Paragraph 7 above, on October 14, 2004, BOSE and THG executed the BOA. The BOA provided that BOSE would work as an independent contractor for THG, that he would be designated as a Branch Manager, and that he would establish, develop and operate a THG branch office in Bethesda, Maryland. BOSE accomplished these objectives and opened a branch office at #3 Bethesda Metro Center, Suite 700, Bethesda, Maryland 20814, and then later moved the office to 4350 East West Highway, Suite 1025 Bethesda, Maryland 20814.

13. Section III of the BOA, "Consulting Services and Marketing Systems," pages 2-3, states that the "services and intellectual property to be provided by THG . . . are of very significant value," and that "[t]he normal time period required for recoupment of the investment made by THG is thirty-six months during which THG will suffer losses occasioned by its forbearance in associating with other revenue producing investment advisors in the Branch Office area." The BOA further provides that "[a]s payment for the services provided Manager by THG," BOSE agreed to pay THG a "one time fee" of One Hundred Fifty Thousand Dollars (\$150,000.00). The one time fee was evidenced by a promissory note. The BOA permitted the promissory note to be serviced or repaid by BOSE at the rate of ten percent (10%) of the gross revenues that he generated. The promissory note has been repaid in full. In fact, since 2004, BOSE has paid in excess of \$500,000 to THG for its percentage share of BOSE's investment advisory earnings.

14. An "Addendum to Branch Office Agreement" was also executed by BOSE and THG on October 14, 2004. Under the Addendum, THG loaned \$30,000 to BOSE, which he likewise repaid in full from a percentage of the gross revenues that he generated.

15. Section XI of the BOA, page 6, contains a liquidated damages clause that purports to obligate BOSE to pay to THG a sum of money equal to sixty percent (60%) of the amount of his gross revenue generated during the last full year of the BOA. The relevant portion of the contract provides:

Term: The term of this AGREEMENT shall be for a period of 3 years but it shall automatically be renew[ed] (sic) for succeeding periods of one year unless written notification is given by one of the parties to the other party not more than 60 days and not less than 30 days prior to its expiration. This AGREEMENT shall not become a binding contract until it is executed by all parties appearing on the signature page and will be deemed effective as of the date on the signature page, unless and to the extent a specific provision of this AGREEMENT refers to a different effective date. This AGREEMENT shall supersede any and all previous agreements between THG and Manager.

Termination: Upon termination of this AGREEMENT by Manager, Manager shall immediately pay to THG, as liquidated damages, a sum of money which is equal to sixty percent (60%) of the amount of Manager's Gross Revenue generated during the last full year of this AGREEMENT.

THG reserves the right to terminate this AGREEMENT without notice upon the occurrence of any of the following items:

- A. A violation of terms and conditions of this AGREEMENT by the Manager.
- B. A good faith determination by THG that the Manager has acted in such a manner as to significantly and adversely affect the marketability or reputation of THG or its Related Entities;
- C. Failure of the Manager to comply with any applicable laws or regulations governing any activity performed under this AGREEMENT;
- D. Conviction of the Manager of any crime involving moral turpitude;
- E. Death of the Manager;
- F. Termination of Manager as a Registered Representative by Sun America Securities (or such other broker-dealer with whom THG becomes affiliated).

16. Section XII.H of the BOA, "Construction", page 8, provides that the agreement "shall be interpreted, enforced and governed by and under the laws of the State of Arizona."

17. On June 19, 2009, BOSE resigned as a registered representative of SagePoint, the broker-dealer with whom THG is currently affiliated. BOSE also resigned as an Investment Adviser Representative of THG. The BOA has been effectively terminated. Under the BOA, BOSE is purportedly required to “immediately pay” to THG the liquidated damages specified in the BOA.

18. The liquidated damages provision is unenforceable on several grounds:

A. Under Arizona law, an agreement made in advance of a breach is a penalty, unless two conditions are met. First, the amount fixed in the contract must be a reasonable forecast of just compensation for the harm that is caused by the breach. *Larson-Hegstrom and Assoc., Inc. v. Jeffries*, 145 Ariz. 329, 333 (Ariz. Ct. App. 1985) (citing RESTATEMENT (SECOND) OF CONTRACTS § 356; RESTATEMENT (FIRST) OF CONTRACTS § 339; *Marshall v. Patzman*, 81 Ariz. 367, 371 (Ariz. 1957)). Second, the harm that is caused by any breach must be one that is incapable or very difficult of accurate estimation. *Id.* Whether these requirements are met is determined as a matter of law. *Id.*; *Pima Sav. & Loan Ass'n v. Rampello*, 168 Ariz. 297, 300 (Ariz. Ct. App. 1991).

B. The liquidated damages provision of the BOA is not a reasonable forecast of damages. It is of unlimited duration. As set forth in the BOA, BOSE is purportedly obligated to pay this sum regardless of when he leaves THG or the circumstances of his or her departure. Here, BOSE has been affiliated with THG for almost five years.

C. The provision applies regardless of whether THG has suffered any harm.

D. The provision is an unlawful penalty for changing employment.

E. The liquidated damages penalty is not a fixed amount or for a definite sum regardless of the nature or extent of the alleged breach of the BOA.

F. The liquidated damages provision is an in terrorem retention mechanism, or departure penalty, rather than a reasonable estimate of harm suffered.

19. The liquidated damages provision is also unenforceable on the ground that THG, an investment adviser firm, seeks to be paid commissions from securities transactions generated by BOSE as a registered representative of SagePoint even though THG is not registered as a broker-dealer firm. It would be unlawful and against public policy to require BOSE to pay to THG 60% of his securities commissions.

20. Section II of the BOA, page 2, defines the “Gross Revenues” which THG seeks from BOSE. The pertinent subsections of Gross Revenues are as follows:

- A. Gross Dealer Concessions (“GDC”) generated by Manager;
- C. All ‘12(b)(1) fees’ generated by Manager, regardless of the source of such fees;
- F. Any other revenues generated by Manager and received by THG or its designee.

“Gross Dealer Concessions” includes commissions earned by BOSE from the sale of securities. “Any other revenues” likewise includes commissions earned by BOSE from the sale of securities if not covered by any of the other definitions of Gross Revenues. 12(b)(1) fees are a form of compensation typically paid by mutual funds to brokers under the guise of marketing and selling fund shares. To be eligible for any of these commissions and fees, one has to be a registered representative or a registered broker-dealer firm. THG is neither.

21. It is unlawful in any state or jurisdiction, and certainly in the States of Maryland and Arizona, for an investment adviser firm which is not concurrently registered as a broker-dealer firm to be paid commissions from the sale of securities or to share in the

commissions earned by a registered representative. The liquidated damages provision is unenforceable as a matter of law and public policy.

22. The identical liquidated damages provision at issue in this case was adjudged unenforceable by the United States District Court for the Northern District of California in *The Householder Group v. Randy S. Fuss*, Case No. C-07-573 SI. On July 22, 2008, Judge Susan Illston entered an Order granting defendant Fuss's motion for partial summary judgment. *See* Exhibit 2. The Court held that the liquidated damages clause was unenforceable under Arizona law, *inter alia*, as it was not a reasonable forecast of damages.

23. The amount of liquidated damages sought by THG under the BOA exceeds \$75,000, excluding interest and costs.

COUNT 1

24. BOSE incorporates by reference the allegations set forth in Paragraphs 1 through 23 above.

25. An actual, present and justiciable controversy exists between BOSE and THG due to the requirement in the BOA that, upon termination of the BOA, BOSE "immediately pay to THG, as liquidated damages, a sum of money which is equal to sixty percent (60%) of the amount of Manager's Gross Revenue generated during the last full year of this AGREEMENT." On June 19, 2009, BOSE resigned from THG as an Investment Adviser Representative and resigned from SagePoint as a registered representative, thereby effectively terminating the BOA.

26. An actual, present and justiciable controversy also exists between BOSE and THG because (a) THG has not waived the liquidated damages provision or released BOSE from the purported obligation of the provision, and (b) THG has been asserting claims around the country under the identical liquidated damages provision against Branch

Managers, like BOSE, who have resigned from THG – notwithstanding the decision of the Court in *The Householder Group v. Randy S. Fuss, supra*,

27. BOSE seeks a declaratory judgment from this Court declaring any or all of the following:

A. That the Summary Judgment Order of the Court, dated July 22, 2008, in *The Householder Group v. Randy S. Fuss*, Case No. C-07-573-SI, decided the issue of law and that decision precludes THG from asserting a claim for liquidated damages against BOSE and relitigating the issue in any forum.

B. That the liquidated damages provision of the BOA is a penalty under Arizona law and, therefore, is unenforceable.

C. That the liquidated damages provision of the BOA is not a reasonable forecast of damages and, therefore, is unenforceable.

D. That the liquidated damages penalty is not a fixed amount or for a definite sum regardless of the nature or extent of the alleged breach of the BOA and, therefore, is unenforceable.

E. That the liquidated damages provision is an in terrorem retention mechanism, or departure penalty, rather than a reasonable estimate of harm suffered and, therefore, is unenforceable.

F. That the liquidated damages provision is unenforceable by THG on grounds that THG is not registered as a broker-dealer firm and it would be unlawful and against public policy to require BOSE to share his securities commissions with, or pay them to, THG.

28. BOSE requests the Court to enter other and further relief to which BOSE may be entitled as a matter of law, or which the Court determines to be just and proper.

29. BOSE requests the Court to award attorneys' fees incurred by him to protect his rights under the BOA, as authorized by Section XII.F of the BOA, page 7.

WHEREFORE, for these and other such reasons as the Court may find, Plaintiff Gautam B. Bose requests the Court to enter a Declaratory Judgment against Defendant The Householder Group, LLLP.

DATED: June 19, 2009

Respectfully submitted,



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