

## Revised Award

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In the Matter of the Arbitration Between:

Name of the Claimants

Roger Peak and Susan Peak

Case Number: 01-01630

Name of the Respondents

First Union Securities, Inc., UBS PaineWebber, Inc.,  
and John Phelps

Hearing Site: Houston, Texas

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### REPRESENTATION OF PARTIES

Claimant, Roger Peak and Susan Peak, hereinafter referred to as "Claimants": Annette M. Henry Esq., Annette M. Henry, Attorney at Law, located in Houston, Texas.

Respondents, First Union Securities, Inc., ("First Union") and John Phelps, ("Phelps") hereinafter collectively referred to as "Respondents": Ashley E. Interrante, Esq., of Jackson Walker L.L.P., Dallas, Texas.

Respondent UBS PaineWebber, Inc., hereinafter referred to as ("PaineWebber"): Laurie Flood Esq., Jenkins & Gilchrist, P.C., located in Dallas, Texas.

### CASE INFORMATION

Statement of Claim filed: April 4, 2001.

Claimants signed the Uniform Submission Agreements: March 21, 2002.

Statement of Answer filed by Respondent, First Union on or about: June 1 2001.

Respondent First Union signed a Uniform Submission Agreement on April 11, 2001.

Respondent John Phelps did not file a Statement of Answer or sign a Uniform Submission Agreement.

Respondent PaineWebber filed its Statement of Answer on or about: November 13, 2001.

Respondent PaineWebber did not file a Uniform Submission Agreement.

### CASE SUMMARY

Claimants asserted the following causes of action against Respondents: breach of contract; violations of the Texas Business and Commercial Code Section 17.50; violations of federal securities laws; fraud; negligence; gross negligence; misrepresentation; breach of fiduciary duty; breach of good faith and fair dealing; unjust enrichment; civil conspiracy, and/or intentional misconduct. Claimants further asserted, violations of the Texas Business and Commercial Code Section 27.01. All causes of action relate to the transfer of funds in Claimants' IRA accounts.

Unless specifically admitted in their Answer, Respondent First Union denied the allegations made in the Statement of Claim by Roger and Susan Peak and asserted the following affirmative defenses: Claimant has failed to state a claim upon which relief may be granted; Claimant is barred from recovery by the doctrines of ratification, estoppel, waiver and laches; Claimants assumed the risks of their investments; Claimant failed to complain in a timely manner; Claimants are barred by the doctrine of unclean hands; Claimants failed to mitigate their damages.

Unless specifically admitted in their Answer, Respondents PaineWebber denied the allegations made in the Statement of Claim by Roger and Susan Peak and asserted the following affirmative defenses: Claimant failure to state a claim upon which relief may be granted; Respondent acted in compliance with all applicable rules and regulations and acted in good faith; Claimants' damages were not caused by Respondent PaineWebber; Claimants contributed to their own damages; Claimants assumed the risks of their investments; Claimants ratified all trading in their account; PaineWebber exercised due diligence in the supervision of its employees and agents; Claimants are barred by the applicable statute of limitations and the NASD eligibility rules.

#### **RELIEF REQUESTED**

Claimant requested:

|                      |                             |
|----------------------|-----------------------------|
| Compensatory Damages | \$ 100,000.00- 3,000,000.00 |
| Punitive Damages     | \$ Unspecified              |
| Interest             | \$ Unspecified              |
| Attorneys' Fees      | \$ Unspecified              |
| Other Costs          | \$ Unspecified              |

Respondents requested that the claims filed against them be dismissed in their entirety.

Respondent First Union filed a Motion to Server on June 1, 2001.

Claimants filed a Response to the Motion to Server and to dismiss on June 14, 2002.

Respondent First Union Filed a Reply to the Response to the Motion to Dismiss on or about July 1, 2002.

Respondents PaineWebber and John Phelps filed a Motion to Dismiss on November 13, 2001.

Claimants filed a Response to this Motion to Dismiss on June 14, 2002.

Respondents filed a Reply to the Response Respondents' PaineWebeer and John Phelps Motion to Dismiss on or about November 29, 2002.

Claimants filed a Motion for Sanctions for failure to comply with discovery requests on or about October 1, 2002.

Respondent first Union filed a Response to the Motion for Sanctions on or about November 15, 2002.

### OTHER ISSUES CONSIDERED AND DECIDED

The Panel granted Respondent First Union's Motion to Sever on or about July 15, 2002. Panel ordered that the adjudication of issues in this action would be limited Claimants Roger Peak and Susan Peak verses Respondents First Union and UBS PaineWebber. Claimants William Roach, Thomas Johnson, Barry Benton and James and Marilyn Odom, initially parties to this action, were ordered to file separate claims.

Also on July 15, 2002 the Panel denied Respondents' PaineWebber and John Phelps Motion to Dismiss Claimants' Statement of Claim.

On October 15, 2002 the NASD received notice that the Claimants had settled their claims with UBS PaineWebber. Thus the Panel did not adjudicate any issues having to do with Claimants Roger Peak and Susan Peak and Respondents UBS PaineWebber.

At the conclusion of the hearing on the Merits the Panel denied Claimants motion for Sanctions.

Respondents First Union and John Phelps did not file with NASD Dispute Resolution, a properly executed submission to arbitration but are required to submit to arbitration pursuant to the Code and having answered the claim, appeared and testified at the hearing, are bound by the determination of the 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 copies of the award while the original remains on file with the NASD Dispute Resolution (the "NASD").

### 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 First Union Securities and John Phelps are jointly and severally liable for and shall pay to Claimants Roger Peak and Susan Peak the sum of \$264,242.00 in compensatory damages.
2. Respondent First Union Securities and John Phelps are jointly and severally liable and shall pay to Claimants Roger and Susan Peak Post -Judgment interest at a rate of 10%. Interest shall begin to accrue on November 21, 2002 and shall cease to accrue when the award is paid in full;
3. Respondent First Union Securities, Inc., and John Phelps are jointly and severally liable for and shall pay to Claimants Roger Peak and Susan Peak Pre-judgment interest in the amount of \$77,484.00;
4. Respondent First Union Securities Inc., and John Phelps are jointly and severally liable for and shall pay to Claimants Roger Peak and Susan Peak the sum of \$86,185.00 in attorneys' fees. The authority for attorneys' fees is based

upon the pleadings, the evidence presented herein and Texas state and federal statutes;

5. Respondent First Union Securities, Inc., and John Phelps are jointly and severally liable for and shall pay to Claimants Roger Peak and Susan Peak the sum of 18,00.00 in costs;
6. Any and all relief not specifically addressed herein is denied; and,
7. Any and all costs not specifically enumerated herein shall be borne by the party who incurred them.

#### **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 = \$ 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. Accordingly, First Union and PaineWebber are Respondent member firms.

###### **First Union:**

|                         |               |
|-------------------------|---------------|
| Member surcharge        | = \$ 2,500.00 |
| Pre-hearing process fee | = \$ 600.00   |
| Hearing process fee     | = \$ 4,500.00 |

###### **PaineWebber:**

|                         |               |
|-------------------------|---------------|
| Member surcharge        | = \$ 2,500.00 |
| Pre-hearing process fee | = \$ 600.00   |
| Hearing process fee     | = \$ 4,500.00 |

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

The Panel has assessed forum fees for each session conducted. A 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:

|   |                      |
|---|----------------------|
| Two (2) Pre-hearing sessions with the Panel @ \$1,200.00            | = \$ 2400.00         |
| Pre-hearing conference: April 12, 2001 1 session                    |                      |
| July 11, 2002 1 session   |                      |
| One (1) Pre-hearing session with the a single Arbitrator @ \$450.00 | = \$ 450.00          |
| June 17, 2002 1 session   |                      |
| Six (6) Hearing sessions @ \$1,200.00                               | = \$ 7,200.00        |
| Hearing Dates: November 19, 2002 2 sessions                         |                      |
| November 20, 2002 2 sessions  |                      |
| November 21, 2002 2 sessions  |                      |
| <hr/> Total Forum Fees  | <hr/> = \$ 10,050.00 |

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### Fee Summary

1. Claimant Roger Peak and Susan Peak are jointly and severally liable for:
 

|   |               |
|---|---------------|
| Initial Filing Fee                          | = \$ 500.00   |
| Total Fees                                  | = \$ 500.00   |
| Less payments                               | = \$ 1,700.00 |
| Balance refunded by NASD Dispute Resolution | = \$ 1,200.00 |
  
2. Respondent First Union is solely liable for:
 

|                                     |                |
|-------------------------------------|----------------|
| Member Fees                         | = \$ 7,600.00  |
| Forum Fees                          | = \$ 10,050.00 |
| Total Fees                          | = \$ 17,650.00 |
| Less payments                       | = \$ 7,600.00  |
| Balance Due NASD Dispute Resolution | = \$ 10,050.00 |
  
3. Respondent PaineWebber is solely liable for:
 

|                                     |               |
|-------------------------------------|---------------|
| Member Fees                         | = \$ 7,600.00 |
| Less payments                       | = \$ 7,600.00 |
| Balance Due NASD Dispute Resolution | = \$ .00      |

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

### ARBITRATION PANEL

Gordon W. Hall Esq.- Public Arbitrator, Presiding Chairperson  
Leonard S. Alpert - Public Arbitrator  
Steven M. Ruderman, CPA, CFP-Non-Public Arbitrator

### Concurring Arbitrators' Signatures

Gordon W. Hall

Gordon W. Hall Esq.  
Public Arbitrator, Presiding Chairperson

02-03-2003

Signature Date

\_\_\_\_\_  
Leonard S. Alpert  
Public Arbitrator

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

\_\_\_\_\_  
Steven M. Ruderman, CPA, CFP  
Non-Public Arbitrator

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

\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution  
Arbitration No. 01-01603  
Award Page 5

The Panel has assessed \$10,050.00 of the forum fees to First Union.

Fee Summary

1. Claimant Roger Peak and Susan Peak are jointly and severally liable for:

|   |               |
|---|---------------|
| Initial Filing Fee                          | = \$ 500.00   |
| Total Fees                                  | = \$ 500.00   |
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Gordon W. Hall Esq.  
Public Arbitrator, Presiding Chairperson

Leonard S. Alpert  
Public Arbitrator

Steven M. Ruderman, CPA, CFP  
Non-Public Arbitrator

Signature Date

2/13/03  
Signature Date

Signature Date

NASD Dispute Resolution  
Arbitration No. 01-01603  
Award Page 5

The Panel has assessed \$10,050.00 of the forum fees to First Union.

Fee Summary

1. Claimant Roger Peak and Susan Peak are jointly and severally liable for:

|   |               |
|---|---------------|
| Initial Filing Fee                          | = \$ 500.00   |
| Total Fees                                  | = \$ 500.00   |
| Less payments                               | = \$ 1,700.00 |
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2. Respondent First Union is solely liable for:

|                                     |                |
|-------------------------------------|----------------|
| Member Fees                         | = \$ 7,600.00  |
| Forum Fees                          | = \$ 10,050.00 |
| Total Fees                          | = \$ 17,650.00 |
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| Balance Due NASD Dispute Resolution | = \$ 10,050.00 |

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|                                     |               |
|-------------------------------------|---------------|
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Concurring Arbitrators' Signatures

Gordon W. Hall Esq.  
Public Arbitrator, Presiding Chairperson

2/13/03  
Signature Date

Leonard S. Alpert  
Public Arbitrator

Signature Date

Steven M. Ruderman, CPA, CFP  
Non-Public Arbitrator

2/15/03  
Signature Date

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Date of Service (For NASD Dispute Resolution office use only)