

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

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In the Matter of the Arbitration Between:

Louis Barinaga and Stuart Mackenzie, Claimants v. Paulson Investment Company, Inc., Marvin L. Cox, Jr. and UBS PaineWebber k/n/a UBS Financial Services, Respondents

Paulson Investment Company, Inc. and Marvin L. Cox, Jr., Counter-Claimants v. Louis Barinaga, Counter-Respondent

Case Number: 02-04697

Hearing Site: Portland, Oregon

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Nature of the Dispute: Customers v. Members and Associated Person  
Member and Associated Person v. Customer

**REPRESENTATION OF PARTIES**

For Claimants/Counter-Respondents  
(hereinafter Claimants)

Kim T. Buckley, Esq.  
Esler, Stephens & Buckley  
Portland, Oregon

For Respondent/Counter-Claimant  
Paulson Investment Company, Inc.  
(hereinafter Respondent Paulson  
Investment Company, Inc.)

Scott A. Shorr, Esq.  
Stoll Stoll Berne Lokting  
& Shlachter P.C.  
Portland, Oregon

For Respondent/Counter-Claimant Marvin L. Cox:  
(hereinafter Respondent Cox)

Marvin L. Cox  
In Pro Se  
Tigard, Oregon

For Respondent UBS Paine Webber  
k/n/a UBS Financial Services, Inc.  
(hereinafter Respondent UBS Financial  
Services, Inc.)

Thomas Sand, Esq.  
Bruce Campbell, Esq.  
Ky Fullerton, Esq.  
Miller Nash LLP  
Portland, Oregon

**CASE INFORMATION**

Statement of Claim filed: August 2, 2002

First Amended Statement of Claim filed: September 26, 2002

Claimant Louis Barinaga's Second Amended Statement of Claim filed: October 28, 2003

Claimant Louis Barinaga's Third Amended Statement of Claim filed: February 2, 2004

Claimant Louis Barinaga's Revised Third Amended Statement of Claim filed: March 31, 2004

Claimant Louis Barinaga's Fourth Amended Statement of Claim filed: May 21, 2005

Claimant Louis Barinaga's Uniform Submission Agreement signed: July 26, 2002

Claimant Stuart MacKenzie's Uniform Submission Agreement signed: August 30, 2002

Claimants Reply to Respondent Paulson Investment Company, Inc.'s Counterclaim filed:  
November 14, 2002

Claimants Reply to Respondent Marvin L. Cox, Jr.'s Counterclaim filed: November 14, 2002

Claimant Louis Barinaga's Reply to UBS Financial Services, Inc.'s Counterclaim filed: October  
13, 2004

Claimant Barinaga's Reply to Respondent Paulson Investment Company Inc.'s Counterclaims in  
First Amended Answer filed: October 11, 2004

Claimant Barinaga's Reply to Respondent Marvin L. Cox Jr.'s Counterclaims in First Amended  
Answer filed: October 11, 2004

Statement of Answer and Counterclaim by Respondent Paulson Investment Company, Inc. filed:  
October 31, 2002

Respondent Paulson Investment Company, Inc.'s Statement of First Amended Answer and  
Counterclaims to Claimant Louis Barinaga's Third Amended Statement of Claim and Stuart  
Mackenzie's Proposed First Amended Statement of Claim filed: May 7, 2004

Respondent Paulson Investment Company Inc.'s Uniform Submission Agreement signed:  
September 17, 2002

Statement of Answer filed by Respondent Marvin L. Cox, Jr.: November 1, 2002

Statement of First Amended Answer and Counterclaims by Respondent Marvin L. Cox, Jr. filed: May 10, 2004

Statement of Second Amended Answer to Claimant Barinaga's Fourth Amended Statement of Claim and Counterclaims by Respondent Marvin L. Cox, Jr. filed: June 13, 2005

Uniform Submission Agreement by Respondent Marvin L. Cox, Jr. signed: November 1, 2002

Respondent UBS Financial Services Inc.'s Statement of Answer to Claimant Louis Barinaga's Revised Third Amended Statement of Claim and Counterclaim for Attorney's Fees filed: April 29, 2004

Respondent UBS Financial Services Inc.'s Statement of Answer and Affirmative Defenses Claimant Louis Barinaga's Fourth Amended Statement of Claim and Counterclaim for Attorney's Fees filed: June 9, 2005

Uniform Submission Agreement by Respondent UBS Financial Services, Inc.: None submitted

### CASE SUMMARY

In their initial and First Amended Statements of Claim, Claimants alleged violation of ORS § 59.115(3) and ORS §59.115(10), negligent misrepresentation, violation of NASD Conduct Rule 2120, breach of fiduciary duty, breach of good faith and fair dealing, violation of Securities Exchange Act §10(b) and Rule 10(b)-5, fraud, negligent supervision and failure to supervise and respondeat superior involving the issuance of convertible promissory notes by E.Com to Claimants. Claimants further allege that Respondents Paulson Investment Company, Inc. and Cox, in the course of their business, acted with malice or have shown reckless or outrageous indifference to a highly unreasonable risk of harm and have acted with a conscious indifference to the welfare of others, including Claimants.

In his Second Amended Statement of Claim, Claimant Barinaga named UBS PaineWebber k/n/a UBS Financial Services, Inc. as a respondent. In addition, Claimant Barinaga alleged violation of ORS §59.115, and .127, negligent misrepresentation, breach of fiduciary duty and assisting breach of fiduciary duty, breach of good faith and fair dealing in violation of NASD Conduct Rule 2120, violation of Securities Exchange Act §10(b) and Rule 10(b)-5, fraud, negligent supervision and failure to supervise and respondeat superior involving the purchase of eDigital stock by Respondent UBS Financial Services from Claimant Barinaga. Claimant Barinaga further alleged that Respondents Paulson and Cox, in the course of their business, acted with malice or have shown reckless or outrageous indifference to a highly unreasonable risk of harm and have acted with a conscious indifference to the welfare of others, including Claimant Barinaga.

In his Third Amended Statement of Claim and Revised Third Amended Statement of Claim, Claimant Barinaga alleged violation of Oregon Securities Law, negligence, breach of fiduciary duty, violation of Securities Exchange Act §10(b) and Rule 10(b)-5, violation of Securities Act of 1933 §12, fraud, negligent supervision and failure to supervise, respondeat superior, as against Respondents Paulson Investment Company, Inc. and Cox regarding the issue of E.Com convertible notes. Claimant Barinaga alleged controlling person as against Respondent Paulson Investment Company, Inc. and liability for punitive damages as against Respondent Cox regarding the issue of E.Com convertible notes. Claimant Barinaga also alleged violation of Oregon Securities Law, breach of fiduciary duty and assisting breach of fiduciary duty, negligent misrepresentation, violation of NASD Conduct Rule 2120, breach of fiduciary duty and assisting breach of fiduciary duty, breach of good faith and fair dealing, violation of Securities Exchange Act §10(b) and Rule 10(b)-5, fraud, negligent supervision and failure to supervise, violation of Securities Act of 1933 §12, negligence, respondeat superior and controlling person against Respondents Paulson Investment Company, Inc. and UBS Financial Services, Inc. Claimant Barinaga alleged that Respondents Paulson Investment Company, Inc., UBS Financial Services, Inc. and Cox, in the course of their business, acted with malice or have shown reckless or outrageous indifference to a highly unreasonable risk of harm and have acted with a conscious indifference to the welfare of others, including Claimant Barinaga. These allegations involved eDigital stock.

In his Fourth Amended Statement of Claim, Claimant Barinaga asserted that all claims relating to E.Com had been settled and alleged the following against Respondent UBS Financial Services, Inc. and Respondent Cox: violation of Oregon Securities Law § 59.115 and § .127, negligence and assisting breach of duty of reasonable care, breach of fiduciary duty and assisting breach of fiduciary duty, negligent misrepresentation, breach of fiduciary duty, breach of good faith and fair dealing, violation of Securities Exchange Act §10(b) and Rule 10(b)-5, fraud, violation of Securities Act of 1933 §12, negligent supervision and failure to supervise, respondeat superior and controlling person involving eDigital stock. Claimant Barinaga alleged that Respondents UBS Financial Services, Inc. and Cox, in the course of their business, acted with malice or have shown reckless or outrageous indifference to a highly unreasonable risk of harm and have acted with a conscious indifference to the welfare of others, including Claimant Barinaga.

Respondents denied the allegations of wrongdoing set forth in the Claimants' Initial and Amended Statements of Claim and asserted various affirmative defenses.

In their Counterclaims, Respondents Paulson Investment Company, Inc. and Cox requested indemnity and contribution from Claimant Barinaga to the extent that Claimant Stuart MacKenzie recovered damages on any of his claims against Respondent Cox.

Claimant Barinaga denied the allegations of wrongdoing set forth in Respondents Paulson Investment Company Inc. and Cox's Counterclaims.

### **RELIEF REQUESTED**

In Fourth Amended Statement of Claim, Claimant Barinaga requested compensatory damages in the sum of \$12,439,258.40 plus interest calculated from the date of payment at the rate provided in the security (\$6,476,452.34 as of January 28, 2005), unspecified compensatory damages for damages Claimant Barinaga allegedly sustained when he was advised not to sell shares of eDigital stock held in his personal account and his retirement account, punitive damages in the amount of \$500,000.00 each from Respondents UBS Financial Services, Inc. and Cox, and costs, including attorney's fees.

Respondents requested dismissal of the Claimant Barinaga's Statement of Claim in its entirety, and costs, including attorney's fees.

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

On or about March 2, 2005, Claimant Stuart Mackenzie dismissed all his claims against Respondents Paulson Investment Company Inc. and Marvin L. Cox, Jr.

On or about March 3, 2005, Claimant Barinaga dismissed with prejudice all claims, specifically including Barinaga's claims in his Revised Third Amended Statement of Claim against Respondent Paulson Investment Company, Inc. On that date, Respondent Paulson Investment Company, Inc. dismissed with prejudice all claims and counterclaims against Claimant Barinaga, specifically including Paulson Investment Company, Inc.'s claims alleged against Barinaga in its First Amended Answer.

On or about January 13, 2005, Respondent UBS Financial Services, Inc. filed a motion to dismiss Claimant Barinaga's suitability claims. On January 25, 2005, after due deliberation in an executive session, the Panel denied the motion.

Respondent UBS Financial Services, Inc. did not file with the NASD Dispute Resolution a properly executed submission agreement but is required to submit to arbitration pursuant to the Code 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, Respondent Cox withdrew all counterclaims except his counterclaim for attorney's fees.

During the hearing, the Panel reviewed and considered the positions of the parties relative to Respondent UBS Financial Services Inc.'s motion to exclude testimony of lawyer expert witnesses. The Panel denied the motion.

During the hearing the Panel reviewed and considered the positions of the parties to Respondent UBS Financial Services, Inc.'s Motion for Summary award. The Panel granted the motion.

During the hearing, the Panel reviewed and considered the positions of the parties relative to Respondent Cox's oral motion for summary award. The panel denied the motion.

During the hearing, Respondent Cox stated that he did not receive a full and fair opportunity to be heard because of insufficient time to prepare his case.

The parties 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, testimony, and evidence presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Respondent Marvin L. Cox, Jr. is solely liable to and shall pay Claimant Louis Barinaga the sum of \$205,000.00 in compensatory damages.
- 2) Respondent Marvin L. Cox, Jr. is solely liable to and shall pay Claimant Louis Barinaga interest on the aforementioned sum of \$205,000.00 at the rate of 9% per annum from August 12, 2005 until payment is made.
- 3) Claimant Louis Barinaga is liable to and shall pay Respondent UBS Financial Services, Inc. the sum of \$287,866.63 in attorneys' fees and costs pursuant to Oregon Securities Law ORS §59.115(10) and §59.127(9).
- 4) Claimant Louis Barinaga's Claims against Respondent UBS Financial Services, Inc. are denied.
- 5) Respondent UBS Financial Services, Inc.'s claim for expert witness fees of \$49,173.99 is denied.
- 6) Except as noted above, the parties shall bear their respective costs, including attorney's fees.
- 7) All other relief requested and not expressly granted is denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 600.00
Respondent Paulson Investment Company, Inc.'s Counterclaim	= \$1,000.00
Respondent Marvin J. Cox, Jr.'s Counterclaim	= \$ 600.00

#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events that gave rise to the dispute, claim, or controversy. Accordingly, the member firm Paulson Investment Company, Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 3,750.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,500.00
<b>Total Member Fees</b>	<b>= \$10,000.00</b>

The member firm UBS Financial Services Inc. is a party and the following fees are assessed:

Member Surcharge	= \$ 3,750.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,500.00
<b>Total Member Fees</b>	<b>= \$ 10,000.00</b>

#### **Adjournment Fees**

The following adjournment fees are assessed:

November 3-6, 2003, adjournment requested by Claimants	= \$ 1,200.00
January 31, 2005 to February 4, 2005, adjournment requested by Respondent UBS Financial Services, Inc.	= \$ 1,200.00

The Panel assessed the fee for the adjournment of November 3-6, 2003 hearing dates to Claimants

The Panel assessed the fee for the adjournment of January 31, 2005 to February 4, 2005 hearing dates to Respondent UBS Financial Services, Inc.

### **Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

Cancellation of January 31, 2005 – February 4, 2005 hearing dates =\$300.00

1. The Panel assessed \$150.00 of three-day cancellation fee to Respondent Paulson Investment Company, Inc.
2. The Panel assessed \$150.00 of the three-day cancellation fee to Respondent Marvin L. Cox, Jr.

### **Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair or the parties and the Panel. The following fees are assessed:

(1) Pre-hearing conference session with a single arbitrator @ \$ 450.00/session	= \$ 450.00
Pre-hearing conference: November 3, 2004 1 session	
(5) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 6,000.00
Pre-hearing conferences: March 18, 2003 1 session	
October 27, 2003 1 session	
March 23, 2004 1 session	
June 27, 2005 1 session	
July 12, 2005 1 session	
(12) Hearing sessions @ \$1,200.00/session	= \$ 14,400.00
Hearings: July 25, 2005 2 sessions	
July 26, 2005 2 sessions	
July 27, 2005 2 sessions	
July 28, 2005 3 sessions	
July 29, 2005 2 sessions	
September 20, 2005 1 session	

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**Total Forum Fees = \$20,850.00**

1. The Panel assessed \$11,025.00 of the forum fees to Claimant Louis Barinaga.
2. The Panel assessed \$9,825.00 of the forum fees to Respondent Marvin L. Cox, Jr.



**Fee Summary**

1. Claimants Louis Barinaga and Stuart Mackenzie are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 500.00
<u>Adjournment Fee</u>	= \$ 1,200.00
Total Fees	= \$ 1,700.00
<u>Less payments</u>	= \$(1,700.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

2. Claimant Louis Barinaga is charged with the following fees and costs:

Additional Filing Fee	= \$ 100.00
<u>Forum Fees</u>	= \$11,025.00
Total Fees	= \$11,125.00
<u>Less Payments</u>	= \$(1,300.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 9,825.00</b>

3. Respondent Paulson Investment Company Inc. is charged with the following fees and costs:

Counterclaim Filing Fee	= \$ 1,000.00
Member Fees	= \$10,000.00
<u>Three Day Cancellation Fee</u>	= \$ 150.00
Total Fees	= \$11,150.00
<u>Less payments</u>	= \$(10,825.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 325.00</b>

4. Respondent UBS Financial Services, Inc. is charged with the following fees and costs:

Member Fees	= \$10,000.00
<u>Adjournment Fee</u>	= \$ 1,200.00
Total Fees	= \$ 11,200.00
<u>Less payments</u>	= \$(11,200.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

5. Respondent Marvin L. Cox, Jr. is charged with the following fees and costs:

Counterclaim Filing Fee	= \$ 600.00
Three Day Cancellation Fee	= \$ 150.00
<u>Forum Fees</u>	= \$ 9,825.00
Total Fees	= \$10,575.00
<u>Less payments</u>	= \$ 0.00
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$10,575.00</b>

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

ARBITRATION PANEL

Alun Hywel Jones	-	Public Arbitrator, Presiding Chair
Gerald D. Wygant, Esq.	-	Public Arbitrator
R. Lee Smith	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Alun Hywel Jones

Alun Hywel Jones  
Chair, Public Arbitrator

September 23, 2005  
Signature Date

Gerald D. Wygant, Esq.  
Public Arbitrator

Signature Date

R. Lee Smith  
Non-Public Arbitrator

Signature Date

9/27/05  
Date of Service

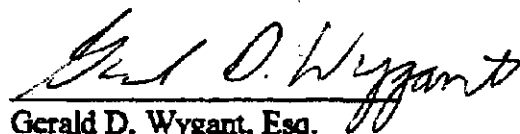
**ARBITRATION PANEL**

Alun Hywel Jones	-	Public Arbitrator, Presiding Chair
Gerald D. Wygant, Esq.	-	Public Arbitrator
R. Lee Smith	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Alun Hywel Jones  
Chair, Public Arbitrator

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

  
\_\_\_\_\_  
Gerald D. Wygant, Esq.  
Public Arbitrator

9-22-05  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
R. Lee Smith  
Non-Public Arbitrator

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

9/27/05  
\_\_\_\_\_  
Date of Service

**ARBITRATION PANEL**

Alun Hywel Jones

Gerald D. Wygant, Esq.

R. Lee Smith

Public Arbitrator, Presiding Chair

Public Arbitrator

Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

Alun Hywel Jones

Chair, Public Arbitrator

Signature Date

Gerald D. Wygant, Esq.

Public Arbitrator

Signature Date



R. Lee Smith

Non-Public Arbitrator

Signature Date

9-23-05

Date of Service

9/27/05