

**AWARD**  
**NASD Dispute Resolution**

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In the Matter of the Arbitration Between

Name of Claimants

Calvin G. Jr. and Cheryl D. Kinchen and Monument Capital  
Mortgage, Inc.

And

02-06137  
Nashville, Tennessee

Name of Respondent

UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc.

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Nature of the Dispute: Customer vs. Member.

**REPRESENTATION OF PARTIES**

Calvin G. Jr. and Cheryl D. Kinchen and Monument Capital Mortgage, Inc. ("**Claimants**") were represented by L. Jerome Stanley, Esq., Baton Rouge, Louisiana.

UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc. ("**Respondent**") represented by George C. Freeman, III, Esq. and Celeste R. Coco-Ewing, Esq., Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., New Orleans, Louisiana.

**CASE INFORMATION**

The Statement of Claim was filed on or about October 11, 2002. Amended Statement of Claim was filed on or about September 2, 2003. Claimants' Response to UBS PaineWebber's Motion to Dismiss and Claimants' Cross-Motion to Bar and For Sanctions was filed on or about October 31, 2003. Claimants' Sur-Reply Memorandum to UBS PaineWebber's Reply Memorandum in Support of Motion to Dismiss was filed on or about November 17, 2003. Claimants' Response to UBS/PaineWebber's Motion to File Answer Under Seal was filed on or about July 27, 2004. Submission Agreement of Claimant Calvin G. Jr. and Cheryl D. Kinchen and Monument Capital Mortgage, Inc. was signed on October 10, 2002.

Answer to Amended Statement of Claim was filed by Respondent UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc. on or about July 1, 2004. Motion to File Answer to Amended Statement of Claim Under Seal was filed on or about July 1, 2004. UBS PaineWebber's Motion for More Definite Statement was filed on or about January 15, 2003. UBS PaineWebber's Reply in Support of its Motion for More Definite Statement and Response to Claimant's Cross-Motion to Bar and for Sanctions was filed on or about February 19, 2003. UBS's Motion to Dismiss and Memorandum in

Support of Motion to Dismiss on Behalf of UBS were filed on or about October 15, 2003. UBS's Reply Memorandum in Support of Motion to Dismiss was filed on or about November 14, 2003. UBS's Supplemental Memorandum on its Motion to Dismiss and Claimant's Motion for Sanctions was filed on or about April 2, 2004. Submission Agreement of Respondent UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc. was signed on January 15, 2003.

### CASE SUMMARY

Claimants asserted the following causes of action: misrepresentation, fraud, detrimental alliance, breach of contract, breach of fiduciary duty, damage to property, deceit, breach of implied duty of good faith and fair dealing, and violation of the Tennessee Securities Act. Claimants specifically alleged that:

PaineWebber put its own interests ahead of the interests of its clients who owned NetGuru, including the Claimants, in forcing the sale of the 1,300,000 block of NetGuru to be sold in October/November 2000. PaineWebber failed to disclose to its clients, including the Claimants, the existence of PaineWebber's adverse position in NetGuru for its own account and benefit and to the detriment of its clients who held long positions in NetGuru, including the Claimants. PaineWebber was negligent and/or breached its duty in allowing the Pegasus Fund carry [sic] a margin account and/or buy securities on margin when the Pegasus Fund partnership Agreement did not allow for the use of margin. PaineWebber was further negligent and/or further breached its duty in failing to review the Pegasus Fund Partnership Agreement when PaineWebber took over the Bradford accounts in August 2000. PaineWebber was further negligent and/or further breached its duty in allowing the Pegasus Fund to buy NetGuru stock on margin in August 2000, which increased the margin balance and risk of a margin call in the Pegasus Fund account. The fact that the Pegasus Fund's PaineWebber account was a margin account caused the circumstances which damaged the Claimants, in as much as the Pegasus Fund's securities holdings would otherwise not have been liquidated to meet a margin call, which liquidation caused the precipitous decline in the price of NetGuru stock in October 2000 and thereafter.

Respondent submitted the following case summary:

Respondent denies the allegations made in the Statement of Claim, unless specifically admitted in its answer. Respondent specifically asserts that there is no legal basis for Claimants' claims, which are based on the alleged manner in which Respondent exercised its contractual right and fulfilled its regulatory obligation in liquidating the account of a separate and unrelated investor that was subject to a maintenance call under NYSE Rule 431. Respondent also affirmatively states that the manner in which the liquidation occurred in this separate and unrelated customer's account was commercially reasonable. Respondent also asserts the following defenses: Claimants' claims are barred by all applicable statutes of limitations; Respondent acted properly, in good faith and in a commercially-reasonable

manner with respect to Claimants' accounts; Claimants fail to state a claim as the unrelated investor's failure to timely object to the transactions of which Claimants complain constitutes a ratification of these transactions and a waiver or estoppel of Claimants' right, if any, to any recovery sought in the Statement of Claim; Claimants failed to mitigate their damages; contributory and/or comparative fault bar Claimants' claims in whole or in part; and Claimants failed to state a claim upon which relief may be granted.

### **RELIEF REQUESTED**

Claimants requested an award of compensatory damages in the total amount of \$672,125.00, plus interest, and reasonable attorneys' fees. In addition, Claimants requested an award of punitive damages in the amount of \$10,000,000.00.

Respondents requested that the claims asserted against them be denied in its entirety and that they be awarded their costs and attorneys' fees.

### **OTHER ISSUES CONSIDERED & DECIDED**

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 Dispute Resolution (the "NASD").

### **AWARD**

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, if any, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The claims asserted in this matter are hereby dismissed in their entirety.
2. That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.
3. Other than the Forum Fees noted below, the parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees, not specifically awarded or otherwise provided for above.

### **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 = \$600.00

### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm(s) is UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc.

Member surcharge	\$	3,750.00
Pre-hearing process fee	\$	750.00
Hearing process fee	\$	5,500.00
Total Member Fees	\$	10,000.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

Hearing Date(s), May 24-28, 2004, adjournment requested jointly by the parties (fee waived) = \$1,200.00

Hearing Date(s), May 23-27, 2005, adjournment requested jointly by parties = \$1,500.00

### **Forum Fees and Assessments**

The Arbitration Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

3	Pre-hearing session(s) with a single arbitrator	x	\$450.00	\$	1,350.00
	February 24, 2005	1	session		
	March 3, 2005	1	session		
	March 28, 2005	1	session		
3	Pre-hearing session(s) with Panel	x	1,200.00	\$	3,600.00
	August 4, 2003	1	session		
	April 6, 2004	1	session		
	May 24, 2004	1	session		
12	Hearing sessions	x	1,200.00	\$	14,400.00
	November 28, 2005	2	sessions		

November 29, 2005	2	sessions	
November 30, 2005	2	sessions	
December 1, 2005	2	sessions	
December 2, 2005	2	sessions	
December 14, 2005	1	session	
December 15, 2005	1	session	
Total Forum Fees			\$ 19,350.00

The Arbitration Panel has assessed \$19,350.00 of the forum fees to Calvin G. Jr. and Cheryl D. Kinchen and Monument Capital Mortgage, Inc.

### 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.

UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc., requested tape duplication. \$210.00

### Fee Summary

Claimants, Calvin G. Jr. and Cheryl D. Kinchen and Monument Capital Mortgage, Inc. are jointly and severally liable for:

Initial Filing Fee	= \$	600.00
Adjournment Fee	= \$	750.00
<u>Forum Fees</u>	= \$	19,350.00
Total Fees	= \$	20,700.00
<u>Less payments</u>	= \$	-1,800.00
Balance Due NASD Dispute Resolution		= \$ 18,900.00

Respondent, UBS Financial Services Inc. f/k/a UBS PaineWebber, Inc., is liable for:

Member Fees	= \$	10,000.00
Adjournment Fee	= \$	750.00
Administrative Costs	= \$	210.00
Total Fees	= \$	10,960.00
<u>Less payments</u>	= \$	-8,710.00
Balance Due NASD Dispute Resolution		= \$ 2,250.00

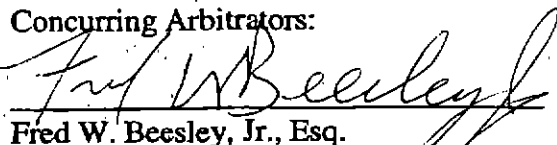
**All balances are due to NASD Dispute Resolution**

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**ARBITRATION PANEL**

Fred W. Beesley, Jr., Esq. - Public Arbitrator, Presiding Chair  
Joe P. Lane, Jr., Esq. - Public Arbitrator  
Nicholas James Douglas - Non-Public Arbitrator

Concurring Arbitrators:

  
Fred W. Beesley, Jr., Esq.  
Public Arbitrator, Presiding Chair

10 JAN 2006  
Signature Date

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Joe P. Lane, Jr., Esq.  
Public Arbitrator

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Signature Date

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Nicholas James Douglas  
Non-Public Arbitrator

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Signature Date

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Date of Service (For NASD office use only)

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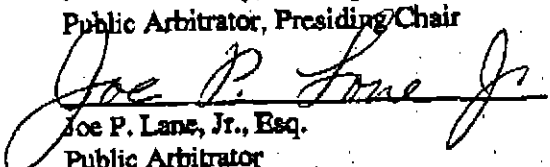
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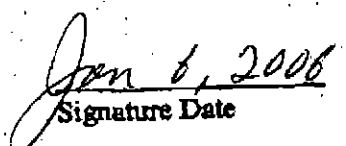
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Public Arbitrator, Presiding Chair

Signature Date

  
Joe P. Lane, Jr., Esq.  
Public Arbitrator

  
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Public Arbitrator, Presiding Chair

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Signature Date

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Joe P. Lane, Jr., Esq.  
Public Arbitrator

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Signature Date

*Nicholas James Douglas*  
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Nicholas James Douglas  
Non-Public Arbitrator

*1-11-06*  
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Signature Date

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