

AWARD
NASD Dispute Resolution

In the Matter of the Arbitration Between

Claimants

Carolyn J. Newkirk, Individually,
John B. Newkirk, Individually,
and John J. Newkirk, Individually,
and as Trustee of the JBN Charitable Lead
Annuity Trusts Nos. 1,2,3, and 4
and as Trustee of the Newkirk
1995 Irrevocable Life Insurance Trust

v.

02-07121
Denver, Colorado

Respondents

UBS PaineWebber, Inc.,
Bruce L. Fleet and John Lester

Nature of Dispute: Customers v. Member and Associated Persons

REPRESENTATION OF PARTIES

Carolyn J. Newkirk, Individually, John B. Newkirk, Individually and John J. Newkirk, Individually and as Trustee of the JBN Charitable Lead Annuity Trusts No. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, hereinafter referred to as ("**Claimants**"), were represented by Michael L. Poindexter, Esq., of the Law Offices of Michael L. Poindexter, Golden, Colorado.

UBS PaineWebber, Inc. ("**UBS**"), Bruce L. Fleet ("**Fleet**") and John Lester ("**Lester**"), hereinafter referred to as ("**Respondents**"), were represented by John W. Shaw, Esq., of Berkowitz, Stanton, Brandt, Williams & Shaw, LLP, Kansas City, Missouri.

CASE INFORMATION

The Statement of Claim was filed on or about November 21, 2002. The Submission Agreements of Claimants were signed on or about November 21, 2002.

The Statement of Answer was filed jointly by Respondents, UBS PaineWebber, Inc., Bruce L. Fleet and John Lester, on or about March 3, 2003. The Submission Agreement of Respondent UBS PaineWebber, Inc., was signed on or about March 7, 2003. The Submission Agreement of Respondent Bruce L. Fleet was signed on or about May 2, 2003. The Submission Agreement of Respondent John Lester was signed on or about May 6, 2003.

Claimants filed a Motion to Amend the Statement of Claim on or about July 9, 2004.

Respondents filed a Response to Claimants' Motion to Amend the Statement of Claim on or about July 12, 2004.

Claimants filed an Amend Statement of Claim on or about July 12, 2004.

CASE SUMMARY

Claimants asserted causes of action including the following: fraud, unsuitable recommendations, failure to supervise, negligence, unauthorized trading, breach of contract, breach of fiduciary duty and violations of the Colorado Consumer Protection Act. The causes of action related to the following allegations:

- 1.) Claimants alleged that Respondents convinced them to liquidate all of their holdings in Stryker Corp. (SYK) common stock, in contrast to Claimants' representation that they only wanted to sell 50% of the their holdings for hedging purposes. Claimants asserted that 1 year after the liquidation, the value of SYK shares had increased by approximately 25% in value compared to the price on the date of liquidation.
- 2.) Claimants alleged that Respondents used the proceeds from the SYK sale to invest in four tiered Charitable Annuity Trusts (CLAT's) which, according to Claimants, were unsuitable and could not return the income necessary to fund the trusts charitable giving requirements without invading principal, causing losses of their principal and estate tax benefits.
- 3.) Claimants alleged that Respondents stated that Claimants would need to sell their \$3,000,000 policy held in the 1995 Irrevocable Life Insurance Trust under a viatical settlement in order to provide up-front funding to enable the proposed premium structure under a new \$6,000,000 policy. Claimants stated that after learning that Respondents invested them in variable Keyport annuities which, according to Claimants, was a direct breach of the express agreement of the parties, they refused to agree to the terms of the viatical sale to a third-party, as requested by Respondents. Claimants asserted that, after the policy lapsed for non-payment of premium, Claimants lost the initial cash invested in the policy and lost the opportunity to obtain additional coverage needed for protected estate taxes without additional cost.
- 4.) Claimants asserted that Respondents invested them in "B" shares of Paine Webber's Tactical Allocation Fund (PWTBX) which, according to Claimants, were unsuitable. Claimants alleged that "A" shares would have reduced the commissions, fees, and penalties incurred.

Respondents denied the allegations set forth in the Statement of Claim and asserted defenses including the following: Claimants failed to state a cause of action against Respondents; the damages

allegedly suffered by Claimants have no causal relationship with any act committed by Respondents or legally attributable to Respondents; Claimants are estopped by their conduct from maintaining this action against Respondents; the Statement of Claim is barred by the doctrines of estoppel and affirmance; the transactions complained of in the Statement of Claim were duly authorized by Claimants; Claimants' claims are barred by waiver, assumption of risk, and/or contributory fault/negligence; and Respondents acted in compliance with all applicable rules, acted in good faith and did not directly induce the alleged acts, if any, constituting alleged violations of law.

RELIEF REQUESTED

In Claimants' claim information sheet, Claimants requested an award of \$1,800,000 in actual damages, plus \$1,800,000 in punitive damages. At the final hearing, Claimants requested the following damages: \$558,493 in damages for sale of 50% of the SYK shares; \$133,214 in damages for losses in the JBN Charitable Lead Annuity Trust #1; \$115,674 in damages for losses in the JBN Charitable Lead Annuity Trust #2; \$140,971 in damages for losses in the JBN Charitable Lead Annuity Trust #3; \$144,982 in damages for losses in the JBN Charitable Lead Annuity Trust #4; \$398,640 in damages resulting from the switching of variable annuities; \$433,763 in damages for the impact of the loan taken on JBN Prudential Policy; \$850,000 in damages as the result of the viatical sale and \$63,175 in damages resulting from the "B" share purchases. In addition, Claimants requested treble damages, attorneys' fees, costs, interest, punitive damages and for such other relief the panel deemed appropriate.

Respondents requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. In addition, Respondents requested that the panel order the expungement of all references to this matter from Bruce L. Fleet's and John Lester's permanent registration records.

OTHER ISSUES CONSIDERED & DECIDED

At the July 12, 2004 hearing, the parties orally argued their positions on the Motion to Amend the Statement of Claim. After deliberation, the panel granted Claimant's Motion to Amend the Statement of Claim.

After the conclusion of Claimants' case-in-chief, Claimants' counsel requested that Claimant, John B. Newkirk, present a summation to the panel. Respondents objected and after deliberation the panel denied Claimants' request.

On or about August 8, 2003, NASD Dispute Resolution informed the parties that Arbitrator, Jess Burton Cohen, had been reclassified as an industry arbitrator. At the final hearing, all parties agreed to the panel's composition.

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 originals remain on file with NASD Dispute Resolution ("NASD").

AWARD

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

1. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Seventy Thousand Dollars and No Cents (\$70,000.00) in damages relating to the premature sale of SYK holdings;
2. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Fifty Five Thousand Dollars and No Cents (\$55,000.00) in damages relating to the JBN Charitable Lead Annuity Trust #1;
3. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Twenty Eight Thousand Dollars and No Cents (\$28,000.00) in damages relating to the JBN Charitable Lead Annuity Trust #2;
4. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Fifteen Thousand Dollars and No Cents (\$15,000.00) in damages relating to the JBN Charitable Lead Annuity Trust #3;
5. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts

Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Fourteen Thousand Dollars and No Cents (\$14,000.00) in damages relating to the JBN Charitable Lead Annuity Trust #4;

6. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of One Hundred Five Thousand Dollars and No Cents (\$105,000.00) in damages relating to ILIT improprieties/variable annuity switching;
7. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Sixty Thousand Dollars and No Cents (\$60,000.00) in damages relating to the impact of loan taken on JBN Prudential Policy and the failure of the viatical sale;
8. Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for and shall pay to Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, the sum of Thirty Nine Thousand Dollars and No Cents (\$39,000.00) in damages relating to the "B" share purchases;
9. Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually, and John J. Newkirk, Individually, and as Trustee of the JBN Charitable Lead Annuity Trusts Nos. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, are jointly and severally liable for and shall pay to Respondent, UBS PaineWebber, Inc., the sum of Thirty Thousand Dollars and No Cents (\$30,000.00) in attorney's fees pursuant to C.R.S. § 13-17-102;
10. Claimants' claims, each and all against Respondent, John Lester, are denied and dismissed with prejudice in their entirety;
11. The Panel recommends the expungement of all reference to the above captioned arbitration from Respondent John Lester's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondent John Lester must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive;
12. Respondent Bruce L. Fleet's request for expungement is denied in its entirety;

13. To the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto, including punitive damages, are denied with prejudice; and

14. 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.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain the non-refundable filing fee for each claim:

Initial claim filing fee = \$ 600

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 persons at the time of the events giving rise to the dispute. In this matter, the member firm is UBS PaineWebber, Inc.

Member surcharge = \$ 3,350
Pre-hearing process fee = \$ 750
Hearing process fee = \$ 5,500

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:

One (1) Pre-hearing session with Panel x \$ 1,200 = \$ 1,200

Pre-hearing conference: 06/12/2003 1 session

Twenty Six (26) Hearing sessions with Panel x \$ 1,200 = \$ 31,200

Hearing Dates: 02/09/2004 2 sessions
02/10/2004 2 sessions

02/11/2004	2 sessions
02/12/2004	2 sessions
02/13/2004	1 session
07/12/2004	2 sessions
07/13/2004	2 sessions
07/14/2004	2 sessions
07/15/2004	2 sessions
11/15/2004	1 session
11/16/2004	2 sessions
11/17/2004	2 sessions
11/18/2004	2 sessions
11/19/2004	2 sessions

Total Forum Fees	= \$ 32,400
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The Arbitration Panel has assessed \$16,200 of the forum fees jointly and severally to Carolyn J. Newkirk, Individually, John B. Newkirk, Individually and John J. Newkirk, Individually and as Trustee of the JBN Charitable Lead Annuity Trusts No. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust.

The Arbitration Panel has assessed \$16,200 of the forum fees jointly and severally to UBS PaineWebber, Inc. and Bruce L. Fleet.

Fee Summary

Claimants, Carolyn J. Newkirk, Individually, John B. Newkirk, Individually and John J. Newkirk, Individually and as Trustee of the JBN Charitable Lead Annuity Trusts No. 1,2,3, and 4 and as Trustee of the Newkirk 1995 Irrevocable Life Insurance Trust, are jointly and severally liable for:

Initial Filing Fee	= \$ 600
<u>Forum Fees</u>	= \$ 16,200
Total Fees	= \$ 16,800
<u>Less payments</u>	= \$ 1,800
Balance Due NASD Dispute Resolution	= \$ 15,000

Respondent, UBS PaineWebber, Inc., is liable for:

<u>Member Fees</u>	= \$ 9,600
Total Fees	= \$ 9,600
<u>Less payments</u>	= \$ 9,600
Balance Due NASD Dispute Resolution	= \$ 0

Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 16,200
<u>Total Fees</u>	= \$ 16,200
<u>Less payments</u>	= \$ 900
<u>Balance Due NASD Dispute Resolution</u>	= \$ 15,300

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

ARBITRATION PANEL

Billy Kwan - Public Arbitrator, Presiding Chair
Jess Burton Cohen - Non-Public Arbitrator
Joseph M. Costello- Non-Public Arbitrator

Concurring Arbitrators:

Billy Kwan
Public Arbitrator, Presiding Chair

Signature Date

Jess Burton Cohen
Non-Public Arbitrator

Signature Date

Joseph M. Costello
Non-Public Arbitrator

Signature Date

12/17/04

Date of Service (NASD use only)

Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 16,200
<u>Total Fees</u>	= \$ 16,200
<u>Less payments</u>	= \$ 900
<u>Balance Due NASD Dispute Resolution</u>	= \$ 15,300

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

ARBITRATION PANEL

Billy Kwan - Public Arbitrator, Presiding Chair
Jess Burton Cohen - Non-Public Arbitrator
Joseph M. Costello - Non-Public Arbitrator

Concurring Arbitrators:

Billy Kwan
Billy Kwan
Public Arbitrator, Presiding Chair

December 15, 2009
Signature Date

Jess Burton Cohen
Jess Burton Cohen
Non-Public Arbitrator

Signature Date

Joseph M. Costello
Joseph M. Costello
Non-Public Arbitrator

Signature Date

12/17/09
Date of Service (NASD use only)

Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for:

<u>Forum Fees</u>	= \$ 16,200
<u>Total Fees</u>	= \$ 16,200
<u>Less payments</u>	= \$ 900
<u>Balance Due NASD Dispute Resolution</u>	= \$ 15,300

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ARBITRATION PANEL

Billy Kwan - Public Arbitrator, Presiding Chair
Jess Burton Cohen - Non-Public Arbitrator
Joseph M. Costello - Non-Public Arbitrator

Concurring Arbitrators:

Billy Kwan
Public Arbitrator, Presiding Chair

Signature Date

Jess Burton Cohen
Jess Burton Cohen
Non-Public Arbitrator

December 15, 2004
Signature Date

Joseph M. Costello
Non-Public Arbitrator

Signature Date

12/17/04
Date of Service (NASD use only)

NASD Dispute Resolution
Arbitration No. 02-07121
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Respondents, UBS PaineWebber, Inc. and Bruce L. Fleet, are jointly and severally liable for:

Forum Fees	= \$ 16,200
Total Fees	= \$ 16,200
Less payments	= \$ 900
Balance Due NASD Dispute Resolution	= \$ 15,300

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

ARBITRATION PANEL

Billy Kwan - Public Arbitrator, Presiding Chair
Jessa Burton Cohen - Non-Public Arbitrator
Joseph M. Costello - Non-Public Arbitrator

Concurring Arbitrators:

Billy Kwan
Public Arbitrator, Presiding Chair

Signature Date

Jessa Burton Cohen
Non-Public Arbitrator

Signature Date



Joseph M. Costello
Non-Public Arbitrator

12/15/04

Signature Date

12/17/04

Date of Service (NASD use only)