

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

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In the Matter of the Arbitration Between

Claimant

Ronald Fortner, as executor  
of the Estate of Doris Erika Berg

v.

03-00556  
Denver, Colorado

Respondents

UBS PaineWebber, Inc., Raymond K. Burkland  
and Diane K. Burkland

Counter-Claimants

Raymond K. Burkland and Diane K. Burkland

v.

Counter-Respondent

Ronald Fortner, as executor  
of the Estate of Doris Erika Berg

Cross-Claimants/Cross-Respondents

Raymond K. Burkland and Diane K. Burkland

v.

Cross-Respondent/Cross-Claimant

UBS PaineWebber, Inc.

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Nature of Dispute: Customer v. Member and Associated Persons; Associated Persons v.  
Claimants; Associated Persons v. Member; and Member v. Associated Persons

**REPRESENTATION OF PARTIES**

Ronald Fortner, as executor of the Estate of Doris Erika Berg ("Claimant") was represented by Susan G. Haines, Esq., of Haines & Campbell, P.C., Denver, Colorado.

UBS PaineWebber, Inc. ("UBS") was represented by Cleo A. Jones, Esq., of Rothgerber Johnson & Lyons, LLP, Denver, Colorado.

Raymond K. Burkland ("**Raymond Burkland**") and Diane K. Burkland ("**Diane Burkland**"), collectively referred to as ("**the Burklands**"), were represented by Michael Poindexter, Esq., of Golden, Colorado.

### CASE INFORMATION

The Statement of Claim was filed on or about January 23, 2003. The Submission Agreement of Claimant was signed on or about February 24, 2003.

A Statement of Answer was filed by Respondent, UBS PaineWebber, Inc., on or about June 16, 2003. The Submission Agreement of Respondent, UBS PaineWebber, Inc., was signed on or about June 4, 2003.

A Statement of Answer, Counterclaims and Cross-claims was filed jointly by Respondents, Raymond K. Burkland and Diane K. Burkland, on or about June 19, 2003. The Submission Agreement of Respondents, Raymond K. Burkland and Diane K. Burkland, was signed on or about June 12, 2003.

UBS PaineWebber, Inc., filed a Response to the Cross-Claim on or about June 26, 2003.

Claimant filed a Reply to the Counterclaim asserted by Raymond K. Burkland and Diane K. Burkland, on or about July 2, 2003.

Raymond K. Burkland and Diane K. Burkland filed a Motion for Summary Judgment on or about April 13, 2004. Claimants filed a Response in Opposition on or about May 20, 2004.

Claimant filed a Motion for Leave to Amend the Statement of Claim on or about May 24, 2004. UBS PaineWebber, Inc., filed a Response in Opposition on or about May 25, 2004. Raymond K. Burkland and Diane K. Burkland filed a Response in Opposition on or about May 26, 2004. Claimant filed a Reply in Support of their Motion to Amend on or about June 4, 2004.

UBS filed an Amended Answer and Cross-claim on or about July 26, 2004.

Respondents, Raymond K. Burkland and Diane K. Burkland, filed an Amended Statement of Answer, Counterclaims and Cross-claims and Reply to UBS' Cross-claim on or about July 30, 2004.

Respondents, Raymond K. Burkland and Diane K. Burkland, filed a Motion to Require a Cash Bond on or about September 10, 2004. Claimant filed a Response in Opposition on or about September 28, 2004.

### CASE SUMMARY

Claimant asserted causes of action including the following: violation of New York & German laws which prohibit transfer on death beneficiary designations, and violation of internal policy, NASD rules and industry standards with regard to transfer on death beneficiary designation. The causes of action related to correct ownership status of a transfer on death beneficiary designation ("TOD") relating to Ms. Berg's account while held at UBS. Claimant alleged that the Burklands solicited Ms. Berg to authorize them to become successors to her account through a TOD designation. Claimant alleged that since Ms. Berg was a German citizen and German law does not recognize TOD designations, all proceeds relating to the TOD should be transferred to Fortner on behalf of the Trust.

UBS PaineWebber, Inc., denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimant failed to state a claim upon which relief can be granted; Claimant's damages, if any, were caused by its own conduct or conduct of third persons or circumstances over which UBS had neither responsibility nor control; Claimant failed to plead fraud with specificity; Ms. Berg ratified the contract at issue; UBS, at all times, acted in good faith, exercised reasonable care in its dealings with Claimant, and had reasonable grounds for believing that Ms. Berg ratified the contract at issue; and Claimant's claims are barred by the doctrine of unclean hands.

Raymond K. Burkland and Diane K. Burkland denied the allegations set forth in the Statement of Claim and asserted affirmative defenses including the following: Claimant's claims are barred by applicable statutes of limitation; Claimant failed to state a claim upon which relief can be granted; Claimant does not have standing to seek to compel arbitration in this matter or to claim the proceeds of the TOD account against UBS or the Burklands; as a matter of Colorado and Nebraska law, the ownership of the securities in the TOD account passed to the Burklands at the instant of Ms. Berg's death, whether or not UBS subsequently re-registered them in the Burklands' name; and Claimant is estopped by his own conduct and by the doctrines of ratification, affirmance and unclean hands from claiming any interest in the TOD account or from challenging the Burklands' status as proper beneficiaries thereof.

In Raymond K. Burkland's and Diane K. Burkland's Counterclaims and Cross-Claims, they asserted the following causes of action: breach of fiduciary duty and willful breach of a third-party beneficiary contract. The causes of action related to Burklands' allegation that UBS did not change Ms. Berg's account to a TOD, despite Ms. Berg's instructions to do so, until two years after her authorization. Burklands also asserted that after Ms. Berg's death, UBS failed to transfer the TOD or re-register the funds from the TOD account to the Burklands, in accordance with its legal obligations. Burklands further alleged that are the joint beneficiaries of the TOD account, and that if UBS failed to honor the terms of Ms. Berg and her TOD, that UBS be held responsible and for UBS to make the Burklands whole.

UBS PaineWebber, Inc., denied the allegations set forth in the Burklands' Cross-Claims and asserted affirmative defenses including the following: the Burklands failed to state a claim upon which relief can be granted; the Burklands' claims are barred by the doctrine of unclean hands; the Burklands' damages, if any, were caused by their own conduct or the conduct of persons over which UBS had neither responsibility nor control; and UBS, at all times, acted in good faith and exercised reasonable care in its dealings with the Burklands.

Claimant denied the allegations as set forth in Raymond K. Burkland's and Diane K. Burkland's Counterclaims.

In UBS PaineWebber, Inc.'s Cross-Claims, it asserted the following cause of action: indemnification. The cause of action related to UBS' allegation that the Burklands knew, or should have known, that Ms. Berg's estate had an interest or would claim to have an interest in her account on behalf of her estate and German heirs. UBS also alleged that pursuant to the Transfer on Death Beneficiary Affidavit, if UBS is ordered to pay damages to Claimant due to the Burklands being awarded the proceeds of the account, the Burklands must indemnify UBS for any and all amounts ultimately paid to Claimant in addition to reasonable attorneys' fees incurred in defending against Claimant's claims.

#### **RELIEF REQUESTED**

Claimant requested the panel issue a finding that the TOD designation of the Burklands was improper and that Fortner, as executor, is the party entitled to the account. In addition, Claimant requested for an award of attorneys' fees, costs and any other relief the panel deemed proper.

UBS PaineWebber, Inc., requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees. In UBS' Cross-Claim, it requested the panel order the Burklands to indemnify UBS for any and all amounts that UBS may be ordered to pay to Claimant as a result of this arbitration, and for such other relief the panel deemed appropriate.

Raymond K. Burkland and Diane K. Burkland requested that the claims asserted against them be denied in their entirety and that they be awarded their costs and attorneys' fees. In addition, in Raymond K. Burkland's and Diane K. Burkland's Cross-Claim, they requested declaratory relief that the TOD account is fully valid and that they were the only persons or entities legally entitled to the account proceeds and any other relief the panel deemed just and equitable.

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

On or about May 20, 2003, all parties stipulated that the hearing situs be Denver, Colorado.

On or about June 7, 2004, the panel denied Raymond K. Burkland's and Diane K. Burkland's Motion for Summary Judgment and granted Claimant's Motion to Amend the Statement of Claim

On or about June 7, 2004, the panel denied Raymond K. Burkland's and Diane K. Burkland's Motion to Require a Cash Bond.

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. Respondent, UBS PaineWebber, Inc., is liable and shall pay to Claimant, Ronald Fortner, as executor of the Estate of Doris Erika Berg, Fifty Thousand Dollars and No Cents (\$50,000.00) in compensatory damages;
2. Respondent, UBS PaineWebber, Inc.'s Cross-Claims, each and all, are hereby denied and dismissed with prejudice;
3. Respondent, UBS PaineWebber, Inc., is ordered to release all proceeds that it holds regarding, relating to, or owned in the name of Doris Berg, her estate, and/or Raymond K. Burkland and Diane K. Burkland as TOD beneficiaries to Cross-Claimants, Raymond K. Burkland and Diane K. Burkland;
4. 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; and
5. 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.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

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

Initial claim filing fee	= \$ 250
Burklands' Counterclaim and Cross-claim filing fee	= \$ 250

UBS PaineWebber, Inc.'s Cross-claim filing fee = \$ 500

### **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. In this matter, the member firm is UBS PaineWebber, Inc.

Member surcharge = \$ 1,500  
Pre-hearing process fee = \$ 750  
Hearing process fee = \$ 2,200

### **Adjournment Fees**

Adjournments granted during these proceedings:

July 5-9, 2004 (Adjournment requested by Claimant)  
Fee Waived by the Panel = \$ 1,125

April 20-22, 2005 (Adjournment requested by UBS PaineWebber, Inc.)  
Fee Waived by the Panel = \$ 1,125

**Three-Day Cancellation Fee** –Fees apply when a hearing on the merits is postponed or settled within three business days of the start of a scheduled hearing session.  
(April 20-22, 2005 dates were adjourned April 18, 2005) = \$ 300

### **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 arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with Chairperson x \$ 450 = \$ 450

Pre-hearing conference: February 17, 2004 1 session

Five (5) Pre-hearing sessions with Panel x \$ 1,000 = \$ 5,000

Pre-hearing conferences: December 22, 2003 1 session  
June 18, 2004 1 session  
July 6, 2004 1 session  
September 30, 2004 1 session

June 23, 2005

1 session

Fourteen (14) Hearing sessions with Panel x \$ 1,000

= \$ 14,000

Hearing Dates:

March 14, 2005

2 sessions

March 15, 2005

2 sessions

March 16, 2005

2 sessions

March 17, 2005

2 sessions

October 3, 2005

2 sessions

October 4, 2005

2 sessions

October 5, 2005

2 sessions

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Total Forum Fees

= \$ 19,450

The Arbitration Panel has assessed \$19,450 of the forum fees to UBS PaineWebber, Inc.

#### EEE SUMMARY

Claimant, Ronald Fortner, as executor of the Estate of Doris Erika Berg, is liable for:

Initial Filing Fee	= \$ 250
<u>Three-Day Cancellation Fee</u>	= \$ 100
Total Fees	= \$ 350
<u>Less payments</u>	= \$ 1,575
Balance Refunded By NASD Dispute Resolution	= \$ 1,225

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

Cross-claim Filing Fee	= \$ 500
Member Fees	= \$ 4,450
Three-Day Cancellation Fee	= \$ 100
<u>Forum Fees</u>	= \$ 19,450
Total Fees	= \$ 24,500
<u>Less payments</u>	= \$ 6,650
Balance Due NASD Dispute Resolution	= \$ 17,850

Respondents, Raymond K. Burkland, Diane K. Burkland, are jointly and severally liable for:

Counterclaim/Cross-claim Filing Fees	= \$ 250
<u>Three-Day Cancellation Fee</u>	<u>= \$ 100</u>
Total Fees	= \$ 350
<u>Less payments</u>	<u>= \$ 1,575</u>
Balance Refunded By NASD Dispute Resolution	= \$ 1,225

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**

Bradford J. Lam, Esq. - Public Arbitrator, Presiding Chair  
Gregory D. Thomas, Esq. - Public Arbitrator  
James P. Beck, Esq. - Non-Public Arbitrator

Concurring Arbitrators:

\_\_\_\_\_  
Bradford J. Lam, Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
Gregory D. Thomas, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
James P. Beck, Esq.  
Non-Public Arbitrator

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

10/26/05  
Date of Service (NASD use only)



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Three-Day Cancellation Fee	= \$ 100
Total Fees	= \$ 350
Less payments	= \$ 1,575
Balance Refunded By NASD Dispute Resolution	= \$ 1,225

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Gregory D. Thomas, Esq. - Public Arbitrator  
James P. Beck, Esq. - Non-Public Arbitrator

Consenting Arbitrators:

  
Bradford J. Lam, Esq.  
Public Arbitrator, Presiding Chair

10/25/05.  
Signature Date

\_\_\_\_\_  
Gregory D. Thomas, Esq.  
Public Arbitrator

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Signature Date

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Non-Public Arbitrator

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Total Fees	= \$ 350
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