

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

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In the Matter of the Arbitration Between:

Jorge Montane, Montane Family LLC, Theodore Okazaki, Kazuyo Okazaki, Ronald Fair, and Diane Fair, Claimants v. Morgan Stanley Dean Witter (n/k/a Morgan Stanley DW Inc.), UBS Painewebber Inc. (n/k/a UBS Financial Services Inc.), and Steven A. Hild, Respondents

Case Number: 03-03604

Hearing Site: San Francisco, California

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

**REPRESENTATION OF PARTIES**

For Claimants:

Nancy Kay Undem, Esq.  
The Law Office of Nancy K.  
Undem  
Santa Barbara, California

Jules Leo Federman  
Santa Barbara, California

For Respondents Morgan Stanley Dean Witter ("Morgan Stanley")  
and Steven A. Hild ("Hild"), while employed  
at Morgan Stanley Dean Witter:

Gilbert R. Serota, Esq.  
Howard Rice Nemerovski  
Canady Falk & Rabkin  
San Francisco, California

For Respondents UBS Painewebber Inc. ("UBS")  
and Steven A. Hild ("Hild"), while employed  
at UBS Painewebber Inc.:

Philip A. McLeod, Esq.  
Darrell C. Martin, Esq.  
Keesal, Young & Logan  
San Francisco, California

### **CASE INFORMATION**

Statement of Claim filed: May 13, 2003

Claimants Jorge Montane and Montane Family LLC's Joint Uniform Submission Agreement signed: June 13, 2003

Joint Statement of Answer to the Statement of Claim filed by Respondents Morgan Stanley and Hild: September 16, 2003

First Amended Statement of Claim filed: February 25, 2004

Claimants Theodore Okazaki and Kazuyo Okazaki's Joint Uniform Submission Agreement signed: September 26, 2003

Claimants Ronald Fair, and Diane Fair's Joint Uniform Submission Agreement signed: September 9, 2003

Joint Statement of Answer to the First Amended Statement of Claim filed by Respondents Morgan Stanley and Hild: March 26, 2004

Joint Statement of Answer to the First Amended Statement of Claim filed by Respondents UBS and Hild: June 11, 2004

### **CASE SUMMARY**

In the Statement of Claim, Claimants Jorge Montane and Montane Family LLC alleged violation of Exchange Rules of Conduct, breach of fiduciary duty, and violation of Securities and Exchange Act of 1934 (10b-5 Market Manipulations or Fraud on the Market) against Respondents Morgan Stanley and Hild. Claimants Jorge Montane and Montane Family LLC's allegations involved various unspecified securities.

In their Answer to the Statement of Claim, Respondents Morgan Stanley and Hild denied the allegations of wrongdoing and asserted various affirmative defenses

In the First Amended Statement of Claim, Claimants Theodore Okazaki, Kazuyo Okazaki, Ronald Fair, and Diane Fair and Respondent UBS were added into this matter. The allegations did not change and the securities at issue remain unspecified.

In their Answer to the First Amended Statement of Claim, Respondents Morgan Stanley and Hild denied the allegations of wrongdoing and asserted various affirmative defenses.

In their Answer to the First Amended Statement of Claim, Respondents UBS and Hild denied the allegations of wrongdoing and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimants Jorge Montane and Montane Family LLC requested \$1.2 million in compensatory damages from Respondents Morgan Stanley and Hild.

In their Answer to the Statement of Claim, Respondents Morgan Stanley and Hild requested dismissal of the Statement of Claim in its entirety, expungement of all references to this matter from Respondent Hild's registration records maintained by the NASD Central Registration Depository ("CRD") and costs.

In the First Amended Statement of Claim, Claimants Jorge Montane and Montane Family LLC requested \$1.2 million in compensatory damages, Claimants Theodore Okazaki and Kazuyo Okazaki requested \$100,000.00 in compensatory damages, and Ronald Fair and Diane Fair requested \$63,000.00 in compensatory damages.

In their Answer to the First Amended Statement of Claim, Respondents Morgan Stanley and Hild requested dismissal of the First Amended Statement of Claim in its entirety, expungement of all references to this matter from Respondent Hild's registration records maintained by the NASD Central Registration Depository ("CRD"), and costs.

In their Answer to the First Amended Statement of Claim, Respondents UBS and Hild requested dismissal of the First Amended Statement of Claim in its entirety, expungement of all references to this arbitration from Respondent Hild's registration records maintained by the NASD Central Registration Depository ("CRD"), and costs.

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

Respondents did not file with the NASD Dispute Resolution properly executed submission agreements but are required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and having answered the claim, appeared and testified at the conference calls and hearings, are bound by the determination of the Panel on all issues submitted.

On July 14, 2003, Claimant Jorge Montane, on behalf of himself and the Montane Family LLC, and his counsel signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On March 2, 2005, Claimants Theodore Okazaki and Kazuyo Okazaki, and their counsel, signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On April 13, 2005, Claimants Ronald Fair and Diane Fair, and their counsel, signed a Waiver Agreement expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

On July 28, 2003, Respondent Morgan Stanley's counsel signed a Waiver Agreement on Respondent Morgan Stanley's behalf expressly waiving any and all rights and benefits under California Civil Code Section 1542 and the California Ethical Standards for Neutral Arbitrators.

Pursuant to the Code of Arbitration Procedure IM-10100, the waivers of the Claimants shall constitute and operate as a waiver for all member firms and associated persons (including terminated or otherwise inactive member firms or associated persons) against whom the Claim has been filed.

On November 9, 2004, Respondent Morgan Stanley filed a motion to bar Jules Leo Federman from acting as counsel for Claimants in this matter. On November 10, 2004, Respondents UBS and Hild filed a Motion to Remove and Exclude Jules Leo Federman as Claimants' representative. On November 24, 2004, Claimants filed an opposition to both motions. On November 29, 2004, Respondent Morgan Stanley filed a reply. On December 3, 2004, the Panel held a conference call with the parties to hear oral argument on these motions. After due deliberation, the Panel denied the motions to bar Jules Leo Federman from representing Claimants in this matter.

On April 6, 2005, Respondents Morgan Stanley and Hild filed their Second Motion to Compel Discovery which included a request for sanctions against Claimants for failure to comply with the Chairperson's February 16, 2005, discovery order. On April 6, 2005, Respondents UBS and Hild joined this motion. On April 5, 2005, Claimants filed their Second Motions to Compel Discovery against Respondents. On April 13, 2005, all parties filed their respective opposition papers. On April 20, 2005, the Chairperson held two pre-hearing discovery conferences with the parties on all of the above-referenced second Motions to Compel Discovery. On April 21, 2005, the Chairperson ordered that all of these motions be decided by the full Panel, *de novo*, on the moving and opposition papers submitted. On May 3, 2005, the Panel deliberated via conference call. On May 4, 2005, the Panel ordered, *inter alia*, Claimants to pay \$2,500.00 to Respondent Morgan Stanley and \$2,500.00 to UBS no later than 5 p.m. Pacific Daylight Savings Time on May 13, 2005.

On April 22, 2005, Claimants requested that the Panel (1) vacate the Chairperson's April 21, 2005, order referenced above, (2) allow Claimants to amend their Statement of Claim to "delete"

allegations pertaining to the investment advisors, or in the alternative (3) conduct a discovery conference call with the full panel, and (4) stay the telephonic hearing on Respondents' Motion to Dismiss Claimants' claims pertaining to the investment advisors. Respondents filed opposition papers on April 28, 2005. On May 2, 2005, after due deliberation, the Panel denied Claimants' requests.

On April 19, 2005, Respondents Morgan Stanley and Hild filed a Motion to Dismiss all claims arising from accounts controlled by five independent investment advisors selected by Claimant Jorge Montane. On May 4, 2005, Claimants filed an opposition. On May 19, 2005, the Panel held a pre-hearing conference with the parties on this motion. On May 20, 2005, after due deliberation, the Panel denied the motion to dismiss.

On May 13, 2005, Claimants requested clarification of the Panel's May 4, 2005, order that directed Claimants to pay Respondents Morgan Stanley and UBS \$2,500.00 each. On May 17, 2005, Respondents Morgan Stanley and Hild filed a response. On May 18, 2005, Respondents UBS and Hild joined Respondents Morgan Stanley and Hild's response. On May 20, 2005, after due deliberation, the Panel ordered Claimants to pay the sums required in the May 4, 2005, order no later than May 27, 2005.

On June 2, 2005, Claimants requested an adjournment of the hearings due to Claimants' co-representative Nancy Kay Udem's physical condition. On June 2, 2005, Respondents Morgan Stanley and Hild filed an opposition and Claimants later filed a reply. After deliberating via teleconference on June 2, 2005, the Panel denied the request for postponement.

On June 3, 2005, Claimants dismissed, with prejudice, Respondents UBS and Hild (while employed at UBS) from this matter pursuant to a settlement agreement.

On May 31, 2005, Respondent Morgan Stanley filed a Motion to Dismiss for, *inter alia*, Claimants' failure to pay the \$2,500.00 sanctions to Respondent Morgan Stanley as ordered by the Panel on May 4, 2005 and May 20, 2005. On June 1, 2005, Claimants filed an opposition. On June 6, 2005, the first day of the hearing on the merits, the Panel raised the sanctions owed by Claimants to Respondent Morgan Stanley to \$5,000.00 and ordered that it be paid no later than June 9, 2005 at 5 p.m. or the Panel will consider Respondent Morgan Stanley's Motion to Dismiss on June 10, 2005, the last scheduled day of the evidentiary hearings.

On June 7, 2005, the second day of the evidentiary hearings, the hearings were adjourned, without objection from the parties, due to the Chairperson's family emergency. In light of the adjournment, the parties stipulated on the record that Claimants would have until July 7, 2005, to pay the previously-ordered \$5,000.00 in sanctions unless Claimants obtained a court order vacating the sanctions order. On June 27, 2005, Claimants requested a written order and on July 5, 2005, the Panel issued one.

On June 6, 2005, the first day of the hearing on the merits, Claimants filed a Motion for Sanctions against Respondents Morgan Stanley and Hild for Wilful (sic) Disobedience of Discovery Orders. Respondents Morgan Stanley and Hild orally opposed it. On June 27, 2005, Claimants requested a decision. The panel deliberated via conference call on July 1, 2005, then on July 5, 2005, denied the motion.

On July 8, 2005, Respondents Morgan Stanley and Hild filed a Motion to Dismiss on the grounds of Claimants' repeated failure to pay the sanctions previously-ordered by the Panel. On July 22, 2005, Claimants filed an opposition. A telephonic hearing was held on August 2, 2005, attended by the remaining parties and the Panel. After due deliberation, the Panel granted the Motion to Dismiss.

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, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimants' claims are dismissed with prejudice.
- 2) The parties shall bear their respective costs, including attorney's fees.
- 3) 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	= \$ 500.00
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#### **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 firms Morgan Stanley and UBS are parties and the following fees are assessed to each:

Member Surcharge	= \$ 2,800.00
Pre-Hearing Process Fee	= \$ 750.00
Hearing Process Fee	= \$ 5,000.00
<b>Total Member Fees</b>	<b>= \$ 8,550.00</b>

#### **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:

(3) Pre-hearing conference sessions with a single arbitrator @ \$450.00/session	= \$ 1,350.00
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Pre-hearing conferences:	February 16, 2005	1 session
	April 20, 2005	2 sessions

(5) Pre-hearing conference sessions with the Panel @ \$1,200.00/session	= \$ 6,000.00
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Pre-hearing conferences:	September 3, 2004	1 session
	December 3, 2004	1 session
	May 11, 2005	1 session
	May 19, 2005	1 session
	August 2, 2005	1 session

(4) Hearing sessions @ \$1,200.00/session	= \$ 4,800.00
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Hearings:	June 6, 2005	2 sessions
	June 7, 2005	2 sessions

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<b>Total Forum Fees</b>	<b>= \$12,150.00</b>
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1. The Panel assessed \$4,455.00 of the forum fees jointly and severally to Claimants.

2. The Panel assessed \$6,637.50 of the forum fees jointly and severally to Respondents Morgan Stanley and Hild.
3. The Panel assessed \$1,057.50 of the forum fees jointly and severally to Respondents UBS and Hild.

**Fee Summary**

1. Claimants are charged jointly and severally with the following fees and costs:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 4,455.00
Total Fees	= \$ 4,955.00
Less payments	= \$(1,700.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 3,255.00</b>
2. Respondent Morgan Stanley is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
Less payments	= \$(8,550.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>
3. Respondent UBS is charged with the following fees and costs:

Member Fees	= \$ 8,550.00
Less payments	= \$(8,550.00)
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>
4. Respondents Morgan Stanley and Hild are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 6,637.50
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 6,637.50</b>
5. Respondents UBS and Hild are charged jointly and severally with the following fees and costs:

Forum Fees	= \$ 1,057.50
Less payments by UBS	= \$(3,550.00)
<b>Refund Due to Respondent UBS</b>	<b>= \$(2,492.50)</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

Robert L. Liu	-	Public Arbitrator, Presiding Chair
Leonard Greenwold	-	Public Arbitrator
Douglas E. DeTata	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

  
Robert L. Liu  
Chair, Public Arbitrator

August 11, '05  
Signature Date

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Leonard Greenwold  
Public Arbitrator

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Signature Date

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Douglas E. DeTata  
Non-Public Arbitrator

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Signature Date

8/11/05  
Date of Service

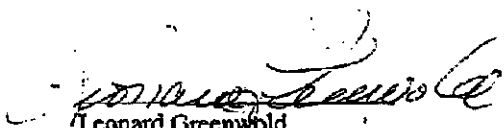
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Leonard Greenwold	-	Public Arbitrator
Douglas E. DeTata	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Robert L. Liu  
Chair, Public Arbitrator

Signature Date

  
Leonard Greenwold  
Public Arbitrator

8/11/05  
Signature Date

Douglas E. DeTata  
Non-Public Arbitrator

Signature Date

8/11/05  
Date of Service

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Leonard Greenwold	-	Public Arbitrator
Douglas E. DeTata	-	Non-Public Arbitrator


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Chair, Public Arbitrator

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Signature Date

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Leonard Greenwold  
Public Arbitrator

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Non-Public Arbitrator

8/11/05  
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Date of Service