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

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In the Matter of the Arbitration Between:

Names of the Claimants

Danny G. Smith  
Kathy Smith

Case Number: 03-04343

Names of the Respondents

UBS PaineWebber, Incorporated, n/k/a UBS Financial Services, Inc.  
John Santi  
John Barrack  
David Blindman

Hearing Site: Memphis, Tennessee

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

For Danny G. Smith ("DS") and Kathy Smith ("KS"), collectively referred to herein as "Claimants": G. Patrick Arnoult, Esq., The Bogatin Law Firm, PLC, Memphis, Tennessee.

For Respondents UBS PaineWebber, Incorporated, n/k/a UBS Financial Services ("UBS") and David Blindman ("Blindman"): Shepherd D. Tate, Esq., Tate, Lazarini and Beall, PLC, Memphis, Tennessee.

For Respondents John Santi ("Santi") and John Barrack ("Barrack"): Shepherd Tate, Esq., Tate Lazarini and Beall, PLC, Memphis, Tennessee, and Daniel F. B. Peel, Esq., Peel & Weirich, Memphis Tennessee.

**CASE INFORMATION**

Statement of Claim filed on or about: June 12, 2003.

Claimant KS signed the Uniform Submission Agreement: June 12, 2003.

Claimant DS signed the Uniform Submission Agreement: June 13, 2003.

Statement of Answer and Motion to Dismiss filed by Respondents on or about: September 5, 2003.

Response to Respondents' Motion to Dismiss filed by Claimants on or about: October 3, 2003.

Respondent UBS signed the Uniform Submission Agreement: October 13, 2003.

Respondents Blindman, Santi and Barrack did not submit executed Uniform Submission Agreements.

Opening Brief in Opposition to Respondents' Motion to Dismiss filed by Claimants on or about: May 17, 2004

Responsive Brief to Claimants' Opening Brief in Opposition to Respondents' Motion to Dismiss filed by Respondents on or about: May 28, 2004.

**CASE SUMMARY**

Claimants asserted the following causes of action: excessive trading; excessive commissions; breach of fiduciary duties; fraud and deceptive trade practices; and failure to properly supervise. The causes of action

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**CASE SUMMARY**

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relate to the purchase and sale in Claimants' accounts of the following common stocks: EMC; Midway Games; E Piphany; Corning; Sunoco Logistics Partners; GameStop; Smith International; PMC-Sierra; Genentech; Exxon Mobil; Global Imaging Systems; WCI Communities; Siebel Systems; Emulex; Alcon; Axcan Pharma; Five Star Quality Care; Novellus Systems; Home Depot; Amerigroup; JDS Uniphase; Linear Technology; Broadcom; Wyeth; Sun Microsystems; Pfizer; Williams Communications; JetBlue Airways; Bea Systems; Ribapharm; Intel; HPL Technologies; Emulex May 2002; Heritage Ppty Invt Tr Com; Liquidmetal Technologies; Altiris Inc; Conmed; SRA Int'l; Autozone; UnumProvident; Continental Airlines; American Elec Power; Applied Materials; Linear Technology; Tyco Intl LTD; Advanced Micro Devices; Inveresk Research Group; Motorola; Citigroup; Adobe Sys; AOL Time Warner; UAL; Kla-Tencor Corp Com; Taiwan Semiconductor; Atmel; Qlogic; Vodafone Group PLC ADR; Cisco Systems; WellChoice; Maxim Integrated Products; Istar Finl; Nortel Networks; Sprint PCS Group; Chicago Mercantile Exchange Holdings; Baxter Intl.; Oracle; Fred's; Nextlink Communications; MedImmune; Anheuser-Busch; Alza; Corning; Medarex; Duke Energy; El Paso Energy Partners; AmSurg; Nasdaq 100; Reliant Resources; RightChoice Managed Care; Peabody Energy; Allele; Laboratory Corp. of America; Universal Health Realty Income Trust; Torch Offshore; Kraft Foods; TriZetto Group; Phoenix Companies; State Street; St. Jude Medical; Community Health Systems; Meredith; Option Care; ISIS Pharmaceuticals; Principal Financial Group; Anthem; Logic Vision; King Pharmaceuticals; Microsoft; Weight Watchers International; Nassda; American Pharmaceutical Partners; Midway Games; Exxon Mobil; Novellus Systems; Home Depot; Travelers Property Casualty A; Prudential Financial; March and McLennan; Johnson & Johnson; SonoSite; Verint Systems; AMN Healthcare Services; Cumulus Media; Altiris Inc.; Autozone Call 85 12/2002; and McData.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various defenses.

#### **RELIEF REQUESTED**

Claimants requested compensatory damages in the amount of \$691,576.64, plus reasonable attorney's fees and reimbursement of all costs incurred in connection with this arbitration proceeding.

Respondents requested that Claimants' claims be dismissed, that all costs and attorneys' fees be assessed against Claimants, and that the NASD Central Registration Depository ("CRD") records of Respondents Santi, Barrack and Blindman be expunged of all references to Claimants' claims and this arbitration proceeding.

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

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

Respondents filed a Motion to Dismiss within their Statement of Answer, which asserted, among other things, that Claimants' claims are factually and legally without merit. In Claimants' response, Claimants asserted, among other things, that it would be premature for the Panel to act upon the Motion to Dismiss in the absence of a plenary hearing on the evidence. On or about March 3, 2004, the Panel issued an Order which, among other things, provided the parties with the opportunity to submit additional briefs on the pending motion.

Claimants filed an Opening Brief on Respondents' Motion to Dismiss, which asserted, among other things, that the Code makes no mention of nor contemplates any procedure for the filing and consideration of a motion to dismiss, and that the only remedy for Claimants is to arbitrate their grievances before this Panel. Claimants additionally asserted that there is currently a proposed rule change to the Code which states that parties have the right to a hearing in arbitration, and that motions that would resolve a claim before a hearing on the merits are discouraged, and may only be granted in extraordinary circumstances. In their response, Respondents asserted, among other things, that any party may file a dispositive motion prior to a hearing, and in the appropriate case, dispositive motions are routinely granted by Panels prior to a hearing. On or about June 7, 2004, the Panel issued an Order which denied Respondents' Motion to Dismiss.

At the outset of the evidentiary hearing and at the conclusion of Claimants' case, Respondents moved to dismiss this matter. The Panel denied both motions.

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, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Claimants' claims are denied in their entirety.

The Panel recommends that all references to the above-captioned arbitration be expunged from Respondents Santi's, Barrack's and Blindman's registration records maintained by the NASD CRD, with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondents Santi, Barrack and Blindman must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Any and all claims for relief not specifically addressed herein are denied.

### 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 = \$ 375.00

#### 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. Accordingly, Respondent UBS is a member firm and a party.

Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$4,000.00
Total Member Fees	= \$4,750.00

**Adjournment Fees**

No adjournments were requested in this matter.

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the Panel.

Injunctive relief fees were not assessed in this matter.

**Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A 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:

Two (2) Pre-hearing sessions with the Panel @ \$1,200.00/session	= \$ 2,400.00
Pre-hearing conferences:	
March 3, 2004	1 session
June 3, 2004	1 session
Ten (10) Hearing sessions @ \$1,200.00/session	= \$12,000.00
Hearing Dates:	
July 12, 2004	2 sessions
July 13, 2004	3 sessions
July 14, 2004	2 sessions
July 15, 2004	3 sessions

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Total Forum Fees	= \$14,400.00
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The Panel has assessed the total forum fees of \$14,400.00 to Claimants, jointly and severally.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred in this matter.

**Fee Summary**

Claimants are jointly and severally liable for:

NASD Dispute Resolution  
Arbitration No. 03-04343  
Award Page 5

Initial Filing Fee	= \$ 375.00
Forum Fees	= \$14,400.00
Total Fees	= \$14,775.00
Less Payments	= \$ 1,575.00
Balance Due NASD Dispute Resolution	= \$13,200.00

Respondent UBS is solely liable for:

Member Fees	= \$ 4,750.00
Total Fees	= \$ 4,750.00
Less Payments	= \$ 4,750.00
Balance Due NASD Dispute Resolution	= \$ 0.00

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

**ARBITRATION PANEL**

Edward R. Niederriter, Esq.	-	Public Arbitrator, Presiding Chairperson
William Graves Hardwick, II, J.D.	-	Public Arbitrator
Eugene R. Katz	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_/s/\_\_\_\_\_  
Edward R. Niederriter, Esq.  
Public Arbitrator, Presiding Chairperson

July 20, 2004  
Signature Date

\_\_\_\_\_/s/\_\_\_\_\_  
William Graves Hardwick, II, J.D.  
Public Arbitrator

July 20, 2004  
Signature Date

\_\_\_\_\_/s/\_\_\_\_\_  
Eugene R. Katz  
Non-Public Arbitrator

July 20, 2004  
Signature Date

July 20, 2004  
Date of Service (For NASD Dispute Resolution office use only)

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Public Arbitrator, Presiding Chairperson

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Signature Date

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Public Arbitrator, Presiding Chairperson  
 Public Arbitrator  
 Non-Public Arbitrator

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Edward R. Niederriter, Esq.  
 Public Arbitrator, Presiding Chairperson

Signature Date

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 William Graves Hardwick, II, J.D.  
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*7/20/04*  
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