

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

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In the Matter of the Arbitration Between:

James Bain and Heidi Bain, Claimants v. UBS Financial Services Inc., Respondent

Case Number: 03-09157

Hearing Site: Seattle, Washington

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Nature of the Dispute: Customers v. Member

**REPRESENTATION OF PARTIES**

For Claimants:

Edward Wolfe, Esq.  
Wolfe Law Offices PLLC  
Bremerton, Washington

For Respondent:

Ted W. Lieu, Esq.  
UBS Financial Services Inc.  
Los Angeles, California

**CASE INFORMATION**

Statement of Claim filed: December 23, 2003

Claimants' Joint Uniform Submission Agreement signed: December 1, 2003

Statement of Answer filed by Respondent UBS Financial Services Inc.: July 15, 2004

Respondent UBS Financial Services Inc.'s Uniform Submission Agreement signed: July 15, 2004

**CASE SUMMARY**

Claimants alleged breach of contract, negligence, margin calls, misrepresentations, omissions, unsuitability, and failure to supervise. Claimants' allegations involved Real Networks stock options that were held in their margin account.

Respondent denied the allegations of wrongdoing set forth in Claimant's Statement of Claim and asserted various affirmative defenses.

**RELIEF REQUESTED**

Claimants requested unspecified compensatory damages, unspecified punitive damages, pre- and post-judgment interest, an award of forum fees against Respondent, reimbursement of witnesses' travel expenses, and costs, including attorney's fees.

Respondent requested dismissal of Claimants' Statement of Claim in its entirety and costs.

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

On April 14, 2004, Respondent UBS Financial Services Inc. filed a Motion to Dismiss. On July 9, 2004, Claimants James Bain and Heidi Bain filed a Memorandum of Complainants in Opposition to Respondent's Motion to Dismiss and a Declaration of James Bain. On July 22, 2004, Respondent filed Respondent's Reply to Claimants' Memorandum in Opposition to Respondent's Motion to Dismiss. On February 4, 2005, Respondent provided NASD with copies of two cases – De Kwiatkowski v. Bear Stearns & Co., 306 F.3d 1293 (2d Cir. 2002) and Steward v. J.P. Morgan Chase & Co., 2004 WL 1823902 (S.D.N.Y.) – which were subsequently provided to the Panel. On February 10, 2005, a telephonic pre-hearing conference call regarding Respondent's Motion to Dismiss was held; Claimants, Respondent, and the Panel participated in the pre-hearing conference call. After due deliberation, the Panel granted the motion.

The panel finds that there was no legal or factual basis showing a duty owed to Claimants James Bain and Heidi Bain by Respondent UBS Financial Services Inc. or by its broker, Walter Taylor, other than to properly and promptly execute any orders Respondent received from Claimants. The margin account was set up at J.C. Bradford, a one-time subsidiary of UBS PaineWebber Inc. (n/k/a UBS Financial Services Inc.), on the advice of Claimants' Washington state investment advisor John Selby. Mr. Selby told Claimants that their stock would be held in the margin account only for a brief time. No trade orders were given in the account between August 11, 2000 and December 27, 2000 when a margin call situation arose, and Claimants were required to pay \$11,116.00 to meet the margin call. As the margin account was not a discretionary account, Respondent could not trade in this account without instructions from Claimants or from their authorized representative. Claimants did not solicit any investment advice from Respondent nor did Respondent offer investment advice or recommend the suitability of any particular securities or positions to Claimants. Therefore, NASD Rule 2310(3) is not applicable.

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, Respondent's Motion to Dismiss, and all of the documents filed by the parties in connection with this motion, the Panel decided in full and final resolution of the issues submitted for determination as follows:

- 1) Claimants' claims are denied in their entirety.
- 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 = \$ waived

**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 firm UBS Financial Services Inc. is a party, and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 750.00
<u>Hearing Process Fee</u>	<u>= \$2,200.00</u>
<b>Total Member Fees</b>	<b>= \$4,450.00</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:

Two (2) pre-hearing conference sessions with the Panel @ \$1,000.00/session	= \$ 2,000.00
Pre-hearing conferences: June 30, 2004 1 session	
February 10, 2005 1 session	
<b>Total Forum Fees</b>	<b>= \$ 2,000.00</b>

The Panel assessed \$2,000.00 of the forum fees jointly and severally to Claimants James Bain and Heidi Bain.

**Fee Summary**

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

<u>Forum Fees</u>	<u>= \$ 2,000.00</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 2,000.00</b>

2. Respondent UBS Financial Services Inc. is charged with the following fees and costs:

Member Fees	= \$ 4,450.00
<u>Less Payments</u>	<u>= \$(4,450.00)</u>
<b>Balance Due NASD Dispute Resolution</b>	<b>= \$ 0.00</b>

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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

<i>Richard L. Warner, Esq.</i>	-	<i>Public Arbitrator, Presiding Chair</i>
<i>Ronald S. Matthew</i>	-	<i>Public Arbitrator</i>
<i>William J. Rex</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures



Richard L. Warner, Esq.  
Chair, Public Arbitrator

FEBRUARY 11, 2005  
Signature Date

Ronald S. Matthew  
Public Arbitrator

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

William J. Rex  
Non-Public Arbitrator

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

2/11/05  
Date of Service

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Chair, Public Arbitrator

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Signature Date

*Ronald S. Matthew*  
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Ronald S. Matthew  
Public Arbitrator

*February 11, 2005*  
\_\_\_\_\_  
Signature Date

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William J. Rex  
Non-Public Arbitrator

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*Non-Public Arbitrator*

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