

**IN ARBITRATION  
UNDER CHAPTER XVIII OF THE RULES  
OF THE CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED**

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IN THE MATTER OF	)	
	)	
Howard Gimbel and Marvin Davis,	)	
	)	
Claimants,	)	
	)	
v.	)	File No. 06NM001
	)	
UBS Financial Services, Inc.	)	
F/k/a/ UBS PaineWebber, Inc.	)	
And Charles Nicky Bank,	)	
	)	
Respondents,	)	
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**Representation**

For Claimants: Arthur Hahn, Christian Kemnitz (Katten Muchin Rosenman, L.L.P.)  
For Respondents: Edward Joyce (Edward T. Joyce and Associates, PC)

**Pleadings**

Howard Gimbel and Marvin Davis Statement of Claim and Submission Agreement, filed on or about:	June 22, 2006
UBS Financial Services, Inc. and Charles Bank Answer and Submission Agreement, filed on or about:	August 31, 2006
UBS Financial Services, Inc. and Charles Bank amended Answer and Submission Agreement, filed on or about:	September 1, 2006

**Hearing**

The named parties appeared at the hearing sessions specified below, and had full opportunity to present arguments and evidence.

<u>Date(s)</u>	<u>No. of Sessions</u>	<u>Location</u>
January 7, 2008	1	Chicago, Illinois
January 8, 2008	2	Chicago, Illinois
January 9, 2008	2	Chicago, Illinois
January 10, 2008	2	Chicago, Illinois
January 22, 2008	2	Chicago, Illinois
January 23, 2008	2	Chicago, Illinois

January 24, 2008	2	Chicago, Illinois
March 4, 2008	2	Chicago, Illinois
March 5, 2008	2	Chicago, Illinois
March 6, 2008	2	Chicago, Illinois
March 7, 2008	1	Chicago, Illinois

### Summary of Issues

On or about June 22, 2006, Howard Gimbel ("Gimbel") and Marvin Davis ("Davis") (collectively referred to as "Claimants"), filed a Statement of Claim ("Statement of Claim") against UBS Financial Services, Inc. f/k/a UBS PaineWebber, Inc. ("UBS") and Charles Nicky Bank ("Bank") (collectively referred to as "Respondents").

Claimants' Statement of Claim alleged unsuitable investment recommendations and misrepresentations. Specifically, Claimants' allegations included the following: (i) UBS failed to realize that Claimants' portfolios did not fit the risk profiles reflected in Claimants' account opening statements and failed to make certain recommendations, (ii) UBS through its agent Howard Jacobson ("Jacobson") provided inappropriate and unsuitable recommendations and advice to Claimants, (iii) UBS made suggestions to Jacobson that he encourage Claimants to trade options without regard to Claimants' experience and suitability, (iv) UBS failed to give Jacobson any training or instruction about options trading and risk, (v) UBS made recommendations of certain options trades despite that Claimants were retired and contrary to their investment objectives and risk tolerance, (vi) UBS failed to ensure that its recommendations were appropriate and (vii) UBS failed to give appropriate and suitable advice.

Claimants' Statement of Claim also alleged that UBS had a computer program flaw and tried to cover it up. Specifically, Claimants contend that UBS' computer system miscalculated certain equity margin requirements and due to the computer program error, excess credit was extended to Claimants and UBS, and upon UBS' discovery of the problem, failed to inform Claimants.

In its Statement of Claim, Claimants further alleged that Respondents breached its duty of due care (negligence) in UBS' management of the Claimants' accounts and are liable for their negligence. Claimants contend Respondents breached their duty of due care by failing to (i) supervise the handling of claimants' accounts, (ii) review the level of risk in which they were involved, (iii) train Jacobson in options trading, (iv) point out the risks inherent in Claimants' concentrations, (v) advise Claimants to hedge their equity concentrations and (vi) further breached their duty of care by recommending that Claimants engage in options trading while placing purchases on margin in the stock market without warning them about the risk involved. Claimants Statement of Claim also alleged Respondents failed to supervise Jacobson's handling of Claimants' accounts and failed to provide the necessary training to Jacobson for handling risky options trading.

Additionally, Claimants' Statement of Claim also alleged that Respondents breached the NASD rules and regulations and its own internal policies and procedures by failing to supervise Jacobson and failed to provide the necessary training to Jacobson for handling risky options trading.

Claimants' Statement of Claim alleged the following: (i) unsuitability (options trading) – the sale of naked puts by Claimants were unsuitable and the risk incurred from these sales was beyond Claimants' risk tolerance, (ii) Unhedged concentration of "tech" stocks – when Claimants transferred their concentrated stock positions to UBS, UBS should have made certain recommendations and failed to

*continuously monitor Claimants' concentrated positions, (iii) Respondents violated Section 2310 of the NASD conduct rules contending that it is inconceivable to believe that Respondents believed that writing naked puts on margin was a suitable investment for retired individuals, (iv) Respondents violated Section 3010 of the NASD conduct rules contending that Jacobson received no training in trading options or writing puts, no one at UBS supervised Jacobson's management of Claimants' accounts, and no one at UBS reviewed Claimants' accounts for purposes of protecting UBS' interests, (v) the conduct of UBS and Jacobson in recommending unsuitable options, failing to supervise Jacobson and failing to warn Claimants of the risks associated with their concentrated equity investments constitute breaches of Illinois securities laws.*

Claimants contend that such acts by Respondents caused Claimants to suffer damages and that such damages fall into two categories: (1) sale of naked puts and (2) concentration damages. Claimants contend that the total damages suffered by Gimbel were in the range of \$40,114,426 to \$50,612,555 and the total damages suffered by Davis were in the range of \$20,760,959 to \$25,726,462.

Therefore, Claimants in their Statement of Claim request that they be awarded: (i) actual damages in the amount of between \$60,825,387 and \$70,339,017 (ii) attorneys fees and costs (iii) interest (iv) punitive damages and (v) and further relief deemed just by the panel.

Respondent filed an answer to the Statement of Claim on or about August 31, 2006. Respondents filed an amended answer to the Statement of Claim on or about September 1, 2006 ("Answer"). In the Answer, Respondents contend that the Claimants are two exceptionally wealthy businessmen who sold their ownership interests in a large telecommunications company to WorldCom and then brought their already-established positions in WorldCom stock with them to UBS. In their Answer, Respondents contend that Claimants chose to remain concentrated in WorldCom stock despite advice from UBS and that they diversify or hedge their positions and that Claimants chose to invest heavily in a number of other high tech companies and to sell naked puts on WorldCom stock.

Respondents also contend that during the period their accounts were at UBS, the Claimants' investments were profitable overall. In their Answer, Respondents contend that Claimants are not asking the arbitration panel to award Claimants the amounts they truly lost, but rather to put them in the position they would have been in if they liquidated their positions at the peak of the market. Respondents further contend that Claimants' principal arguments are contradicted by the facts, including the following: claimants were neither naïve nor unsophisticated, the risk profile of the six accounts in which the trading that is subject of this claim took place was "Aggressive/Speculative", Respondents did recommend that Claimants diversify their portfolio or otherwise limit their risk, Claimants understood the risks of the option-writing they undertook, Claimants received monthly statements, and in some cases daily reports, reflecting their losses in WorldCom and the tech market decline, Claimants accounts were properly monitored, the error in UBS' computer flaw which affected margin calculations caused Claimants no harm, and Claimants reviewed and signed a variety of documents, including a one-page special statement addressing the risks of writing uncovered put options, in which they specifically stated that they acknowledged and accepted the substantial risks associated with their option strategies.

In the Answer, Respondents contend that Claimants' damages theory is flawed. Respondents contend that Claimants theory assumes the Claimants get the benefit of their concentrated positions during the period in which stock prices were increasing and should have been advised to diversify or hedge only at the peak of the market. Additionally, Respondents contend that Claimants accounts were profitable over the full period they were at UBS. Second, Respondents contend that Claimants' theory assessed against UBS purported losses that Claimants suffered during the period their accounts were at Morgan Stanley,

not UBS. Lastly, Respondents contend that UBS did in fact advise Claimants to reduce the risks associated with their concentrated positions but Claimants rejected that advice.

In their Answer, Respondents assert the following additional defenses: Claimants are barred from recovery to the extent required by the terms of any settlement of litigation in which claims relating to WorldCom or other holdings were released and/or enjoined, no right of action lies for violations of the rules of self-regulated organizations, including the NASD, the statement of claim fails to state a claim upon which relief may be granted, the Claimants have not suffered any damages, the Claimants have failed to mitigate any damages they may have suffered, any damages the Claimants may have suffered were not caused by Respondents' actions, the Claimants' claims for damages are limited, in whole or part, by applicable law, the Claimants have no legal or factual basis for recovering punitive damages from the Respondents, Claimants' claims are subject, in whole or part, to the defense of estoppel, Claimants' claims are subject, in whole or part, to the defense of unclean hands, any damages that the Claimants may recover must be reduced by any amount recovered from any other source in compensation for damages allegedly suffered as a result of the allegation in the Statement of Claim, Claimants' claims are barred by the governing statute of limitations, any award to Claimants must be reduced by the doctrines of contributory and/or comparative negligence, Claimants ratified the investments in question by continuing to hold them after their risks became apparent, and Claimants are not entitled to rescission because they have not tendered the securities as to which rescission is sought.

Respondents therefore pray for relief as follows: (i) Claimants' claim be dismissed with prejudice, (ii) that the Claimants have and recover nothing from Respondents, (iii) that the cost of this action be taxed to the Claimants, (iv) that the Claimants be ordered to pay Respondents' attorneys fees, and (v) such other relief as the arbitration panel deems just and proper.

At the start of the hearing on January 7, 2008, due to the Federal Court in New York granting an injunction proceeding which prohibited Claimants from seeking damages regarding WorldCom or derivatives on WorldCom, Claimants voluntarily declared that they would not seek damages related to WorldCom in this arbitration proceeding.

#### **Award\***

After due deliberation and in consideration of the hearing testimony, documentary evidence, and other submissions made by the parties, the undersigned arbitrators, in full and final resolution of all issues in controversy, award as follows:

1. Claimants' request for actual damages is denied.
2. Claimants' request for attorneys' fees and costs is denied.
3. Claimants' request for punitive damages is denied.
4. Respondent's request for attorneys fees and costs is denied.
5. Claimant and Respondent shall pay all filing and forum fees as detailed below.

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\* Pursuant to CBOE Rule 18.31, all monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction.

### Forum Fees

Pursuant to Exchange Rule 18.33, the Arbitrators assess the following filing and forum fees:

Initial Filing Fee – Claim	\$300
Pre-hearing session Fees (1)	\$1,500
Adjournment of hearings (2)	waived
Hearing session Fees (20 x \$1,500)	\$30,000
Total	\$31,800

1. Responsibility for the filing fee, totaling \$300, shall be assessed as follows: Claimants shall be responsible for \$300.
2. Responsibility for the forum fees, totaling \$31,500, shall be assessed as follows: Claimants shall be responsible for \$15,750 and Respondents shall be responsible for \$15,750.
3. The Exchange shall retain the non-refundable filing fees and the hearing session deposits, as previously submitted by Claimants. Claimants initially submitted \$300 for the filing fee and \$1,500 for the hearing deposit.
4. Claimants shall submit \$14,250 to the Chicago Board Options Exchange, Incorporated.
5. Respondents shall submit \$15,750 to the Chicago Board Options Exchange, Incorporated.

/s/ Stephen C. Esposito 4/10/08  
Stephen C. Esposito, Chairman and Public Arbitrator Date

/s/ Mary Beth Wheeler 4/11/08  
Mary Beth Wheeler, Public Arbitrator Date

/s/ Mark R. Fluger 4/09/08  
Mark R. Fluger, Industry Arbitrator Date