

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

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In the Matter of the Arbitration Between:

MK Link Investments Limited Partnership and Levine Investments, LP (Claimants) v.  
WSW Capital, Inc.; Wood, Struthers & Winthrop Management Corp.; Donaldson, Lufkin  
& Jenrette Securities Corporation; and CSAM Capital, Inc., as successor to WSW  
Capital, Inc. (Respondents)

Case Number: 99-01327

Hearing Site: New York, New York

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Nature of the Dispute: Customers v. Member and Non-Members

**REPRESENTATION OF PARTIES**

Claimants MK Link Investments Limited Partnership ("MK Link") and Levine Investments, LP ("Levine") hereinafter collectively referred to as "Claimants": Daniel R. Solin, Esq., Pittsfield, MA and David E. Valicenti, Esq., Cain Hibbard Myers & Cook, P.C., Pittsfield, MA. Previously represented by: Brian N. Smiley, Esq., Page Gard Smiley & Bishop, LLP, Atlanta, GA. Also previously represented by: Leonard Weintraub, Esq., Paduano & Weintraub, formerly Smith, Campbell & Paduano, New York, NY.

Respondents WSW Capital, Inc. ("WSW"), Wood, Struthers & Winthrop Management Corp. ("Wood"), Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ") and CSAM Capital, Inc. ("CSAM") hereinafter collectively referred to as "Respondents": Jonathan Rosenberg, Esq., O'Melveny & Myers, LLP, New York, NY. Previously represented by: Bradley J. Butwin, Esq., O'Sullivan, LLP, formerly O'Sullivan Graev & Karabell, LLP, New York, NY. Also previously represented by: Frederick T. Davis, Esq. and Margaret A. Helen MacFarlane, Esq., Shearman & Sterling, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: March 19, 1999.

Amended Statement of Claim filed on or about: August 30, 1999.

Second Amended Statement of Claim filed on or about: April 23, 2003.

MK signed the Uniform Submission Agreement: March 18, 1999.

MK signed the Uniform Submission Agreement: April 24, 2003.

Levine signed the Uniform Submission Agreement: August 26, 1999.

Levine signed the Uniform Submission Agreement: April 24, 2003.

Joint Statement of Answer filed by Respondents WSW, Wood, and DLJ on or about:  
June 29, 1999.

Joint Statement of Answer to Claimants' Amended Statement of Claim filed by

Respondents WSW, Wood, and DLJ on or about: September 14, 1999.

WSW signed the Uniform Submission Agreement: June 25, 1999.

Wood signed the Uniform Submission Agreement: June 25, 1999.

DLJ signed the Uniform Submission Agreement: June 25, 1999.

CSAM did not file a Statement of Answer or sign a Uniform Submission Agreement.

### **CASE SUMMARY**

In the Statement of Claim, MK Link asserted the following causes of action: breach of the partnership agreement; violation of Delaware Limited Partnership Law; breach of fiduciary duty – failure to provide adequate notice; breach of fiduciary duty – self interest; and breach of fiduciary duty – conflict of interest. MK Link's claim involved the 1996, 1997, and 1998 Exchange Funds.

In the Amended Statement of Claim and Second Amended Statement of Claim, Claimants asserted the following causes of action: breach of the partnership agreement; violation of Delaware Limited Partnership Law; breach of fiduciary duty – failure to provide adequate notice; breach of fiduciary duty – self interest; and breach of fiduciary duty – conflict of interest; and misrepresentation – omission of material information. Claimants' claims involved the 1996, 1997, and 1998 Exchange Funds.

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

Unless specifically admitted in their Answer to Claimants' Amended Statement of Claim, WSW, Wood, and DLJ denied the allegation made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, MK Link requested that the Panel enter an award in its favor as follows:

- A. Enjoining each of the Respondents from proceeding with the proposed transaction to combine the marketable securities of the 1996 Exchange Fund in a master fund with the marketable securities of the 1997 Exchange Fund, the 1998 Exchange Fund, or any other fund or entity;
- B. Requiring and directing Respondents to rescind the Partnership Agreement with respect to MK Link and to return to MK Link the securities it originally contributed to the 1996 Exchange Fund;
- C. Compensatory damages in an amount to be proven at the hearing;

- D. Punitive damages in the amount of \$500,000.00;
- E. Reasonable attorneys' fees and the costs of this proceeding; and
- F. Such other and further relief as the Panel deems just and proper.

In the Amended Statement of Claim, Claimants requested:

- A. Enjoining each of the Respondents from proceeding with the proposed transaction to combine the marketable securities of the 1996 Exchange Fund in a master fund with the marketable securities of the 1997 Exchange Fund, the 1998 Exchange Fund, or any other fund or entity;
- B. If the proposed transactions are completed, requiring Respondents to unwind the transactions, placing the 1996 Exchange Fund in the same position it would have been had the transactions not taken place;
- C. Requiring and directing Respondents to rescind the Partnership Agreement with respect to Claimants and to return to Claimants the securities they originally contributed to the 1996 Exchange Fund;
- D. Compensatory damages in an amount to be proven at the hearing;
- E. Punitive damages in the amount of \$500,000.00;
- F. Reasonable attorneys' fees and the costs of this proceeding; and
- G. Such other and further relief as the Panel deems just and proper.

In their Second Amended Statement of Claim, Claimants requested:

- A. Enjoining each of the Respondent from proceeding with the proposed transaction to combine the marketable securities of the 1996 Exchange Fund in a master fund with the marketable securities of the 1997 Exchange Fund, the 1998 Exchange Fund, or any other fund or entity;
- B. If the proposed transactions are completed, requiring Respondent to unwind the transactions, placing the 1996 Exchange Fund in the same position it would have been had the transactions not taken place;
- C. Requiring and directing Respondent to rescind the Partnership Agreement with respect to Claimants and to return to Claimants the securities they originally contributed to the 1996 Exchange Fund;

- D. Compensatory damages in an amount to be proven at the hearing;
- E. Punitive damages;
- F. Reasonable attorneys' fees and the costs of this proceeding; and
- G. Such other and further relief as the Panel deems just and proper.

In their Answer and their Answer to Claimants' Amended Statement of Claim, Respondents WSW, Wood, and DLJ indicated that Claimants are not entitled to relief as requested in their Claim, or at all; that the Panel award them their costs and expenses, including reasonable attorneys' fees; and that the Panel award such other and further relief as it deems just and proper.

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

Respondent CSAM did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but agreed with Claimants to submit to NASD's jurisdiction, and, having appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

Claimants filed a Second Amended Statement of Claim removing the original Respondents WSW, Wood, and DLJ and substituting them with CSAM as the sole respondent. According to Claimants' counsel, the amendment resulted from DLJ's merger with Credit Suisse First Boston and the fact that CSAM became the General Partner of the 1996 Fund, and is therefore the proper party.

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.

#### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. CSAM is liable for and shall pay Claimants \$960,000.00 for attorneys' fees and expert witness' fees and expenses as stipulated by the parties, plus interest at 6% from July 15, 2003 to December 20, 2003 or earlier date when payment is received by Claimants' counsel. Interest shall accrue at the New York state judgment rate from December 20, 2003.
2. CSAM shall pay all forum fees and costs of this arbitration.

3. Claimants' consent was required for the roll-up from the 1996 Exchange Fund to the Master Fund. As a result of their failure to consent, Claimants are not bound by any amendment to the 1996 Limited Partnership Agreement in connection with the roll-up transactions. The arbitrators make no determination regarding the rights of other limited partners in the 1996 Exchange Fund.
4. Claimants' 1996 Exchange Fund limited partnership capital account position shall be effected for the full 13-year term of the 1996 Exchange Fund, without calculation of any participation in the Master Fund. Deutsche Bank and CSAM shall attest to the accuracy of such capital account value and shall be furnished all information used in reaching such value. This Award does not prohibit Claimants from filing a new claim to determine if (1) the value of such capital accounts if the parties cannot agree, with the presumption that such calculation by Deutsche Bank is accurate; and (2) consider an award of Claimants' reasonable expert fees and expenses on the question of such value if it is determined to be different in a material amount than such calculation by Deutsche Bank. In the event a new claim is submitted, the parties may agree to the appointment of this panel.
5. Claimants shall have all rights of withdrawal and otherwise as set forth in the Limited Partnership Agreement.
6. CSAM shall furnish an opinion of Skadden, Arps, acceptable in the reasonable opinion of Claimants, to the effect that the transactions contemplated by this Award including the above-awarded fees and expenses, are a non-taxable event. This opinion may be addressed to the panel, the parties or the Claimants, but shall permit the Claimants to rely thereon. In the event that such an opinion is not rendered, Claimants shall have 60 days from the date of this Award in which to require a private or other ruling or advice (the "ruling") from the Internal Revenue Service concerning this transaction. If such ruling determines the transactions herein are a taxable event, Claimants may file a new claim to determine if an award shall be made for any taxes payable thereon by Claimants together with reasonable attorneys' fees and expenses incurred by Claimants in seeking such ruling. If such ruling determines that there is no taxable event, Claimants may file a new claim to determine if an award shall be made for reasonable accountant and legal fees incurred in seeking such ruling. In the event Claimants do not request such ruling within 60 days (a) from the date of receipt of this Award or (b) after receipt of the Skadden, Arps opinion, whichever is later, they shall have waived any rights under this Paragraph 6 of this Award. This Award does not prohibit Claimants from filing a new claim to determine if an award shall be due for any fees and expenses as set forth in this Award. In the event a new claim is submitted, the parties may agree to the appointment of this panel.
7. Any and all relief not specifically addressed herein is 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	= \$300.00
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#### **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. Accordingly, Donaldson, Lufkin & Jenrette Securities Corp. was a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$2,500.00

#### **Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

April 14, 17, 18, 19, and 21, 2000, adjournment by Claimants	= \$ 562.50
April 14, 17, 18, 19, and 21, 2000, adjournment by Respondents	= \$ 562.50
December 14, 15, 18, and 19, 2000, adjournment by Claimants	= \$1,125.00
April 2, 4, and 18, 2001, adjournment by Claimants	= \$1,000.00
October 8, 9, 10, and 11, 2001, adjournment by Claimants	= \$1,000.00
April 15, 16, 17, and 18, 2002, adjournment by Respondents	= \$1,125.00
April 22, 23, 24, and 25, 2002, adjournment by all parties	= WAIVED
May 6, 7, 8, and 9, 2003, adjournment by Respondent CSAM	= \$1,125.00

#### **Forum Fees and Assessments**

The Panel has assessed forum fees for each session conducted. A 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 a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: February 7, 2000 1 session	

Four (4) Pre-hearing sessions with Panel @ \$1,125.00	= \$ 4,500.00
Pre-hearing conferences: November 18, 1999 1 session	
April 30, 2003 1 session	
September 17, 2003 1 session	
October 28, 2003 1 session	

Ten (10) Hearing sessions @ \$1,125.00		= \$11,250.00
Hearing Dates:	June 2, 2003	2 sessions
	June 4, 2003	2 sessions
	June 5, 2003	2 sessions
	June 6, 2003	2 sessions
	November 11, 2003	2 sessions
<hr/> Total Forum Fees		= \$16,200.00

1. The Panel has assessed the forum fees of \$16,200.00 against Respondent CSAM.

**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 are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimants requested tapes = \$ 150.00

**Fee Summary**

1. Claimants are jointly and severally liable for:
- |                        |                     |
|------------------------|---------------------|
| Initial Filing Fee     | = \$ 300.00         |
| Administrative Cost    | = \$ 150.00         |
| <u>Adjournment Fee</u> | <u>= \$3,687.50</u> |
| Total Fees             | = \$4,137.50        |
| <u>Less payments</u>   | <u>= \$4,650.50</u> |
| Refund Due             | = \$ 512.50         |
2. DLJ is solely liable for:
- |                      |                     |
|----------------------|---------------------|
| <u>Member Fees</u>   | <u>= \$4,600.00</u> |
| Total Fees           | = \$4,600.00        |
| <u>Less payments</u> | <u>= \$8,475.00</u> |
| Refund Due           | = \$3,875.00        |
3. Respondents WSW, Wood, and DLJ are jointly and severally liable for:
- |                                     |                     |
|-------------------------------------|---------------------|
| <u>Adjournment Fee</u>              | <u>= \$1,687.50</u> |
| Total Fees                          | = \$1,687.50        |
| <u>Less payments</u>                | <u>= \$1,687.50</u> |
| Balance Due NASD Dispute Resolution | = \$ 0.00           |

4. CSAM is solely liable for:

Adjournment Fee	= \$ 1,125.00
Forum Fees	= \$16,200.00
Total Fees	= \$17,325.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$17,325.00

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

J. Kirkland Grant	-	Public Arbitrator, Presiding Chair
Paul Schriffes	-	Public Arbitrator
James A. Mullin	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

\_\_\_\_\_  
J. Kirkland Grant  
Public Arbitrator, Presiding Chairperson

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

\_\_\_\_\_  
Paul Schriffes  
Public Arbitrator

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

  
\_\_\_\_\_  
James A. Mullin  
Non-Public Arbitrator

12-30-03  
\_\_\_\_\_  
Signature Date

December 31, 2003  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

J. Kirkland Grant	-	Public Arbitrator, Presiding Chair
Paul Schiffres	-	Public Arbitrator
James A. Mullin	-	Non-Public Arbitrator

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\_\_\_\_\_  
J. Kirkland Grant  
Public Arbitrator, Presiding Chairperson

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

Paul Schiffres  
Paul Schiffres  
Public Arbitrator

12/24/2003  
Signature Date

\_\_\_\_\_  
James A. Mullin  
Non-Public Arbitrator

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


December 31, 2003  
Date of Service (For NASD Dispute Resolution use only)

**ARBITRATION PANEL**

J. Kirkland Grant	-	Public Arbitrator, Presiding Chair
Paul Schiffres	-	Public Arbitrator
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J. Kirkland Grant  
Public Arbitrator, Presiding Chairperson

12/30/03  
\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Paul Schiffres  
Public Arbitrator

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

\_\_\_\_\_  
James A. Mullin  
Non-Public Arbitrator

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

December 31, 2003  
\_\_\_\_\_  
Date of Service (For NASD Dispute Resolution use only)