

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

In the Matter of the Arbitration Between:

Name of the Claimant  
First Union Securities, Inc.

Case Number: 01-00200

Name of the Respondents  
John M. Mulvihill  
R. John Giannone

Hearing Site: Philadelphia, PA

**REPRESENTATION OF PARTIES**

Claimant, First Union Securities, Inc. ("First Union"), hereinafter referred to as "Claimant":  
Diane C. Fischer, Esq., Kane & Fischer, Ltd., Chicago, IL.

Respondent, John M. Mulvihill ("Mulvihill"), hereinafter referred to as "Respondent Mulvihill":  
Paula D. Shaffner, Esq., Saul Ewing, LLP, Philadelphia, PA.

Respondent R. John Giannone ("Giannone"), hereinafter referred to as "Respondent Giannone":  
Diane C. Fischer, Esq., Kane & Fischer, Ltd., Chicago, IL.

**CASE INFORMATION**

Statement of Claim filed on: January 12, 2001

A representative of Claimant First Union signed the Uniform Submission Agreement: January 3, 2001

Amended Statement of Claim filed on: June 5, 2001

Statement of Answer filed by Respondent Mulvihill on: April 16, 2001

Counterclaim and Third Party Claim filed by Respondent Mulvihill on: April 16, 2001

Respondent Mulvihill did not file a signed Uniform Submission Agreement

Claimant First Union and Respondent Giannone filed a Reply to the Counterclaim and Third Party Claim on: May 31, 2001

Respondent Mulvihill filed a Motion for an Order to have Claimant First Union release funds held in his investment accounts prior to the hearing.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of promissory note.

Unless specifically admitted in its Answer, Respondent Mulvihill denied the allegations made in the Statement of Claim and asserted the following defenses, among others: that the promissory note is unenforceable due to failure of consideration, fraud in the inducement,

misrepresentations, and breach of contract; estoppel; and, unjust enrichment.

Respondent Mulvihill also asserted a counterclaim against Claimant First Union and a Third Party Claim against Respondent Giannone, asserting the following causes of action: defamation; refusal to return business property, including records of clients; and, refusal to return personal investment accounts.

Claimant First Union and Respondent Giannone denied the allegations made in the Counterclaim and Third Party Claim and asserted the following defenses, among others: that Respondent Mulvihill's request to return unidentified "personal property" has no basis; and, that Claimant First Union is entitled to maintain custody of Respondent Mulvihill's accounts pending this proceeding.

#### **RELIEF REQUESTED**

Claimant First Union requested in its Amended Statement of Claim:

Compensatory Damages	\$ 217,769.00
Interest	amount unspecified
Attorneys' Fees	amount unspecified
Other Costs	amount unspecified

Respondent Mulvihill requested:

Compensatory Damages	amount unspecified
Other Non-Monetary Relief if any:	return of business and personal property and the return of his investment accounts

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

Respondent Mulvihill did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared at the hearing, is bound by the determination of the Panel on all issues submitted.

Respondent Giannone did not file with NASD Dispute Resolution, a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, and appeared at the hearing, is bound by the determination of the Panel on all issues submitted.

The Panel denied Respondent Mulvihill's pre-hearing Motion for an Order to have Claimant First Union release funds held in his investment accounts.

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

#### Majority Opinion:

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

1. The Panel finds in favor of Respondent Mulvihill and against Claimant First Union on the claims for sums of principal, interest, and cost of collection of the Promissory Note dated April 22, 1999;
2. The Panel directs Claimant First Union to pay to Respondent Mulvihill the sum of \$200,000 in compensatory damages;
3. The Panel directs Respondent Giannone to pay to Respondent Mulvihill the sum of \$50,000 in compensatory damages;
4. The Panel directs Claimant First Union to transfer the investment accounts of Respondent Mulvihill in accordance with Respondent Mulvihill's directions properly communicated in writing pursuant to this Award; and,
5. Any request for relief not specifically addressed herein is denied in its entirety.

#### Dissenting Opinion:

I note my dissent from the majority decision of the panel with the following: having the legal right to take action does not mean it is the right action to take. Absence of fairness in actions does not make them actionable.

### 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	= \$ 1,000.00
Counter claim and Third Party Claim filing fee	= \$ 250.00

#### 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 persons at the time of the events giving rise to the

dispute. Accordingly, Claimant First Union is 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:

May 14 – 15, 2002, adjournment by Respondent Mulvihill	= \$ 1,125.00
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#### 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:

One (1) Pre-hearing session with a single arbitrator @ \$ 450	= \$ 450.00
Pre-hearing conference: November 13, 2001 1 session	

One (1) Pre-hearing session with Panel @ \$ 1,125	= \$ 1,125.00
Pre-hearing conference: October 29, 2001 1 session	

Six (6) Hearing sessions @ \$ 1,125	= \$ 6,750.00
Hearing Dates: July 1, 2002 2 sessions	
July 2, 2002 2 sessions	
July 3, 2002 2 sessions	

Total Forum Fees	= \$ 8,325.00
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1. The Panel has assessed \$ 4,162.50 of the forum fees jointly and severally to Claimant First Union and Respondent Giannone.

2. The Panel has assessed \$ 4,162.50 of the forum fees to Respondent Mulvihill.

#### Fee Summary

1. Claimant, First Union, is assessed and shall pay:

Initial Filing Fee	= \$ 1,000.00
Member Fees	= \$ 4,600.00
Total Fees	= \$ 5,600.00
Less payments	= \$ 5,600.00
Balance Due NASD Dispute Resolution	= \$ 00.00

2. Claimant First Union and Respondent Giannone are jointly and severally assessed and shall pay:

Forum Fees	= \$ 4,162.50
Total Fees	= \$ 4,162.50
Less Payments	= \$ 1,125.00

Balance Due NASD Dispute Resolution = \$ 3,037.50

3. Respondent Mulvihill is assessed and shall pay:

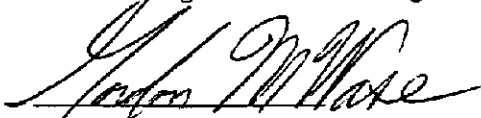
Filing Fee	= \$ 250.00
Adjournment Fee	= \$ 1,125.00
<u>Forum Fees</u>	<u>= \$ 4,162.50</u>
Total Fees	= \$ 5,537.50
<u>Less payments</u>	<u>= \$ 1,125.00</u>
Balance Due NASD Dispute Resolution	= \$ 4,412.50

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

ARBITRATION PANEL

Gordon M. Wase, Esq.	-	Public Arbitrator, Presiding Chairperson
Kimberly Day Lewis, Esq.	-	Public Arbitrator, Panelist
Clifford A. Harwick	-	Non-Public Arbitrator, Panelist

**Concurring Arbitrators' Signatures**



Gordon M. Wase, Esq.  
Public Arbitrator, Presiding Chairperson

7/30/02  
Signature Date

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Clifford A. Harwick  
Non-Public Arbitrator, Panelist

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

**Dissenting Arbitrator's Signature**

\_\_\_\_\_  
Kimberly Day Lewis, Esq.  
Public Arbitrator, Panelist


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

August 6, 2002  
Date of Service (For NASD Dispute Resolution office use only)

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Public Arbitrator, Presiding Chairperson

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