

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Harold J. Bonfiglio and Sally A. Bonfiglio, (Claimants) v. Prudential Securities, Inc.,  
John Kuhlman, Eric Kuehl, and Matthew J. Miller (Respondents)

Case Number: 01-01774

Hearing Site: Chicago, Illinois

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**REPRESENTATION OF PARTIES**

Claimant Harold J. Bonfiglio and Sally A. Bonfiglio ("Bonfiglio"): Lee Phillip Forman of the Law Offices of Lee Phillip Forman, Ltd. located in Oak Brook, Illinois.

Respondent Prudential Securities, Inc. ("Prudential" or "PSI"), John Kuhlman ("Kuhlman"), Eric Kuehl ("Kuehl") and Matthew J. Miller ("Miller"), hereinafter collectively referred to as "Respondents": Patrick Gaffney, Esq. of the Legal Department of Prudential Securities, Inc. located in New York City, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: April 09, 2001.

Amended Statement of Claim filed on or about: July 02, 2001.

Claimants each signed the Uniform Submission Agreement: April 05, 2001.

Claimants' Response to Respondent Prudential and Kuhlman's Motion to Dismiss all claims prior to April 05, 1995 pursuant to NASD Code of Arbitration Rule 10304 filed on or about: June 06, 2001.

Claimants' Reply to Respondents' Amended Statement of Answer filed on or about: December 12, 2001.

Statement of Answer filed by Respondents Prudential, Kuhlman, and Kuehl on or about: June 01, 2001.

Amended Statement of Answer filed by Respondents Prudential, Kuhlman, Miller, and Kuehl on or about: December 04, 2001.

Respondent Prudential and Kuhlman's Motion to Dismiss all claims prior to April 05, 1995 pursuant to NASD Code of Arbitration Rule 10304 filed on or about: May 31, 2001.

### CASE SUMMARY

Claimants asserted the following causes of action: Fraud; Violation of the Illinois Consumer Fraud and Deceptive Business Practice Act; Unsuitability; Churning; Unauthorized Trading; Failure to Supervise; and Respondeat Superior.

The causes of action relate to the XIN NET CORP., Patriot Scientific Corp., Evison USA.Com Inc., Pacific Century Cyberworks, E Digital Corp., Preferred Networks Inc., Georgia, Electronic Identification Inc., UST Telemanagement Inc., International Internet, Inc., LegalOpinion.Com, DICOM Imaging Systems, Inc., Ecom Ecom Com, Inc., Fibercore, Inc. Class A, Tianrong Internet Products & Services, Fonix Corp. Delaware, ECONNET, Inc., and other unspecified stocks.

Unless specifically admitted in their Answer, Respondents Prudential, Kuhlman, and Kuehl denied the allegations made in the Statement of Claim and asserted the following defenses: Failure to state a claim upon which relief may be granted; Doctrine of Unclean Hands; Ratification; Waiver; Estoppel; and Claim/claims barred by the applicable Statute of Limitations.

### RELIEF REQUESTED

In their Statement of Claim Claimants requested:

Compensatory Damages	\$1,400,000.00
Punitive Damages	\$1,000,000.00
Attorneys' Fees and Costs	\$ 70,000.00

In their Amended Statement of Claim Claimants requested:

Compensatory Damages	\$ 600,000.00
Punitive Damages	\$ 500,000.00
Attorneys' Fees and Costs	\$ 300,000.00

In their Statement of Answer Respondents Prudential Securities, Inc., John Kuhlman, and Eric Kuehl requested:

Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	dismissal of all Claims

In their Amended Statement of Answer Respondents Prudential Securities, Inc., John Kuhlman, Eric Kuehl and Matthew Miller requested:

Attorneys' Fees	unspecified
Other Costs	unspecified
Other Monetary/Non-Monetary Relief if any:	dismissal of all Claims

### ISSUES CONSIDERED AND DECIDED

Respondents did not file with NASD Dispute Resolution, Inc. properly executed submissions to arbitration but are required to submit to arbitration pursuant to 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.

The panel granted Respondents' Kuhlman & Prudential's Motion to Dismiss Claims for events that occurring prior to April 05, 1995 due to Rule 10304 of the Code of Arbitration Procedure.

The panel issues the following findings regarding the issues asserted in this matter:

In Paragraphs 15 and 16 of the Amended Statement of Claim ("ASC"), Claimants alleged that Miller in effect committed fraud by his response to a complaint made by H. Bonfiglio.

The Panel held that Claimants did not bear their burden of proof that Miller's response to H. Bonfiglio's complaint rose to the level of a fraud. Therefore, Claimants' Fraud Claim against Miller was denied.

The Panel concluded that the evidence about Miller's failure to respond efficaciously to H. Bonfiglio's complaint did not show fraudulent intent on Miller's part. Other than this fraud charge, Miller would not have been a proper Respondent.

The Panel believes that keeping the fraud allegation on Miller's CRD would unfairly tarnish the reputation of Miller; and therefore, the Panel unanimously urges NASD Regulation to expunge this proceeding from Mr. Matthew J. Miller's CRD Record. In this regard, we cite p. 566 of NASD Notice to Members 01-65 and state that we believe that two of the three items listed therein as being grounds for expungement exist, to wit: "(2) the claim (on the evidence) is without legal merit," and "(3) the information on the CRD System is defamatory in nature."

In Paragraph 17 of the ASC, Claimants allege that the Respondents were guilty of violating the Illinois Consumer Fraud and Deceptive Business Practices Act ("Act")

The Panel held that Respondents did not violate the Act.

The Panel has separated this Award into two Parts. Part I relates to the Bonfiglios' accounts as they were handled by Kuhlman and PSI ("Kuhlman/PSI") from April 5, 1995 to October 31, 1997. Part II relates to the Bonfiglios' accounts as they were handled by Kuehl and PSI ("Kuehl/PSI") from mid-November of 1997 through the closure of the account by December 31, 2000.

Part I

- (1) Claimants alleged that Kuhlman violated the standard of suitability under NASD Rule 2310.
- (2) Claimants alleged that Kuhlman was guilty of churning the Claimants' accounts.
- (3) Claimants alleged that Kuhlman was guilty of unauthorized trading.

PSI was alleged to have failed to properly supervise Kuhlman, and the Panel noted in its deliberations that PSI was also jointly responsible for Kuhlman's (and Kuehl's) actions (or omissions), taken within the scope of his (their) employment under the doctrine of Respondent Superior.

Claimants did not, in their ASC or in their closing argument, allocate the asserted damages between Kuhlman/PSI and Kuehl/PSI.

This allocation of damages between Kuhlman/PSI and Kuehl/PSI, set forth below in this Award, has been made in order to give fair and proper treatment to Kuhlman, Kuehl, PSI and the Bonfiglios. This allocation is based upon the sworn oral and admitted documentary evidence received by the Panel at the Hearing, which distinguished between the actions or omissions of Kuhlman and the actions or omissions of Kuehl, and which distinguished between the financial loss to the Bonfiglios under Kuhlman/PSI and under Kuehl/PSI.

- (1) The Panel found that Kuhlman (and PSI under both legal concepts described above) violated suitability on most of the positions that Kuhlman placed in the Bonfiglios' accounts.
- (2) The Panel held that Kuhlman/PSI was not guilty of churning.
- (3) The evidence showed that Kuhlman never received approval of either of the Bonfiglios before any of the many purchases or sales he made for their accounts, and hence was guilty of unauthorized trading (as was PSI under both legal concepts described above).

The Claimants testified (and Kuhlman agreed) that Kuhlman had projected that the accounts would earn at least 7.5 percent. In their claim for damages presented by their expert witness, the Claimants sought a lesser, more reasonable percentage of about 6.4 percent based upon the mean of the 7.5 percent projected earnings and 5.26 percent T-Bill earnings. The Claimants also sought disgorgement of commissions and margin interest. Evidence presented by Claimant's expert showed that the accounts under Kuhlman earned in excess of Kuhlman's 7.5 percent projection.

Therefore, the Panel (except as set forth below) found that Kuhlman/PSI's wrongful acts did not proximately cause any financial loss and hence caused no damages to the Bonfiglios.

Evidence was presented to the Panel that Kuhlman, without consulting either Claimant, placed the Bonfiglios in about \$270,000 of different Class B mutual funds all from one fund family. Evidence was presented that if Class A funds had been selected, the aggregation of funds in the fund family would have substantially reduced the commissions.

Therefore, the Panel awards the Bonfiglios, jointly, the sum of \$8,000 against Kuhlman and PSI, jointly and severally.

The Panel did not award Claimants any costs or attorney's fees against Kuhlman/PSI.

The Panel denied Claimants' prayer for punitive damages against Kuhlman/PSI.

#### Part II

- (1) Claimants alleged that Kuehl violated the standard of suitability under NASD Rule 2310.
- (2) Claimants alleged that Kuehl was guilty of churning; and
- (3) Claimants alleged that Kuehl was guilty of unauthorized trading.

PSI was alleged to be jointly and severally liable as described above under Part I.

- (1) The Panel found that Kuehl (and PSI under both legal concepts described above) violated suitability on most of the recommendations he made to the Bonfiglios.
- (2) The Panel held that Kuehl/PSI was not guilty of churning.
- (3) The Panel held that the Claimants did not bear their burden of proof that Kuehl/PSI was guilty of unauthorized trading.

The Panel found that Kuehl's breach proximately caused financial loss to the Bonfiglios, and hence gave rise to damages and that PSI was jointly and severally liable for part of these damages, and that Kuehl was individually liable for part of these damages.

The Claimants, through testimony and documents presented by their expert witness, asserted that from April 5, 1995 to December 31, 2000, the wrongful actions of the Respondents caused \$260,500 in damages. (The Claimants also asked for disgorgement of commissions and margin interest totaling about \$139,500. The Panel denied these requests.) It was the Claimants' contention that, but for the wrongful acts

and omissions of Respondents, the Claimants would have earned at a 6.4 percent rate on the average monthly equity in the accounts. If said rate had been earned, the Claimants' account would have totaled \$317,991 on December 31, 2000. The Claimants in fact had only \$57,491 on December 31, 2000; therefore, the financial loss/damages were \$260,500.

The Claimants' damage calculations were based on the assertion that all losses incurred in the Claimants' accounts were the fault of the Respondents. The Panel accepted Claimants' 6.4 percent earning concept; however, the Panel did not find that all of the losses in the accounts were the fault of the Respondents. The Panel found that \$77,800 of the losses in the Claimants' accounts were from stocks that H. Bonfiglio purchased without a recommendation from any Respondent. The Panel held that the net losses on stocks recommended by Kuhlman or Kuehl (of \$20,000), which the Panel found to be suitable for the Bonfiglios, was not the fault of Respondents. The Panel also held that the Respondents should not have been required to earn a 6.4 percent on the portfolio of stocks purchased by H. Bonfiglio without a recommendation by any Respondent and that after deducting the average monthly balance of these stocks, the loss/damages were reduced by \$2,600. The Panel also made an adjustment for the failure of the Respondents Kuehl and PSI to sell all positions in the portfolio on December 18, 2000 when asked to do so by the Bonfiglios.

#### Recapitulation

Economic loss per Claimants	\$317,991-\$57,491	\$260,500
Less:		
H. Bonfiglio trades	77,800	
6.4% interest on average monthly balance of H. Bonfiglio's trades	2,600	
Net loss on stocks recommended by Kuhlman and Kuehl which the Panel deemed to be suitable for the Bonfiglios	20,000	<u>100,400</u>
		160,100
Add back net adjustment for failure to sell on 12/18		<u>1,500</u>
Net economic loss/damages		<u>\$161,600</u>

Respondents called PSI's Profit and Loss Group Supervisor as a witness, and he testified that on an out-of-pocket basis, under Kuhlman the Claimants had a profit of \$305,705, and under Kuehl the Claimants had a loss of \$253,590. (Claimants' expert also computed out-of-pocket gains and losses as a profit under Kuhlman of \$321,978, and a loss under Kuehl of \$273,473.)

The Panel noted that the effect of using the method described above to arrive at damages of \$161,600 offset the losses experienced under Kuehl with the gains earned under Kuhlman. Panel concluded that as to PSI, it was proper to offset the gains under Kuhlman against the losses under Kuehl, and therefore arrive at damages of \$161,600 against PSI and Kuehl jointly and severally.

However, as to Kuehl, the Panel held that it was not proper to offset the gains made under Kuhlman against the losses experienced under Kuehl. On being assigned the Bonfiglios' accounts, Kuehl recommended that the Bonfiglios sell over 75 percent of the Kuhlman selected positions and to replace these positions with positions found by the Panel to be mostly unsuitable.

Kuehl's duty was to properly recommend suitable security positions for them on the October 31, 1997, \$981,809 value of the Bonfiglio's accounts, as if they came in to PSI with the funds from another Broker/Dealer.

The Panel has computed the economic loss caused by Kuehl as follows.

- Out-of-pocket loss under Kuehl as testified to by PSI's Profit and Loss Supervisor: \$253,590
- A significant portion of the losses in the Bonfiglios' account was caused by the stocks selected by H. Bonfiglio (all when Kuehl was his F.A.): \$77,800.
- In addition, there were net losses on stocks recommended by Kuehl that the Panel found were suitable for the Bonfiglios totaling: \$10,600.
- The Panel held that the Bonfiglios' portfolio under Kuehl should have earned at least the average T-bill rate of 5.26 percent on the average monthly account equity (which was reduced by the average equity in the stocks purchased by H. Bonfiglio without Kuehl's recommendation). This interest factor was computed to be: \$96,300.
- Finally, the Panel made an adjustment for the failure to sell the entire portfolio on 12/18/00.

Recap of Net Financial Losses Caused Under Kuehl

Out-of-pocket losses		\$253,590
Plus interest factor @ 5.26%		96,400
		<u>349,990</u>
Less:		
H. Bonfiglio's unsolicited trade:	\$77,800	
Net losses on stocks recommended by Kuehl determined to be suitable:	10,600	<u>(88,400)</u>
		\$261,590
Add back adjustment for failure to sell on 12/18		<u>1,500</u>
Net economic loss/damages under Kuehl		\$263,090
As set forth above Kuehl and PSI are jointly and severally liable for:	161,600	
The Panel has concluded that Kuehl is individually liable for:	263,090	
	less 161,600	<u>\$101,400</u>

The Panel declined to award costs or attorney's fees against Kuehl/PSI.

The Panel unanimously denied any punitive damages against Kuehl/PSI.

In this Amended Answer to the ASC, Respondents asserted five Affirmative Defenses. The Panel denied all five Affirmative Defenses.

Recap of Damages

The Panel awards the sum of \$8,000 to the Bonfiglios jointly against Kuhlman and PSI jointly and severally.

The Panel awards the sum of \$161,600 to the Bonfiglios jointly against Kuehl and PSI jointly and severally.



The Panel awards the sum of \$101,400 to the Bonfiglios jointly against Kuehl individually.

In addition, the Panel awards pre-award interest at the rate of 4 percent annually (non-compounded) from December 20, 2000 through March 31, 2002. Said amounts are to be paid and received as are the awards set forth above.

Through March 31, 2002, the accrued amounts are:

<u>Respondent</u>	<u>Amount</u>	<u>Daily After 3/31/02</u>
Kuhlman/PSI	\$410.00	\$.877
Kuehl/PSI	\$8,098	\$17.71
Kuehl	\$5,197	\$11.12

#### AWARD

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

1. Respondents Prudential Securities, Inc. and John Kuhlman are jointly and severally liable for and shall pay to Claimants Harold J. Bonfiglio and Sally A. Bonfiglio the sum of \$8,000.00 as compensatory damages, plus the sum of \$410.00 as pre-award interest and \$.877, accruing daily, beginning April 01, 2002.
2. Respondents Prudential Securities, Inc. and Eric Kuehl are jointly and severally liable for and shall pay to Claimants Harold J. Bonfiglio and Sally A. Bonfiglio the sum of \$161,600.00 as compensatory damages, plus the sum of \$8,098.00 as pre-award interest and \$17.71, accruing daily, beginning April 01, 2002.
3. Respondent Eric Kuehl is solely liable for and shall pay to Claimants Harold J. Bonfiglio and Sally A. Bonfiglio the sum of \$101,400.00 as compensatory damages, plus the sum of \$5,197.00 as pre-award interest and \$11.12, accruing daily, beginning April 01, 2002.
4. Parties shall each bear their own costs, including attorney's fees.
5. Any and all claims asserted by Claimants Harold J. Bonfiglio and Sally A. Bonfiglio against Respondent Matthew J. Miller are denied in their entirety.
6. The panel recommends the expungement of all reference to the above captioned arbitration from Respondent Matthew J. Miller's registration records maintained by the NASD Central Registration Depository ("CRD"), with the understanding that pursuant to NASD Notice to Members 99-09, Respondent Matthew J. Miller must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.
7. Claimants Harold J. Bonfiglio and Sally A. Bonfiglio's request for punitive

damages against Respondent John Kuhlman and Prudential Securities, Inc. (based on Respondent Superior liability as to Kuhlman) is denied.

8. Claimants Harold J. Bonfiglio and Sally A. Bonfiglio's request for punitive damages against Respondent Eric Kuehl and Respondent Prudential Securities, Inc. (based on Respondent Superior liability as to Kuehl) is denied.
9. Any and all relief not enumerated herein, including punitive damages, is denied.

### FEES

Pursuant to the Code, the following fees are assessed:

#### Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$500.00
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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. In this matter, the member firm is a party.

Member surcharge	= \$2,500.00
Pre-hearing process fee	= \$ 600.00
<u>Hearing process fee</u>	<u>= \$5,000.00</u>
Total Member Fee:	= \$8,100.00

#### Forum Fees and Assessments

The panel has the authority to assess forum fees for each hearing session conducted. A hearing 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 x \$450.00	= \$ 450.00
Pre-hearing conference: November 14, 2001	1 session

One (1) Pre-hearing session with Panel x \$1,200.00	= \$ 1,200.00
Pre-hearing conference: December 17, 2001	1 session

Eight (8) Hearing sessions x \$1,200.00	= \$ 9,600.00
Hearing Dates:	
March 12, 2002	2 sessions
March 13, 2002	2 sessions
March 14, 2002	2 sessions
March 15, 2002	2 sessions

Total Forum Fees	= \$11,250.00
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1. The panel has assessed \$825.00 of the forum fees jointly and severally to Harold J. Bonfiglio and Sally A. Bonfiglio.
2. The panel has assessed \$10,425.00 of the forum fees jointly and severally to Prudential Securities, Inc., John Kuhlman, Eric Kuehl, and Matthew J. Miller

### Fee Summary

1. Claimant Harold J. Bonfiglio and Sally A. Bonfiglio are jointly and severally liable for:

Initial Filing Fee	= \$ 500.00
Forum Fees	= \$ 825.00
Total Fees	= \$ 1,325.00
Less payments	= \$ 1,700.00
Refund Due From NASD Dispute Resolution, Inc.	= \$ 375.00

2. Respondent Prudential Securities, Inc., is solely liable for:

Member Fees	= \$ 8,100.00
Total Fees	= \$ 8,100.00
Less payments	= \$ 8,100.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 0.00

3. Respondents Prudential Securities, Inc., John Kuhlman, Eric Kuehl, and Matthew J. Miller are jointly and severally liable for:

Forum Fees	= \$10,425.00
Total Fees	= \$10,425.00
Less payments	= \$ 600.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 9,825.00

All balances are due to NASD Dispute Resolution, Inc.

### ARBITRATION PANEL

Philip P. Rummel, Esq.	Public Arbitrator, Presiding Chair
Larry M. Dreyfus, Esq.	Public Arbitrator
Donald R. Casper	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

/s/ Philip Rummel

04/23/02

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Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

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

/s/ Donald Casper

04/23/02

\_\_\_\_\_  
Donald R. Casper  
Non-Public Arbitrator

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

**Concurring in part and Dissenting in part:**

Although arbitrator Dreyfus agrees with the amount of the award, he dissents as to the distribution as set forth in numbers 2 and 3 in the Award section. Arbitrator Dreyfus concluded that it was not proper to offset the gains under Kuhlman against the losses under Kuehl, and therefore arrive at damages of \$161,600.00 against PSI and Kuehl jointly and severally and \$104,490.00 against Kuehl individually. He concludes that PSI should be liable for the entire \$263,090.00 jointly and severally with Kuehl under the doctrine of Respondeat Superior. Furthermore, arbitrator Dreyfus dissents from number 7 in the Award section.

/s/ Larry M. Dreyfus

04/25/02

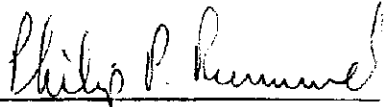
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Larry M. Dreyfus, Esq.  
Public Arbitrator

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

04/25/02

\_\_\_\_\_  
Date of Service (For NASD-Dispute Resolution office use only)

**Concurring Arbitrators' Signatures**



Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

April 23, 2002  
Signature Date

\_\_\_\_\_  
Donald R. Casper  
Non-Public Arbitrator

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

**Concurring in part and Dissenting in part:**

Although arbitrator Dreytus agrees with the amount of the award, he dissents as to the distribution as set forth in numbers 2 and 3 in the Award section. Arbitrator Dreytus concluded that it was not proper to offset the gains under Kuhlman against the losses under Kuehl, and therefore arrive at damages of \$161,600.00 against PSI and Kuehl jointly and severally and \$104,490.00 against Kuehl individually. He concludes that PSI should be liable for the entire \$263,090.00 jointly and severally with Kuehl under the doctrine of Respondeat Superior. Furthermore, arbitrator Dreytus dissents from number 7 in the Award section.

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Larry M. Dreytus, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Date of Service (For NASD-Dispute Resolution office use only)

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Concurring Arbitrators' Signatures



Philip P. Kummel, Esq.  
Public Arbitrator, Presiding Chair

April 23, 2002

Signature Date



Donald R. Casper  
Non-Public Arbitrator

4.23.02

Signature Date

Concurring in part and Dissenting in part:

Although arbitrator Dreyfus agrees with the amount of the award, he dissents as to the distribution as set forth in numbers 2 and 3 in the Award section. Arbitrator Dreyfus concluded that it was not proper to offset the gains under Kuhlman against the losses under Kuehl, and therefore arrive at damages of \$161,600.00 against PSI and Kuehl jointly and severally and \$104,490.00 against Kuehl individually. He concludes that PSI should be liable for the entire \$266,090.00 jointly and severally with Kuehl under the doctrine of Respondent Superior. Furthermore, arbitrator Dreyfus dissents from number 7 in the Award section.

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Larry M. Dreyfus, Esq.  
Public Arbitrator

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

\_\_\_\_\_  
Date of Service (For NASD-Dispute Resolution office use only)

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**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Philip P. Rummel, Esq.  
Public Arbitrator, Presiding Chair

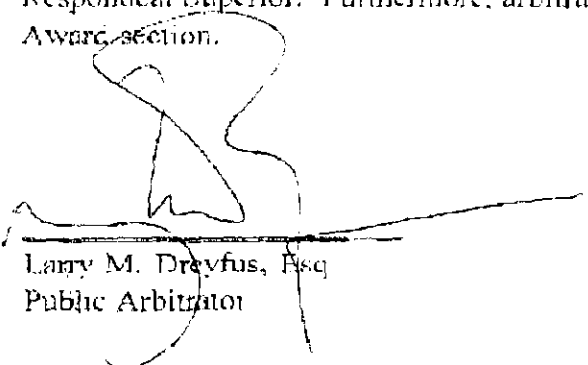
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Donald R. Casper  
Non-Public Arbitrator

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

**Concurring in part and Dissenting in part:**

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Larry M. Dreyfus, Esq.  
Public Arbitrator

4/25/02  
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Signature Date

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Date of Service (For NASD-Dispute Resolution office use only)