

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

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In the Matter of the Arbitration Between

Name of Claimant

Merrill Lynch Pierce Fenner & Smith, Inc.

Case No. 01-01822

Names of Respondents

UBS PaineWebber, Inc.

Dennis V. Coleman

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**REPRESENTATION OF PARTIES**

For Merrill Lynch Pierce Fenner & Smith, Inc., hereinafter referred to as "Claimant": Mark L. Prior, Esq. and M. Dawes Cooke, Jr., Esq., Rubin & Associates, Inc., Paoli, Pennsylvania.

For UBS PaineWebber, Inc. ("PaineWebber"): Stephen P. Pherson, Esq., Schuyler, Roche & Zwirner, P.C., Chicago, Illinois.

For Dennis V. Coleman ("Coleman"): David C. Cleveland, Esq., Clawson & Staubes, LLC, Charleston, South Carolina. On or about May 15, 2001, Michael G. Brown, Esq., Figari, Davenport & Graves, LLP, Dallas, Texas, substituted as counsel for Respondent Coleman.

Respondents PaineWebber and Coleman are hereinafter collectively referred to as "Respondents".

**CASE INFORMATION**

Statement of Claim filed on or about: April 10, 2001.

Claimant signed the Uniform Submission Agreement on: April 10, 2001.

Amended Statement of Claim filed on or about: April 25, 2001.

Statements of Answer filed by Respondents on or about: May 8, 2001.

Respondent PaineWebber signed the Uniform Submission Agreement on: April 26, 2001.

Respondent Coleman signed the Uniform Submission Agreement on: April 20, 2001.

**CASE SUMMARY**

Claimant alleged that in connection with his resignation of employment with Claimant on April 6, 2001, Respondent Coleman violated the terms and conditions of the non-solicitation and non-disclosure provisions contained in his Financial Consultant Employment Agreement and Restrictive Covenants and related confidentiality and non-disclosure agreements.

Respondent Coleman signed the Financial Consultant Employment Agreement and Restrictive

Covenants and related confidentiality and non-disclosure agreements at the outset of and as a condition of his employment with Claimant in 1996 and/or thereafter in connection with Claimant policy. Claimant further alleged that Respondent Coleman misappropriated and converted Claimant trade secret customer information and engaged in unfair competition and breached his fiduciary duty to Claimant. In addition, Claimant alleged that Respondent Coleman's new employer, Respondent PaineWebber intentionally interfered with Claimant's contractual rights, misappropriated Claimant trade secret customer information and engaged in unfair competition.

Respondents denied the material allegations complained of by Claimant. As for Respondent Coleman he denied the alleged validity and enforceability of the Financial Consultant Employment Agreement and Restrictive Covenants and alleged related confidentiality and non-disclosure documents signed by him, because such documents violated South Carolina law and the Rules of Practice of the NASD. Specifically, Respondent Coleman asserted that such documents are not favored under South Carolina law, that they are strictly construed against the employer and as such were invalid under South Carolina law because Claimant could not show under the facts of this case that: 1) it had a legitimate business interest necessary for protection; 2) the legitimate interests of Respondent Coleman to earn a living did not outweigh any alleged interest of Claimant; 3) any alleged restriction was sufficiently limited in its operation and with respect to time; 4) any alleged restriction was reasonable from the standpoint of sound public policy; or 5) any alleged restriction was supported by valuable consideration.

Respondent Coleman also asserted that Claimant's claims failed under equitable principles including judicial estoppel, unclean hands and related equitable grounds given Claimant's own recruiting conduct known to Respondent Coleman that is practiced by Claimant firm wide, in South Carolina, and specifically by the Claimant manager who formerly supervised Respondent Coleman in South Carolina.

Respondent Coleman also asserted that under South Carolina law as well as under the NASD Rules of Practice as recently commented on by the NASD Board of Governors, any limit on a client's right to move his or her account to his or her broker of choice, including any limit on the broker or firm to accept a requested account transfer, was improper and against NASD or South Carolina public policy.

Finally, Respondent Coleman denied that Claimant was entitled to any monetary award.

### **RELIEF REQUESTED**

Claimant sought a continuation of the Preliminary Injunction entered by the United States District Court of South Carolina for a period of one year. Claimant also sought compensatory damages for Respondent Coleman's breach of his Financial Consultant Employment Agreement and Restrictive Covenants and other confidentiality and non-disclosure documents, for misappropriation and conversion of trade secret customer information, and for breach of fiduciary duty and unfair competition. Claimant also sought

compensatory damages against Respondent PaineWebber for its alleged intentional interference with Claimant's contractual rights, conversion and misappropriation of Claimant's trade secrets and unfair competition. The compensation damages sought against Respondents was to be not less than \$1,500,000.00.

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

On April 10, 2001, Claimant moved for temporary injunctive relief in the United States District Court for the District of South Carolina. *Merrill Lynch Pierce Fenner & Smith v. Dennis V. Coleman*, No. 2.01-1050-18 (DSC 2001). The Court granted Claimant's Motion for Temporary Injunctive Relief. The Court also conducted a preliminary injunctive hearing. On April 24, 2001, the Court issued a Preliminary Injunction enforcing the terms of the Financial Consultant Agreement and Restrictive Covenants signed by Respondent Coleman. Specifically, the Court Order prohibited Respondents from soliciting any business and accepting any business from wrongfully solicited Claimant customers Respondent Coleman served during his employment with Claimant. The Court also ordered Respondents to return to Claimant any and all Claimant customer information and records.

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. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

Before the hearing commenced on May 22, 2001, the Panel heard arguments on a Motion filed by Respondent Coleman to modify the injunction. After hearing and considering the arguments of counsel, the Panel entered a ruling that a decision on the Motion would be deferred until all the evidence was heard.

During the hearing, Respondents made a Motion for a Directed Verdict. After hearing and considering the arguments of counsel, the Panel denied the Motion.

During the telephonic testimony of a witness, a Motion in Limine was asserted by the Respondents for the purpose of limiting cross-examination. After hearing and considering arguments of counsel, the Panel granted the Motion.

Near the closing of Respondents' evidence, a disagreement arose concerning the testimony of Dr. Pflaum, Respondents' expert witness, with particular reference to data contained in a laptop computer of Dr. Pflaum. After hearing arguments by counsel, the Panel ordered the disk to be produced. Notwithstanding closing arguments of counsel, the Panel informed counsel that the record would remain open and allow his production of the disk. After the Respondents produced a disk and hard copies of the data on the computer, a post-hearing motion was made by Claimant to strike all evidence and testimony of Dr. Pflaum or continue the testimony of Dr. Pflaum. Although the Respondents argued against the Motion, each of them alternatively requested by respective counsels' letters dated May 31, 2001 addressed to NASD Dispute Resolution, Inc. that the testimony and evidence of Dr. Pflaum be stricken. Therefore the testimony and evidence of Dr. Pflaum is stricken from the record.

### **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. The Preliminary Injunction entered by the United States District Court of South Carolina is hereby continued and extended to April 10, 2002 as to those clients or customers who are not family related to Respondent Coleman and to those clients who have not executed, completed and delivered to Respondent Coleman the ACAT Forms as of May 21, 2001; in other words, the Preliminary Injunction is dissolved only as to the clients who are family related to Respondent Coleman and to those customers who have executed, completed and delivered to Respondent Coleman the ACAT Forms as of May 21, 2001 as presented in Claimant's Exhibit number 17 introduced into evidence without objection.
2. Respondents are jointly and severally liable in compensatory damages to Claimant and they shall pay to Claimant the sum of Five Hundred Fifty Thousand (\$550,000.00) Dollars, such sum to bear interest from the date of issuance of the Award at the legal rate on judgments entered by South Carolina State Courts.
3. Each of the parties to this action shall bear their respective costs, including attorneys' fees.
4. The bond posted by Claimant in the United States District Court of South Carolina is henceforth discontinued and discharged.
5. All other requests for relief not specifically addressed herein are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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
Interim injunctive surcharge	= \$2,500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00

Hearing process fee = \$4,500.00

**Adjournment Fees**

Adjournments requested during these proceedings:

There were no adjournments requested during these proceedings.

**Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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 x \$450.00 = \$ 450.00  
Pre-hearing conference: May 11, 2001 1 session

Two (2) Pre-hearing sessions with Panel x \$1,200.00 = \$ 2,400.00  
Pre-hearing conferences: May 4, 2001 1 session  
May 21, 2001 1 session

Seven (7) Hearing sessions x \$1,200.00 = \$ 8,400.00  
Hearing Dates: May 22, 2001 2 sessions  
May 23, 2001 3 sessions  
May 24, 2001 2 sessions

Total Forum Fees = \$11,250.00

The Panel has assessed the total forum fees of \$11,250.00 jointly and severally to Respondents.

**Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

**FEE SUMMARY**

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 500.00
Interim Injunctive Surcharge	= \$2,500.00
Member Fees	= \$6,300.00
Total Fees	= \$9,300.00
<u>Less payments</u>	<u>= \$5,200.00</u>

Balance Due NASD Dispute Resolution, Inc. = \$4,100.00

Respondent PaineWebber be and hereby is solely liable for:

Member Fees	= \$6,300.00
Total Fees	= \$6,300.00
<u>Less payments</u>	<u>= \$1,800.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$4,500.00

Respondents be and hereby are jointly and severally liable for:

Forum Fees	= \$11,250.00
Total Fees	= \$11,250.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution, Inc.	= \$11,250.00

All balances are payable to NASD Dispute Resolution, Inc. and are due immediately upon receipt of the Award by the parties.

**ARBITRATION PANEL**

William H. Malloy, Jr., Esq.	-	Public Arbitrator, Presiding Chair
W. Allen Schmitt	-	Public Arbitrator
F. John Herrmann	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

<u>/s/</u> William H. Malloy, Jr., Esq. Public Arbitrator, Presiding Chair	<u>Signature Date</u>
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<u>/s/</u> W. Allen Schmitt Public Arbitrator	<u>Signature Date</u>
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<u>/s/</u> F. John Herrmann Industry Arbitrator	<u>Signature Date</u>
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June 7, 2001  
Date of Service (For NASD-DR office use only)

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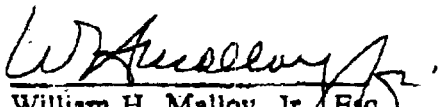
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**ARBITRATION PANEL**

William H. Malloy, Jr., Esq.	-	Public Arbitrator, Presiding Chair
W. Allen Schmitt	-	Public Arbitrator
F. John Herrmann	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
William H. Malloy, Jr., Esq.  
Public Arbitrator, Presiding Chair

JUNE 6, 2001  
Signature Date

W. Allen Schmitt  
Public Arbitrator

Signature Date

F. John Herrmann  
Industry Arbitrator

Signature Date

Date of Service (For NASD-DR office use only)

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Public Arbitrator, Presiding Chair

  
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W. Allen Schmitt  
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Signature Date

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Public Arbitrator

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Signature Date

F. John Herrmann  
F. John Herrmann  
Industry Arbitrator

JUNE 6, 2001  
Signature Date

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

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

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In the Matter of the Arbitration Between

Name of Claimant

Merrill Lynch Pierce Fenner & Smith, Inc.

Case No. 01-01822

Names of Respondents

UBS PaineWebber, Inc.  
Dennis V. Coleman

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**REPRESENTATION OF PARTIES**

For Merrill Lynch Pierce Fenner & Smith, Inc., hereinafter referred to as "Claimant": Mark L. Prior, Esq. and M. Dawes Cooke, Jr., Esq., Rubin & Associates, Inc., Paoli, Pennsylvania.

For UBS PaineWebber, Inc. ("PaineWebber"): Stephen P. Pherson, Esq., Schuyler, Roche & Zwirner, P.C., Chicago, Illinois.

For Dennis V. Coleman ("Coleman"): David C. Cleveland, Esq., Clawson & Staubes, LLC, Charleston, South Carolina. On or about May 15, 2001, Michael G. Brown, Esq., Figari, Davenport & Graves, LLP, Dallas, Texas, substituted as counsel for Respondent Coleman.

Respondents PaineWebber and Coleman are hereinafter collectively referred to as "Respondents".

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**CASE SUMMARY**

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Respondent Coleman signed the Financial Consultant Employment Agreement and Restrictive

Covenants and related confidentiality and non-disclosure agreements at the outset of and as a condition of his employment with Claimant in 1996 and/or thereafter in connection with Claimant policy. Claimant further alleged that Respondent Coleman misappropriated and converted Claimant trade secret customer information and engaged in unfair competition and breached his fiduciary duty to Claimant. In addition, Claimant alleged that Respondent Coleman's new employer, Respondent PaineWebber intentionally interfered with Claimant's contractual rights, misappropriated Claimant trade secret customer information and engaged in unfair competition.

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Respondent Coleman also asserted that Claimant's claims failed under equitable principles including judicial estoppel, unclean hands and related equitable grounds given Claimant's own recruiting conduct known to Respondent Coleman that is practiced by Claimant firm wide, in South Carolina, and specifically by the Claimant manager who formerly supervised Respondent Coleman in South Carolina.

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Finally, Respondent Coleman denied that Claimant was entitled to any monetary award.

### **RELIEF REQUESTED**

Claimant sought a continuation of the Preliminary Injunction entered by the United States District Court of South Carolina for a period of one year. Claimant also sought compensatory damages for Respondent Coleman's breach of his Financial Consultant Employment Agreement and Restrictive Covenants and other confidentiality and non-disclosure documents, for misappropriation and conversion of trade secret customer information, and for breach of fiduciary duty and unfair competition. Claimant also sought

compensatory damages against Respondent PaineWebber for its alleged intentional interference with Claimant's contractual rights, conversion and misappropriation of Claimant's trade secrets and unfair competition. The compensation damages sought against Respondents was to be not less than \$1,500,000.00.

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

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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. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

Before the hearing commenced on May 22, 2001, the Panel heard arguments on a Motion filed by Respondent Coleman to modify the injunction. After hearing and considering the arguments of counsel, the Panel entered a ruling that a decision on the Motion would be deferred until all the evidence was heard.

During the hearing, Respondents made a Motion for a Directed Verdict. After hearing and considering the arguments of counsel, the Panel denied the Motion.

During the telephonic testimony of a witness, a Motion in Limine was asserted by the Respondents for the purpose of limiting cross-examination. After hearing and considering arguments of counsel, the Panel granted the Motion.

Near the closing of Respondents' evidence, a disagreement arose concerning the testimony of Dr. Pflaum, Respondents' expert witness, with particular reference to data contained in a laptop computer of Dr. Pflaum. After hearing arguments by counsel, the Panel ordered the disk to be produced. Notwithstanding closing arguments of counsel, the Panel informed counsel that the record would remain open and allow his production of the disk. After the Respondents produced a disk and hard copies of the data on the computer, a post-hearing motion was made by Claimant to strike all evidence and testimony of Dr. Pflaum or continue the testimony of Dr. Pflaum. Although the Respondents argued against the Motion, each of them alternatively requested by respective counsels' letters dated May 31, 2001 addressed to NASD Dispute Resolution, Inc. that the testimony and evidence of Dr. Pflaum be stricken. Therefore the testimony and evidence of Dr. Pflaum is stricken from the record.

### **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. The Preliminary Injunction entered by the United States District Court of South Carolina is hereby continued and extended to April 10, 2001 as to those clients or customers who are not family related to Respondent Coleman and to those clients who have not executed, completed and delivered to Respondent Coleman the ACAT Forms as of May 21, 2001; in other words, the Preliminary Injunction is dissolved only as to the clients who are family related to Respondent Coleman and to those customers who have executed, completed and delivered to Respondent Coleman the ACAT Forms as of May 21, 2001 as presented in Claimant's Exhibit number 17 introduced into evidence without objection.
2. Respondents are jointly and severally liable in compensatory damages to Claimant and they shall pay to Claimant the sum of Five Hundred Fifty Thousand (\$550,000.00) Dollars, such sum to bear interest from the date of issuance of the Award at the legal rate on judgments entered by South Carolina State Courts.
3. Each of the parties to this action shall bear their respective costs, including attorneys' fees.
4. The bond posted by Claimant in the United States District Court of South Carolina is henceforth discontinued and discharged.
5. All other requests for relief not specifically addressed herein are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (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
Interim injunctive surcharge	= \$2,500.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	= \$1,200.00
Pre-hearing process fee	= \$ 600.00

Hearing process fee = \$4,500.00

### **Adjournment Fees**

Adjournments requested during these proceedings:

There were no adjournments requested during these proceedings.

### **Forum Fees and Assessments**

The Panel assesses forum fees for each hearing session conducted. A hearing 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:

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Pre-hearing conference: May 11, 2001 1 session

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Seven (7) Hearing sessions x \$1,200.00 = \$ 8,400.00  
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May 23, 2001 3 sessions  
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Total Forum Fees = \$11,250.00

The Panel has assessed the total forum fees of \$11,250.00 jointly and severally to Respondents.

### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred during these proceedings.

### **FEE SUMMARY**

Claimant be and hereby is solely liable for:

Initial Filing Fee	= \$ 500.00
Interim Injunctive Surcharge	= \$2,500.00
Member Fees	= \$6,300.00
Total Fees	= \$9,300.00
<u>Less payments</u>	<u>= \$5,200.00</u>

Date of Service (For NASD-DR office use only)

Balance Due NASD Dispute Resolution, Inc. = \$4,100.00

Respondent PaineWebber be and hereby is solely liable for:

Member Fees = \$6,300.00

Total Fees = \$6,300.00

Less payments = \$1,800.00

Balance Due NASD Dispute Resolution, Inc. = \$4,500.00

Respondents be and hereby are jointly and severally liable for:

Forum Fees = \$11,250.00

Total Fees = \$11,250.00

Less payments = \$ 0.00

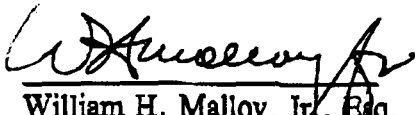
Balance Due NASD Dispute Resolution, Inc. = \$11,250.00

All balances are payable to NASD Dispute Resolution, Inc. and are due immediately upon receipt of the Award by the parties.

**ARBITRATION PANEL**

William H. Malloy, Jr., Esq.	-	Public Arbitrator, Presiding Chair
W. Allen Schmitt	-	Public Arbitrator
F. John Herrmann	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

  
William H. Malloy, Jr., Esq.

Public Arbitrator, Presiding Chair

JUNE 4 2001  
Signature Date

\_\_\_\_\_  
W. Allen Schmitt  
Public Arbitrator

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

\_\_\_\_\_  
F. John Herrmann  
Industry Arbitrator

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



Balance Due NASD Dispute Resolution, Inc. = \$4,100.00

Respondent PaineWebber be and hereby is solely liable for:

Member Fees	= \$6,300.00	
Total Fees	= \$6,300.00	
<u>Less payments</u>	<u>= \$1,800.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$4,500.00

Respondents be and hereby are jointly and severally liable for:

Forum Fees	= \$11,250.00	
Total Fees	= \$11,250.00	
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**ARBITRATION PANEL**

William H. Malloy, Jr., Esq.	-	Public Arbitrator, Presiding Chair
W. Allen Schmitt	-	Public Arbitrator
F. John Herrmann	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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William H. Malloy, Jr., Esq.  
Public Arbitrator, Presiding Chair

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Signature Date

  
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Forum Fees	= \$11,250.00	
Total Fees	= \$11,250.00	
<u>Less payments</u>	<u>= \$ 0.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$11,250.00

All balances are payable to NASD Dispute Resolution, Inc. and are due immediately upon receipt of the Award by the parties.

**ARBITRATION PANEL**

William H. Malloy, Jr., Esq.	-	Public Arbitrator, Presiding Chair
W. Allen Schmitt	-	Public Arbitrator
F. John Herrmann	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
William H. Malloy, Jr., Esq.  
Public Arbitrator, Presiding Chair

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

\_\_\_\_\_  
W. Allen Schmitt  
Public Arbitrator

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

F. John Herrmann  
F. John Herrmann  
Industry Arbitrator

JUNE 5, 2001  
Signature Date

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