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

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In the Matter of the Arbitration Between:

Names of the Claimants

Lance Foody and Constance Foody JTEN

Case Number: 02-06088

Names of the Respondents

Morgan Stanley DW, Inc.

Mark Larue Alexander

Frank Jay Kemper

Hearing Site: Memphis, TN

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Nature of the Dispute: Customer vs. Member and Associated Person.

**REPRESENTATION OF PARTIES**

For Lance Foody and Constance Foody JTEN, hereinafter collectively referred to as "Claimants": Mark J. Grai, Esq., The Winchester Law Firm, Memphis, TN.

For Morgan Stanley DW, Inc. ("MSDW"), Mark Larue Alexander ("Alexander"), and Frank Jay Kemper ("Kemper"), hereinafter collectively referred to as "Respondents": Adam D. Cole, Esq. and Kathryn S. Gostinger, Esq., Greenberg Traurig, LLP, New York, NY.

**CASE INFORMATION**

Statement of Claim filed on or about: October 11, 2002.

Claimants signed but did not date the Uniform Submission Agreement.

Respondents' Statement of Answer filed on or about: December 31, 2002.

Respondent MSDW signed the Uniform Submission Agreement: December 31, 2002.

Respondents Alexander and Kemper did not file executed Uniform Submission Agreements.

**CASE SUMMARY**

Claimants asserted the following causes of action: unauthorized trading; breach of contract; negligence; reckless, willful, and/or intentional misconduct; violations of NYSE Rule 405, NASD Rules 2310 and IM 2310, the Tennessee Securities Act of 1980, and federal securities laws; common law fraud; negligent and intentional misrepresentation; and, breach of fiduciary duty. The causes of action relate to the purchase of shares of AmerOnline, Applied Materials, Inc., At Home Corporation, Avanex Corp., Carrier 1 Intl SA, Harmonic, Inc., Qlogic Corp., and other unspecified securities products in Claimants' account.

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

**RELIEF REQUESTED**

Claimants requested compensatory damages of \$955,201.83, exemplary damages of

\$600,000.00, attorneys' fees, costs, and all other fees incurred.

Respondents requested dismissal of the Statement of Claim, costs, and such other relief as is just and proper.

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

On or about February 3, 2005, Claimants advised NASD Dispute Resolution that the parties had settled the above-referenced matter.

On or about February 8, 2005, the parties filed a Stipulated Motion for Award Directing Expungement ("Stipulated Motion") seeking expungement of all references to the above-captioned arbitration from Respondents Alexander and Kemper's public and non-public registration records maintained by the NASD Central Registration Depository ("CRD").

Respondents Alexander and Kemper did not file with NASD Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, are bound by the determination of the undersigned arbitrators (the "Panel") on all issues submitted.

The parties agreed that the Stipulated Award in this matter may be executed in counterpart copies or that a handwritten, signed Stipulated Award may be entered.

### **AWARD**

After considering the pleadings and the Stipulated Motion, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

The Panel recommends the expungement of all references to the above-captioned arbitration from Respondents Alexander and Kemper's public and non-public registration records maintained by the NASD CRD with the understanding that pursuant to NASD Notices to Members 99-09 and 99-54, Respondents Alexander and Kemper must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

### **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	= \$ 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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, Respondent MSDW is a member firm and party.

Member surcharge	= \$2,800.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$5,000.00

Total Member Fees = \$8,550.00

**Adjournment Fees**

Adjournments granted during these proceedings for which fees were assessed:

January 20-22, 2004, adjournment by Claimants and Respondents. The Panel waived assessment of the adjournment fee.

**Three-Day Cancellation Fees**

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

February 8-10, 2005, settled by Claimants = \$ 150.00  
February 8-10, 2005, settled by Respondents = \$ 150.00

**Injunctive Relief Fees**

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

No injunctive relief fees were assessed during these proceedings.

**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 the Panel @ \$1,200.00/session = \$1,200.00  
Pre-hearing conference: July 9, 2003 1 session

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Total Forum Fees = \$1,200.00

The Panel has assessed \$600.00 of the forum fees jointly and severally to Claimants.  
The Panel has assessed \$600.00 of the forum fees jointly and severally to Respondents.

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

No administrative costs were incurred during these proceedings.

**Fee Summary**

Claimants are jointly and severally liable for:  
Initial Filing Fee = \$ 500.00

Three-Day Cancellation Fee	= \$ 150.00
Retained Hearing Session Deposit pursuant to Rule 10332(f) of the Code	= \$ 600.00
Forum Fees	= \$ 600.00
Total Fees	= \$ 1,850.00
<u>Less payments</u>	<u>= \$ 1,700.00</u>
Balance Due NASD Dispute Resolution	= \$ 150.00

Respondent MSDW is solely liable for:

Member Fees	= \$ 8,550.00
Total Fees	= \$ 8,550.00
<u>Less payments</u>	<u>= \$ 8,550.00</u>
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents are jointly and severally liable for:

Three-Day Cancellation Fee	= \$ 150.00
Forum Fees	= \$ 600.00
Total Fees	= \$ 750.00
<u>Less payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$ 750.00

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

#### ARBITRATION PANEL

Fred M. Acuff, Jr., Esq.	-	Public Arbitrator, Presiding Chairperson
Fred M. Ridolphi, Jr., Esq.	-	Public Arbitrator
Franklin P. Allen, III	-	Non-Public Arbitrator

#### Concurring Arbitrators' Signatures

/s/  
Fred M. Acuff, Jr., Esq.  
Public Arbitrator, Presiding Chairperson

Signature Date

/s/  
Fred M. Ridolphi, Jr., Esq.  
Public Arbitrator

Signature Date

/s/  
Franklin P. Allen, III  
Non-Public Arbitrator

Signature Date

February 10, 2005

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

Arbitration No. 02-06088

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Three-Day Cancellation Fee	= \$ 150.00
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Concurring Arbitrators' Signatures

  
 Fred M. Acuff, Jr., Esq.  
 Public Arbitrator, Presiding Chairperson

2-9-05  
 Signature Date

  
 Fred M. Ridolphi, Jr., Esq.  
 Public Arbitrator

2-9-05  
 Signature Date

Franklin P. Allen, III  
 Non-Public Arbitrator

Signature Date

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

FEB-10-2005 11:40

NASD Dispute Resolution

Arbitration No. 02-06088

Stipulated Award Page 4 of 4

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Non-Public Arbitrator

2-10-05  
Signature Date

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